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CASES ON CONSTITUTIONAL LAW.

CASES

ON

CONSTITUTIONAL LAW

WITH NOTES.

BY

JAMES BRADLEY THAYER, LL.D.

WELD PROFESSOR OF LAW AT HARVARD UNIVERSITY.

IN TWO VOLUMES.

VOL. I.

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PREFACE.

In preparing this book I have had chiefly in mind the wants of my own classes at the Harvard Law School; of these and students elsewhere who follow similar methods of study. I should have been glad to make it more serviceable to others by introducing headnotes, were this consistent, in my opinion, with its best usefulness for the main purpose in hand.

It is nearly a year now since the first part of the book appeared. I am led to hope that the completed work may help to promote a deeper, more systematic, and exacter study of this most interesting and important subject, too much neglected by the profession. It appears to me that what scientific men call the *genetic* method of study, which allows one to see the topic grow and develop under his eye, — a thing always grateful and stimulating to the human faculties, as if they were called home to some native and congenial field, — is one peculiarly suited to the subject of Constitutional Law. For, while this is a body of *law*, — of law in a strict sense, as distinguished from constitutional history, politics, or literature, since it deals with the principles and rules which courts apply in deciding litigated cases; and while, therefore, it is an exact and technical subject; yet it has that quality which Phillipps, the writer on Evidence, alluded to when he said, in speaking of the State Trials, that "The study of the law is ennobled by an alliance with history." The study of Constitutional Law is allied not merely with history, but with statecraft, and with the political problems of our great and complex national life.

In this wide and novel field of labor our judges have been pioneers. There have been men among them, like Marshall, Shaw, and Ruffin, who were sensible of the true nature of their work and of the large method of treatment which it required, who perceived that our constitutions had made them, in a limited and secondary way, but yet a real one, coadjutors with the

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other departments in the business of government; but many have fallen short of the requirements of so great a function. Even under the most favorable circumstances, in dealing with such a subject as this, results must often be tentative and temporary. Views that seem adequate at the time, are announced, applied, and developed; and yet, by and by, almost unperceived, they melt away in the light of later experience, and other doctrines take their place.

Nothing else can bring home to a student the existence and the nature of this process, the large scope of the questions presented, and the true limitations of the legal principles that govern them, with anything like the freshness, precision, and force, and I might add also the fascination, which accompany the orderly tracing of these things in the cases.

I find a pleasure in thinking that these volumes are appearing in the twenty-fifth anniversary year of the accession of Dean Langdell to his chair as a professor at the Harvard Law School. The method of legal study with which his name is associated, regarded as a mere mode of investigation, was indeed no novelty at all; lawyers have always known well enough the necessity of following it in working out their problems. But Dean Langdell, early in life, had the sagacity to apply it in his own self-instruction in law, and in his greatly valued help of fellow-students; and when he came back to the school as a professor, he had the courage and the foresight to introduce here the same method of study, and to lay down for himself a mode of instruction which rigorously drove his pupils to adopt it.

Of teaching there has never been at this school any prescribed method. There never can be, in any place where the best work is sought for. Every teacher, as I have said elsewhere, "in law, as in other things, has his own methods, determined by his own gifts or lack of gifts, — methods as incommunicable as his temperament, his looks, or his manners." But as to modes of study, a very different matter, Dean Langdell's associates have all come to agree with him, where they have ever differed, in thinking, so far at least as our system of law is concerned, that there is no method of preparatory study so good as the one with which his name is so honorably connected, — that of studying cases, carefully chosen and arranged so as to present the development of principles. Doubtless, the mode of study must greatly affect

the mode of teaching; if students are to prepare themselves by studying cases, their teachers also must study them. And, moreover, while good teaching will differ widely in its methods, there is at least one thing in which all good teaching will be alike; no teaching is good which does not rouse and "dephlegmatize" the students, — to borrow an expression attributed to Novalis, — which does not engage as its allies, their awakened, sympathetic, and co-operating faculties. As helping to that, as tending to secure for an instructor this chief element of success, I do not think that there is or can be any method of study which is comparable with the one in question.

In order to keep this collection within the compass of two volumes and yet do anything like justice to the subject, I have selected only the leading titles, and have given to these a fairly full treatment, choosing as the text, for obvious reasons, so far as practicable, the decisions of the Supreme Court of the United States. I have preferred to make the two volumes as large as they could well be, with any regard to convenient use, and to pack them closely, rather than to take the much easier course of letting the work run over into three or four volumes. In doing this, it has been necessary, almost always, to omit the arguments of counsel. Other omissions are mentioned or sufficiently indicated.

JAMES BRADLEY THAYER.

Law School of Harvard University.
March 12, 1895.

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UNIV. OF CALIFORNIA

CASES ON CONSTITUTIONAL LAW.

PART I.

CHAPTER I.

CONSTITUTIONS OF GOVERNMENT. — THE THREE DEPARTMENTS. — THE OFFICE OF THE JUDICIARY.

SECTION I.

PRELIMINARY.

A CONSTITUTION has been well defined as "L'ensemble des institutions et des lois fondamentales, destinées à règler l'action de l'administration et de tous les citoyens."[1] It is often, as in England, an unwritten body of custom, though, since the assertion of the "rights of man" which preceded the French Revolution, the written enactment of such fundamental principles has been not uncommon, as well on the European continent as in America. A written constitution usually contains provisions which make innovation less easy than in the case of customary constitutions, such as that of England, any part of which may be modified by an ordinary Act of Parliament.[2] — HOLLAND, *Elem. Jurisp.* (6th ed.) 323.

In every form of government (*πολιτεία*) there are three departments (*μόρια*), and in every form the wise law-giver must consider, what, in respect to each of these, is for its interest. If all is well with these, all must needs be well with it, and the differences between forms of government are differences in respect to these. Of these three, one is the part which deliberates (*τὸ βουλευόμενον*)[3] about public affairs; the second

[1] Ahrens, Cours, iii. p. 380.

[2] Ahrens, Cours, iii. p. 381. Mr. Bryce has suggested the use of the terms "rigid" and "flexible" to express this distinction. See Dicey, Law of the Constitution, p. 84, and Professor Dicey's own instructive and ingenious applications of the distinctions, *Ib.* pp. 114–125.

[3] The Greek legislature of the present day, a single chamber, is called The Boulè. — ED.

is that which has to do with the offices . . . ; and the third is the judicial part (τὸ δικάζον). — ARISTOTLE, *Politics*, book vi. c. xiv.

Il y a dans chaque État trois sortes de pouvoirs : la puissance législative, la puissance exécutrice des choses qui dépendent du droit des gens, et la puissance exécutrice de celles qui dépendent du droit civil.

Par la première, le prince ou le magistrat fait des lois . . . et corrige ou abroge celles qui sont faites. Par la seconde, il fait la paix ou la guerre, envoie ou reçoit des ambassades, établie la sûreté, previent les invasions. Par la troisième, il punit les crimes, ou juge les différends des particuliers. On appellera cette dernière la puissance de juger, et l'autre simplement la puissance exécutrice de l'État. . . .

Lorsque dans la même personne ou dans le même corps de magistrature, la puissance législative est réunie à la puissance exécutrice, il n'y a point de liberté ; parce qu'on peut craindre que le même monarque ou le même sénat ne fasse des lois tyranniques pour les exécuter tyranniquement.

Il n'y a point encore de liberté si la puissance de juger n'est pas séparée de la puissance législative et de l'exécutrice. Si elle étoit jointe à la puissance législative, le pouvoir sur la vie et la liberté des citoyens seroit arbitraire : car le juge seroit legislateur. Si elle étoit jointe à la puissance exécutrice, le juge pourroit avoir la force d'un oppresseur.

Tout seroit perdu si le même homme, ou le même corps des principaux, ou des nobles, ou du peuple, exerçoient ces trois pouvoirs : celui de faire des lois, celui d'exécuter les résolutions publiques, et celui de juger les crimes ou les différends des particuliers. — MONTESQUIEU, *L'Esprit des Lois*, livre xi. c. vi. (1748).[1]

Le corps politique a les mêmes mobiles : on y distingue de même la force et la volonté ; celle-ci sous le nom de *puissance législative*, l'autre sous le nom de *puissance exécutive*. Rien ne s'y fait ou ne s'y doit faire sans leur concours.

Nous avons vu que la puissance législative appartient au peuple, et ne peut appartenir qu'à lui. Il est aisé de voir, au contraire, par les principes ci-devant établis, que la puissance exécutive ne peut appartenir à

[1] It may be confidently laid down, that neither the institution of a Supreme Court, nor the entire structure of the Constitution of the United States, were the least likely to occur to anybody's mind before the publication of the "Esprit des Lois." We have already observed that the "Federalist" regards the opinions of Montesquieu as of paramount authority, and no opinion had more weight with its writers than that which affirmed the essential separation of the Executive, Legislative, and Judicial powers. The distinction is so familiar to us, that we find it hard to believe that even the different nature of the Executive and Legislative powers was not recognized till the fourteenth century; it occurs in the *Defensor Pacis* of the great Ghibelline jurist, Marsilio da Padova (1327), with many other curious anticipations of modern political ideas, but it was not till the eighteenth that the "Esprit des Lois" made the analysis of the various powers of the State part of the accepted political doctrine of the civilized world. — MAINE, *Popular Government*, 218. — ED.

la généralité comme Législatrice ou Souveraine; parce que cette puissance ne consiste qu'en des actes particuliers qui ne sont point du ressort de la loi, ni par conséquent de celui du Souverain, dont tous les actes ne peuvent être que des lois.

Il faut donc à la force publique un agent propre qui la réunisse et la mette en œuvre selon les directions de la volonté générale, qui serve à la communication de l'État et du Souverain, qui fasse en quelque sorte dans la personne publique ce que fait dans l'homme l'union de l'ame et du corps. Voilà quelle est dans l'État, la raison du gouvernement, confondu mal à propos avec le Souverain, dont il n'est que le ministre.

Qu'est-ce donc que le Gouvernement? Un corps intermédiaire établi entre les sujets et le Souverain pour leur mutuelle correspondance, chargé de l'exécution des lois, et du maintien de la liberté, tant civile que politique. . . .

J'appelle donc *Gouvernement* ou suprême administration l'exercice légitime de la puissance exécutive, et Prince ou magistrat l'homme ou le corps chargé de cette administration. — ROUSSEAU, *Du Contrat Social*, livre iii. c. i. (1762).

Le principe de la vie politique est dans l'autorité Souveraine. La puissance législative est le cœur de l'État, la puissance exécutive en est le cerveau, qui donne le mouvement à toutes les parties. Le cerveau peut tomber en paralysie et l'individu vivre encore. Un homme reste imbécile, et vit: mais sitôt que le cœur a cessé ses fonctions, l'animal est mort. — *Ib.* c. xi.

In all tyrannical governments, the supreme magistracy, or the right both of making and of enforcing the laws, is vested in one and the same man, or one and the same body of men; and wherever these two powers are united together, there can be no public liberty. The magistrate may enact tyrannical laws, and execute them in a tyrannical manner, since he is possessed, in quality of dispenser of justice, with all the power which he, as legislator, thinks proper to give himself. But, where the legislative and executive authority are in distinct hands, the former will take care not to intrust the latter with so large a power as may tend to the subversion of its own independence, and therewith of the liberty of the subject. With us, therefore, in England, this supreme power is divided into two branches: the one legislative, to wit, the Parliament, consisting of king, lords, and commons; the other executive, consisting of the king alone. It will be the business of this chapter to consider the British Parliament, in which the legislative power, and (of course) the supreme and absolute authority of the State, is vested by our constitution. — 1 *Blackst. Com.* (1st ed.) 142 (1765).[1]

The original power of judicature, by the fundamental principles of society, is lodged in the society at large: but as it would be impracti-

[1] At p. 52 Blackstone had already remarked: "I proceed to observe that, as the power of making laws constitutes the supreme authority, so wherever the supreme authority in any State resides, it is the right of that authority to make laws." — ED.

cable to render complete justice to every individual, by the people in their collective capacity, therefore every nation has committed that power to certain select magistrates, who with more ease and expedition can hear and determine complaints; and in England this authority has immemorially been exercised by the king or his substitutes. He therefore has alone the right of erecting courts of judicature; for, though the constitution of the kingdom hath intrusted him with the whole executive power of the laws,[1] it is impossible, as well as improper, that he should personally carry into execution this great and extensive trust: it is consequently necessary that courts should be erected, to assist him in executing this power; and equally necessary that, if erected, they should be erected by his authority. And hence it is, that all jurisdictions of courts are either mediately or immediately derived from the Crown, their proceedings run generally in the king's name, they pass under his seal, and are executed by his officers. — *Ib.* 266, 267.

Two features have at all times since the Norman Conquest characterized the political institutions of England.

The first of these features is the omnipotence or undisputed supremacy throughout the whole country of the central government. This authority of the State or the nation was, during the earlier periods of our history, represented by the power of the Crown. The king was the source of law and the maintainer of order. The maxim of the courts, "Tout fuit in luy et vient de lui al commencement," was originally the expression of an actual and undoubted fact. This royal supremacy has now passed into that sovereignty of Parliament which has formed the main subject of the foregoing chapters.

The second of these features, which is closely connected with the first, is the rule or supremacy of law. This peculiarity of our polity is well expressed in the old saw of the courts, "La ley est le plus haute inheritance, que le roy ad; car par la ley il même et toutes ses sujets sont rulés, et si la ley ne fuit, nul roi, et nul inheritance sera." — DICEY, *Law of the Const.* (4th ed.) c. iv. 173.

It has been already pointed out that in many countries, and especially in France, servants of the State are in their official capacity to a great extent protected from the ordinary law of the land, exempted from the jurisdiction of the ordinary tribunals, and subject to official law, administered by official bodies. This scheme of so-called administrative law is opposed to all English ideas, and by way of contrast admirably illustrates the full meaning of that rule of law which is an essential characteristic of our constitution. . . .

The term *droit administratif* is one for which English legal phraseology supplies no proper equivalent. The words "administrative law," which are its most natural rendering, are unknown to English

[1] He could not agree that the judiciary, which was part of the executive, should be bound to say that a direct violation of the constitution was law. — *Gouverneur Morris*, 5 Ell. Deb. 429. — ED.

judges and counsel, and are in themselves hardly intelligible without further explanation.

This absence from our language of any satisfactory equivalent for the expression, *droit administratif*, is significant; the want of a name arises at bottom from our non-recognition of the thing itself. In England, and in countries which, like the United States, derive their civilization from English sources, the system of administrative law, and the very principles on which it rests, are in truth unknown. . . .

Droit administratif, or "administrative law," has been defined by French authorities in general terms as "the body of rules which regulate the relations of the administration or of the administrative authority towards private citizens;" and Aucoc, in his work on *droit administratif*, describes his topic in this very general language: "Administrative law determines (1) the constitution and the relations of those organs of society which are charged with the care of those social interests (*intérêts collectifs*) which are the object of public administration, by which term is meant the different representatives of society among which the State is the most important, and (2) the relation of the administrative authorities towards the citizens of the State."

These definitions are obviously wanting in precision, and their vagueness is not without significance. As far, however, as an Englishman may venture to deduce the meaning of *droit administratif* from foreign treatises and reports, it may (at any rate for our present purpose) be best described as that portion of French law which determines (i.) the position and liabilities of all State officials, and (ii.) the civil rights and liabilities of private individuals in their dealings with officials as representatives of the State, and (iii.) the procedure by which these rights and liabilities are enforced.

The effect of this description is most easily made intelligible to English students by giving examples of the sort of matters to which the rules of administrative law apply. If a minister, a prefect, a policeman, or any other official, commits acts in excess of his legal authority (*excès de pouvoirs*), as, for example, if a police officer, in pursuance of orders, say from the Minister of the Interior, wrongfully arrests a private person, the rights of the individual aggrieved and the mode in which these rights are to be determined is a question of administrative law. If, again, a contractor enters into a contract with any branch of the administration, *e. g.*, for the supply of goods to the government, or for the purchase of stores sold off by a public office, and a dispute arises as to whether the contract has been duly performed, or as to the damages due from the government to the contractor for a breach of it, the rights of the contracting parties are to be determined in accordance with the rules of administrative law, and to be enforced (if at all) by the methods of procedure which that law provides. All dealings, in short, in which the rights of an individual in reference to the State, or officials representing the State, come in question, fall within the scope of administrative law. . . .

The second of the general ideas on which rests the system of administrative law is the necessity of maintaining the so-called separation of powers (*séparation de pouvoirs*), or, in other words, of preventing the government, the legislature, and the courts from encroaching upon one another's province.

The expression "separation of powers," as applied by Frenchmen to the relations of the executive and the courts, with which alone we are here concerned, may easily mislead. It means, in the mouth of a French statesman or lawyer, something different from what we mean in England by the "independence of the judges," or the like expressions. As interpreted by French history, by French legislation, and by the decisions of French tribunals, it means neither more nor less than the maintenance of the principle that while the ordinary judges ought to be irremovable and thus independent of the executive, the government and its officials ought (whilst acting officially) to be independent of and to a great extent free from the jurisdiction of the ordinary courts. It were curious to follow out the historical growth of the whole theory as to the "separation of powers." It rests apparently upon Montesquieu's "Esprit des Lois," book xi. c. 6, and is in some sort the offspring of a double misconception; Montesquieu misunderstood on this point the principles and practice of the English Constitution, and his doctrine was in turn, if not misunderstood, exaggerated and misapplied by the French statesmen of the Revolution, whose judgment was biassed, at once by knowledge of the inconveniences which had resulted from the interference of the French "parliaments" in matters of State, and by the characteristic and traditional desire to increase the force of the central government. The investigation, however, into the varying fate of a dogma which has undergone a different development on each side the Atlantic would lead us too far from our immediate topic. All that we need note is the extraordinary influence exerted in France, and in all countries which have followed French examples, by this part of Montesquieu's teaching, and the extent to which it underlies the political and legal institutions of the French Republic. . . .

We can now understand the way in which the existence of a *droit administratif* affects the whole legal position of French public servants, and renders it quite different from that of English officials.

Persons in the employment of the government, who form, be it observed, a much larger and more important part of the community than do the whole body of the servants of the English Crown, occupy in France a position in some respects resembling that of soldiers in England. For the breach of official discipline they are, we may safely assume, readily punishable in one form or another. But if like English soldiers they are subject to official discipline, they have what even soldiers in England do not possess, a very large amount of protection against legal proceedings for wrongs done to private citizens. The party wronged by an official must certainly seek relief, not from

the judges of the land, but from some official court. Before such a body the question which will be mainly considered is likely to be, not whether the complainant has been injured, but whether the defendant, say a policeman, has acted in discharge of his duties and in *bonâ fide* obedience to the commands of his superiors. If the defendant has so acted he will, we may almost certainly assume, be sure of acquittal, even though his conduct may have involved a technical breach of law. . . . We may further draw the general conclusion that under the French system no servant of the government who, without any malicious or corrupt motive, executes the orders of his superiors, can be made civilly responsible for his conduct. He is exempted from the jurisdiction of the civil courts because he is engaged in an administrative act; he is safe from official condemnation because the act complained of is done in pursuance of his official duties.

To this must be added a further consideration, to which for the sake of clearness no reference has hitherto been made. French law appears to recognize an indefinite class of "acts of State," — acts, that is to say, which are done by the government, as matters of police, of high policy, of public security, and the like, and acts of this class do not fall within the control either of the administrative or of any other courts. It would, for example, appear that in questions of extradition, as regards persons who are not French citizens, the government can act freely on its own discretion, and that a foreigner threatened with expulsion or expelled from French territory by orders of the government will not be able to obtain protection or redress in any French court whatever; the executive possesses, under the French constitution, "prerogatives" — no other word so well expresses the idea — which are above and beyond, rather than opposed to, the law of the land.

What may be the precise limits which the system of administrative law taken together with the authority ascribed in France to the executive in matters of State imposes on the jurisdiction of the civil tribunals, no foreigner can pronounce with certainty. These limitations are, however, as we have seen, in many instances very strict, and are certainly sufficient to prevent the judges of the land from pronouncing judgment on wrongs, not amounting to actual crimes, done by officials to private citizens. These restrictions on the authority of the courts must, at any rate as an Englishman would think, diminish the moral influence of the whole judicial body, and deprive the French judicature of that dignity which the English Bench have derived from their undoubted power to intervene, indirectly indeed, but none the less efficiently, in matters of State. The condemnation of general warrants — a condemnation which, whatever be the French law of arrest, could not (it would seem) be at the present day pronounced by any court in France — did as much in the last century to raise the reputation of the Bench as to protect the freedom of the subject. Our judges would with difficulty retain the reverence with which their traditions surround them if the decisions, even of the House of Lords, were, whenever

they were alleged to interfere with the prerogative of the Crown, or the discretionary powers of the ministry, liable to be invalidated by some official body. The separation of powers, as the doctrine is interpreted in France, means, it would seem to an Englishman, the powerlessness of the courts in any conflict with the executive. However this may be, it assuredly means the protection of official persons from the liabilities of ordinary citizens.

Compare for a moment with the position of French officials under the system of *droit administratif* the situation of servants of the Crown in England.

Among modern Englishmen the political doctrines which have in France created the system of *droit administratif* are all but unknown. Our law bears very few traces indeed of the idea that when questions arise between the State or, as we should say, the Crown or its servants and private persons, the interests of the government should be in any sense preferred or the acts of its agents claim any special protection. Our laws, again, lend no countenance to the dogma of the "separation of powers" as that doctrine is understood by Frenchmen. The common law courts have constantly hampered the action of the executive, and by issuing the writ of *habeas corpus* as well as by other means do in fact exert a strict supervision over the proceedings of the Crown and its servants. . . .

The doctrine propounded under various metaphors by Bacon that the prerogative was something beyond and above the ordinary law, is like the foreign doctrine that in matters of high policy the administration has a discretionary authority which cannot be controlled by any court. The celebrated dictum that the judges, though they be "lions," yet should be "lions under the throne, being circumspect that they do not check or oppose any points of sovereignty," is a curious anticipation of the maxim formulated by French revolutionary statesmanship, that the judges are under no circumstances to disturb the action of the administration, and would, if logically worked out, have led to the exemption of every administrative act, or, to use English terms, of every act alleged to be done in virtue of the prerogative from judicial cognizance. The constantly increasing power of the Star Chamber and of the Council gave practical expression to prevalent theories as to the royal prerogative, and it is hardly fanciful to compare these courts, which were in reality portions of the executive government, with the *Conseil d'état* and other *Tribunaux administratifs* of France. Nor is a parallel wanting to the celebrated Article 75 of the Constitution of the Year VIII. This parallel is to be found in Bacon's attempt to prevent the judges, by means of the writ *De non procedendo Rege inconsulto*, from proceeding with any case in which the interests of the Crown were concerned. "The working of this writ," observes Mr. Gardiner, "if Bacon had obtained his object, would have been to some extent analogous to that provision which has been found in so many French constitutions, according to which no

agent of the government can be summoned before a tribunal, for acts done in the exercise of his office, without a preliminary authorization of the Council of State. The effect of the English writ being confined to cases where the king himself was supposed to be injured, would have been of less universal application, but the principle on which it rested would have been equally bad." The principle, moreover, admitted of unlimited extension, and this, we may add, was perceived by Bacon. "The writ," he writes to the king, "is a mean provided by the ancient law of England to bring any case that may *concern your Majesty in profit or power from the ordinary Benches, to be tried and judged before the Chancellor of England*, by the ordinary and legal part of this power. And your Majesty knoweth *your Chancellor is ever a principal counsellor and instrument of monarchy, of immediate dependence on the king; and therefore like to be a safe and tender guardian of the regal rights.*" Bacon's innovation would, if successful, have formally established the fundamental dogma of administrative law that administrative questions must be determined by administrative bodies.

The analogy between the administrative ideas which still prevail on the Continent[1] and the conception of the prerogative which was maintained by the English Crown in the seventeenth century has considerable speculative interest. That the administrative ideas supposed by many French writers to have been originated by the statesmanship of the great Revolution or of the first Empire are to a great extent developments of the traditions and habits of the French monarchy is almost past a doubt, and it is a curious inquiry how far the efforts made by the Tudors or Stuarts to establish a strong government were influenced by foreign examples. This, however, is a problem for historians. A lawyer may content himself with noting that French history throws light on the causes both of the partial success and of the ultimate failure of the attempt to establish in England a strong administrative system. The endeavor had a partial success, because circumstances, similar to those which made French monarchs ultimately despotic, tended in England during the sixteenth and part of the seventeenth century to increase the influence of the Crown. The attempt ended in failure, partly because of the personal deficiencies of the Stuarts, but chiefly because the whole scheme of administrative law was opposed to those habits of equality before the law which had long been essential characteristics of English institutions. — DICEY, *Law of the Const.* c. xii.[2]

It must be recollected that in the Continental States of Europe the courts of law have not, as a rule, the power to decide upon the legality

[1] It is worth noting that the system of "administrative law," though more fully developed in France than elsewhere, exists in one form or another in most of the Continental States.

[2] Reprinted here by permission — ED.

or illegality of the administrative acts of executive officials. Such questions seem to be regarded as matters of public right and so properly withheld from the courts, whose jurisdiction over civil rights should not extend beyond private right. It can hardly be denied that every American lawyer, who holds that judicial courts are competent to decide questioned laws to be constitutional or unconstitutional, presupposes that the same courts are competent to decide questioned executive acts to be legal or illegal. Indeed, it is safe to assert, that every American must ponder long before he can understand how a judiciary which cannot question an executive act, can question an act of legislation. When judicial power was in America extended to cases arising under written constitutions, which involved the unconstitutionality and resultant invalidity of legislation, that extension was partially due to originality in creating new institutions and was partially the effect of existing causes. One of the most potent of existing causes must have been that the judges in every land of the common law could decide upon the legality or illegality of the executive acts of officials. It has been said in France that judges should not be competent to decide laws to be unconstitutional because the judiciary is a feeble power. Doubtless, it is correct to say that the judiciary is a feeble power in France and other civil law countries. But in all the lands of the common law, whether in the Eastern, the Western, or the Southern hemisphere, the judiciary is not a feeble power, and never has been. — BRINTON COXE, *Judicial Power and Unconstitutional Legislation*, 102.

In approaching the history of the mediæval church, we may regard the spiritualty of England, the clergy or clerical estate, as a body completely organized, with a minutely constituted and regulated hierarchy, possessing the right of legislating for itself and taxing itself, having its recognized assemblies, judicature and executive, and, although not as a legal corporation holding common property, yet composed of a great number of persons, each of whom possesses corporate property by a title which is either conferred by ecclesiastical authority, or is not to be acquired without ecclesiastical assent. . . . The spiritualty is by itself an estate of the realm; its leading members, the bishops and certain abbots, are likewise members of the estate of baronage; the inferior clergy, if they possess lay property or temporal endowments, are likewise members of the estate of the commons. . . . As an estate of the realm the spiritualty recognizes the headship of the king, as a member of the Church Catholic it recognizes, according to the mediæval idea, the headship of the pope. . . . They recognize the king as supreme in matters temporal, and the pope as supreme in matters spiritual; but there are questions as to the exact limits between the spiritual and the temporal, and most important questions touching the precise relations between the Crown and the Papacy. On mediæval theory the king is a spiritual son of the pope; and the pope

may be the king's superior in things spiritual only, or in things temporal and spiritual alike. . . .

The idea of placing in one and the same hand the direct control of all causes temporal and spiritual was not unknown in the Middle Ages. The pope's spiritual supremacy being granted, complete harmony might be attained not only by making the pope supreme in matters temporal, but by delegating to the king supremacy in matters spiritual. . . . There were not wanting men who would try to persuade him [Henry II.] that even without any such commission he was supreme in spiritual as well as in temporal matters. Reginald Fitz Urse, when he was disputing with Becket just before the murder, asked him from whom he had the archbishopric? Thomas replied, "The spirituals I have from God and my lord the pope, the temporals and possessions from my lord the king." "Do you not," asked Reginald, "acknowledge that you hold the whole from the king?" "No," was the prelate's answer; "we have to render to the king the things that are the king's, and to God the things that are God's." The words of the archbishop embody the commonly received idea; the words of Reginald, although they do not represent the theory of Henry II., contain the germ of the doctrine which was formulated under Henry VIII. — 3 STUBBS, *Const. Hist. Eng.* ch. xix. §§ 376, 377.

A case of 1505–6 (Y. B. 21 H. VII., 1, 1), is stated by Coxe (Judic. Power and Unconst. Leg. 147), in which the validity of an Act of Parliament was debated. In this case KINGSMILL, J. (fol. 2 *a*), said: "But, sir, the Act of Parliament cannot make the king a parson, for we, by our law, cannot make any temporal man have spiritual jurisdiction; no one can do this except the Supreme Head" [*i. e.*, the pope]. Later on *Palmes*, "one of the new sergeants" (fol. 2 *b*), argued: "No temporal Act can make a temporal man have spiritual jurisdiction; if it were ordained by Act that so and so should not offer any tithes to his curate, the Act would be void. And at the end of the case FROWIKE, C. J. (fol. 4 *b*), said: "As to the other matter, whether the king can be parson by the Act of Parliament, — as I understand, it is no great matter for argument; I have never seen that any temporal man can be a parson without the assent of the Supreme Head. . . . And so a temporal Act, without the assent of the Supreme Head, cannot make the king a parson."

Coxe, *ubi supra*, p. 148, remarks: "It may seem strange to many of Blackstone's readers that parliamentary power should be spoken of as limited; but it would have seemed stranger to Englishmen before the Reformation for any one to say that the temporal Parliament could legislate with unlimited power in ecclesiastical matters regardless of the pope's wishes and authority. It required the Reformation, that is to say, an ecclesiastical revolution, for Parliament to obtain its modern plenitude of power in matters ecclesiastical."

This "ecclesiastical revolution" came within thirty years after the

debate above referred to, — within the lifetime of those who heard it. In 1534 the Convocations of Canterbury and York announced that "the Bishop of Rome has no greater jurisdiction conferred on him by God in this kingdom of England than any other foreign bishop" (Acland and Ransome, Polit. Hist. of England, 75); and in the next year the "Supreme Head" of the Church of England was declared by Act of Parliament to be the King of England (Stat. 26 H. VIII. c. i.).

In the Matter of CAVENDISH.

Common Bench. 1587.

[1 *Anderson*, 152.][1]

One R. Cavendish suggested to the queen that she had power to establish the office of making all the writs of *supersedeas quia improvide emanavit* in the Common Bench: whereupon the queen, by her letters-patent, granted to the said Cavendish the office of making the said writs for some years, with words of *constituimus;* after making which patent, the judges were commanded orally, by a messenger, to admit the said Cavendish to the said office. The judges did not do it; and thereupon Cavendish procured the directing of a letter to the said judges, under the sign-manual and signet, in these words: —

"Trusty and well-beloved, we greet you well; whereas we perceive that notwithstanding our grant unto our well-beloved servant, Richard Cavendish, of the writs of *supersedeas* upon exigent in that court, he is as yet impeached from the exercise thereof, a matter that we cannot but think strange, being contrary to our meaning, and to the expectation we had of more conformity to be found to the yielding to our said grant than yet we perceive; so as thereby our said servant remaineth as yet frustrate of the commodity and benefit due to the said office; We let you weet that our express will and commandment is, that forthwith you give order that a sequestration of all the profits already grown since our grant to our said servant, and continuing to grow of the said office, be made and committed unto such persons as you shall think meet, with whom you shall take order by bond or other sufficient manner to answer, and yield the same profits unto our said servant, or to any other to whom the same shall be due immediately after the controversy for the execution of the said office shall be decided or ordered, whereof we eftsoones will you not to fail, &c."

The justices considered this letter, and thought that they could not lawfully act according to the contents of the said letter and its order, because it might be that by such sequestration others, alleging the right to make these writs, might be disseised of their freehold, claimed by

[1] Translated from the Reporter's French. — Ed.

them, in the making of these writs and fees thereupon. All this was told the queen by great men, friends of Cavendish. Thereupon another letter, under the signet and sign-manual, was directed to the justices, as follows: —

"Trusty and well-beloved, . . . we greet you well, whereas we granted to our trusty and well-beloved servant, Richard Cavendish, Esquire, by our letters-patent, under our great seal of England, the making and writing of all *supersedeases* upon exigent issuing out of our Court of Common Pleas, and have divers times sent unto you for his admittance into the said office, as well by message delivered by persons near about us as otherwise, which nevertheless hath been neglected, in consideration whereof we, for that our said servant was to depart into the Low Countries for a season, gave commandment for the sequestration *de les profits* of the said office until our further pleasure therein should be declared; wherefore for that we look for some more dutiful regard to be had by you of our prerogative royal, we have thought good to signify our further pleasure unto you in this behalf, which is that our said servant be no longer withholden from the benefit and use of our said grant; and these are therefore to will and command you and every of you, that immediately upon the sight thereof, without any further delay, you cause present payment to be made unto them [him] or to his assignee of all the foresaid profits since the day of our said grant upon bond with condition that if from time of his admission into the said office, he, his deputy or deputies, shall by virtue of our said grant hold and enjoy the same without lawful eviction or recovery thereof out of the hands of him or his deputy or deputies by any other pretending title to the making and writing of the said writs, that then the said obligation to be void, &c. And furthermore our will and pleasure is, and thereunto we will and command you that upon our said servant offering of himself unto you in our said court this next term, you presently without any further delay admit him unto the use, execution, and profits of the said office according to our said grant; for that we be nothing ignorant that if any of your clerks have any such title or interest as they pretend, both our laws lie open for their remedy, and also they be persons both for wealth and skill able to recover their own right if any such be. In consideration whereof we look that you and every of you should dutifully fulfil our commandment therein, and these our letters shall be your warrant, &c."

This letter was delivered to the justices in presence of the Lord Chancellor of England and the Earl of Leicester at the beginning of the Easter Term, in the twenty-ninth year of the queen [1587]; and the Lord Chancellor declared to the judges that the queen had made the said patent to Cavendish upon a great desire that she had to provide advancement for him; that she understood that by this means he might enjoy this [right], and that she cared much about it. On which account she had commanded him and the said viscount [*sic*] to hear

the answer of the justices to the contents of the letter last mentioned. Thereupon the justices took the letter, and desired a little time to inspect and consider it; which was thought convenient. After perusing the letter, they went at once to the said lords and said for their answer that in all lawful points they would dutifully and in humble manner obey her Majesty, but as regards this case they could not without being perjured; and this, as they said, they well knew that the queen would not knowingly command or require.

Upon this they departed; and the said answer was reported to the queen, who commanded the said Chancellor, the Chief Justice of the King's Bench, and the Master of the Rolls to hear from the said judges the reasons and grounds which moved them to make such an answer; and also what they had to say against the prerogative and right of the queen in this matter; and therewith the learned counsel of the queen were commanded to attend. All these being assembled, the queen's sergeant showed that the queen had the right and prerogative of granting the making of these writs. . . . To which, for the judges, it was protested that with all their power they would aid her Majesty in all her rights, being bound thereto not only by common duty, but by oath, which rights they wished might be maintained and preserved; but for their answer it was said that this mode of proceeding was out of the course of justice, and therefore they would not make answer to those who had spoken. Their reasons they gave as follows, *viz.*: that they had and claimed nothing as to the making of the said writs, but the prenotaries and divers exigenters of the same place, — who claimed it as a freehold for their lives. These, in law and reason, should be brought to answer, and not the judges; for these, and no others, were they who were to be touched as regards profit or damage by this; and always they who have the thing in controversy are the persons to answer as to what is in question. On this point no other answer was made.

When this was ended, the letters above recited were shown, and the judges were charged with not having obeyed the orders therein contained. To this they said that they must needs confess that they had not performed the orders; but this was no offence or contempt to her Majesty, for the orders were against the law of the land (*le ley de terre*), in which case it was said, no one is bound to obey such an order: and they offered to show what had been adjudged heretofore to prove what they said to be true.

And they said that the queen herself was sworn and took oath to keep her laws, and the judges also, as regards their willingly breaking them. As to this matter, so far as it concerned the judges, they answered again that if they obeyed these orders they should act otherwise than the laws warranted, and merely and directly against them; and that was contrary to their oath, and in contempt of God, her Majesty, and the country and commonwealth in which they were born and lived; of which, if the fear of God were gone from them, yet the examples of others and the punishment of those who had formerly violated the laws,

reminded them, and recalled them from such offences. The examples and precedents in these matters were remembered; namely: [Then followed brief statements as to Hugh Despenser, Lord Chamberlain of Edward II., Thorp, J., in the time of Edward III., "certain precedents of the time of Richard II.," and last the indictments against Empson, lately councillor to King Henry VII.; one of which only is recited at large, *pur avoyder tediousness*. Then Magna Carta, c. 29 (9 H. III.) was cited, and statutes 5 Ed. III. c. 9, and 28 Ed. III. c. 3; and another of 11 Rich., providing "that neither letters of signet, nor of the king's secret seal, shall be from henceforth sent in damage or prejudice of the realm."]

By which laws the office and duty of judges appears and of all others whomsoever; and also by the precedents before cited it appears what an offence it is willingly to break the laws of the land. . . . For these reasons, and because the queen and the judges are sworn, they said that they would not act according to the said letters. The oath of the queen and the judges appears in print, and so it need not be written here.

All this was reported by the said Lord Chancellor to the queen with his good allowance of the matters aforesaid and reasons alleged; which her Majesty, as I have heard,[1] well accepted. But nothing more was done or heard by the judges in the said Easter Term, or in the Trinity Term then next following; which moves the judges to think that no more will ever be.

DARCY *v.* ALLEN. (The Case of Monopolies.)

King's Bench. 1603.

[*Moore*, 671; s. c. 11 *Co.* 84 *b.*][2]

In the King's Bench; an action on the case; and a count that, whereas men of mean trades and occupations in the commonwealth apply themselves to idle games with cards, the queen, by way of redress and restraint of this enormity, made letters-patent to Ralph Bowes, authorizing him and his factors and deputies to provide playing-cards, and prohibiting all others to import playing-cards into the realm or to make or sell them in the realm for a certain term of years now expired, and (reciting the grant) she made another like grant to Darcy, who provided cards accordingly: yet the defendant brought cards into the realm and sold them and did things contrary to the privilege granted to the plaintiff, and to his damage to the amount of £2,000. The defend-

[1] It is Anderson, the Chief Justice of the court, who is reporting the case. — Ed.

[2] The statement of the case and a part of the argument are translated from the French of Moore. The opinion is not given by him, and so far as here presented, is taken from Coke. — Ed.

ant pleaded the custom of London, that a freeman may buy and sell all things merchantable, and that, since he was a freeman and haberdasher of London, and cards were things merchantable, he bought and sold them; and he demanded judgment. The plaintiff demurred in law; and it was argued first, Trin. 44 Eliz. [1602], by *Altham*, with the plaintiff, and *Dyer*, with the defendant. . . . Afterwards, Mich. 44 and 45 Eliz. [1602], it was argued by *Dodderidge*, against the patent, and by *Fleming*, solicitor, with the patent; and afterwards, the same term, by *Fuller*, against the patent, and *Coke*, Attorney-General, with the patent. And *Dodderidge* said that the case was tender, concerning the prince's prerogative and the subject's liberty, and must be argued with much caution; for *he that hews above his hand chips will fall into his eyes*, and *qui majestatem scrutatur principis opprimetur spendore ejus.* Yet since it is the honor and safety of the prince to govern by the laws, . . . as Bracton says, *merito retribuat Rex legi quod lex attribuat ei*,[1] therefore the princes of this realm have always been content that their patents and grants should be examined by the laws, and so is her Majesty that now is. In this examination it has always been held by the judges that the queen's grants procured against the usual and settled liberty of the subjects are void, and also those which tend to their grievance and oppression. . . .

It was . . . resolved by POPHAM, Chief Justice, *et per totam curiam*, that the said grant to the plaintiff of the sole making of cards within the realm was utterly void, and that for two reasons: 1. That it is a monopoly, and against the common law. 2. That it is against divers Acts of Parliament. . . .

3. The queen was deceived in her grant; for the queen, as by the preamble appears, intended it to be for the weal public, and it will be employed for the private gain of the patentee, and for the prejudice of the weal public; moreover the queen meant that the abuse should be taken away, which shall never be by this patent, but *potius* the abuse will be increased for the private benefit of the patentee, and therefore, as it is said in 21 E. 3, 47, in the Earl of Kent's case, this grant is void *jure Regio*. 4. This grant is *primæ impressionis*, for no such was ever seen to pass by letters-patent under the great seal before these days, and therefore it is a dangerous innovation, as well without any precedent, or example, as without authority of law or reason. . . . And therefore it was resolved, that the queen could not suppress the making of cards within the realm, no more than the making of dice, bowls, balls, hawks' hoods, bells, lures, dog-couples, and other the like, which are works of labor and art, although they serve for pleasure, recreation, and pastime, and cannot be suppressed but by Parliament, nor a man restrained from exercising any trade, but by Parliament, 37 E. 3, cap. 16, 5 Eliz. cap. 4. . . .

[1] Attribuat igitur rex legi, quod lex attribuit ei, videlicet, dominationem et potestatem. BRACTON, 5 *b*. — ED.

Also such charter of a monopoly, against the freedom of trade and traffic, is against divers Acts of Parliament, *sc.* 9 E. 3, c. 1 & 2, which for the advancement of the freedom of trade and traffic extends to all things vendible, notwithstanding any charter of franchise granted to the contrary, or usage, or custom, or judgment given upon such charter, which charters are adjudged by the same Parliament to be of no force or effect, and made to the derogation of the prelates, earls, barons, and grandees of the realm, and to the oppression of the Commons. And by the statute of 25 E. 3, cap. 2, it is enacted that the said Act of 9 E. 3, shall be observed, holden, and maintained in all points. And it is further by the same Act provided, that if any statute, charter, letters-patent, proclamation, command, usage, allowance, or judgment be made to the contrary, that it shall be utterly void. *Vide Magna Charta*, cap. 18, 27 E. 3 cap. 11, &c. . . .

And *nota*, reader, and well observe the glorious preamble and pretence of this odious monopoly. And it is true *quod privilegia quæ re vera sunt in præjudicium reipublicæ, magis tamen speciosa habent frontispicia, et boni publici prætextum, quam bonæ et legales concessiones, sed prætextu liciti non debet admitti illicitum.* And our lord the king that now is, in a book which he in zeal to the law and justice commanded to be printed *anno* 1610,[1] entitled, "A Declaration of His Majesty's Pleasure, &c.," p. 13, has published, that monopolies are things against the laws of this realm, and therefore expressly commands that no suitor presume to move him to grant any of them, &c.

In the famous *Case of Ship-Money*, 3 How. St. Tr. 825, in 1637, the prerogative of the Crown was much discussed. Hallam (Const. Hist. c. vii.), gives a convenient abstract of it.

"The first writ issued from the council in October, 1634. It was directed to the magistrates of London and other sea-port towns. Reciting the depredations lately committed by pirates, and slightly adverting to the dangers imminent in a season of general war on the Continent, it enjoins them to provide a certain number of ships of war of a prescribed tonnage and equipage, empowering them also to assess all the inhabitants for a contribution toward this armament according to their substance. . . .

"This desire of being at least prepared for war, as well as the general system of stretching the prerogative beyond all limits, suggested an extension of the former writs from the sea-ports to the whole kingdom. Finch, Chief Justice of the Common Pleas, has the honor of this improvement on Noy's scheme. He was a man of little learning or respectability, a servile tool of the despotic cabal, who, as speaker of the last Parliament, had, in obedience to a command from the king to adjourn, refused to put the question upon a remonstrance moved in the House. By the new writs for ship-money, properly so denominated,

[1] This volume of Coke's Reports was published in 1615 — Ed.

since the former had only demanded the actual equipment of vessels, for which inland counties were of course obliged to compound, the sheriffs were directed to assess every land-holder and other inhabitant according to their judgment of his means, and to enforce the payment by distress. . . .

"The first that resisted was the gallant Richard Chambers, who brought an action against the lord mayor for imprisoning him on account of his refusal to pay his assessment on the former writ. The magistrate pleaded the writ as a special justification; when Berkley, one of the judges of the King's Bench, declared that there was a rule of law and a rule of government; that many things which could not be done by the first rule, might be done by the other, and would not suffer counsel to argue against the lawfulness of ship-money. The next were Lord Say and Mr. Hampden, both of whom appealed to the justice of their country; but the famous decision which has made the latter so illustrious, put an end to all attempts at obtaining redress by course of law.

"Hampden, it seems hardly necessary to mention, was a gentleman of good estate in Buckinghamshire, whose assessment to the contribution for ship-money demanded from his county amounted only to twenty shillings. The cause, though properly belonging to the Court of Exchequer, was heard, on account of its magnitude, before all the judges in the Exchequer Chamber. The precise question, so far as related to Mr. Hampden, was, Whether the king had a right, on his own allegation of public danger, to require an inland county to furnish ships, or a prescribed sum of money by way of commutation, for the defence of the kingdom? It was argued by St. John and Holborne in behalf of Hampden, and by the Solicitor-General Littleton and the Attorney-General Banks for the Crown. . . .

"Some of the judges who pronounced sentence in this cause . . . denied the power of Parliament to limit the high prerogatives of the Crown. . . . 'Where Mr. Holborne,' says Justice Berkley, 'supposed a fundamental policy in the creation of the frame of this kingdom, that in case the monarch of England should be inclined to exact from his subjects at his pleasure, he should be restrained, for that he could have nothing from them but upon a common consent in Parliament; he is utterly mistaken herein. The law knows no such king-yoking policy. The law is itself an old and trusty servant of the king's; it is his instrument or means which he useth to govern his people by: I never read nor heard that *lex* was *rex;* but it is common and most true that *rex* is *lex.*' Vernon, another judge, gave his opinion in few words: 'That the king, *pro bono publico*, may charge his subjects for the safety and defence of the kingdom, notwithstanding any Act of Parliament, and that a statute derogatory from the prerogative doth not bind the king; and the king may dispense with any law in cases of ne essity.' Finch, the adviser of the ship-money, was not backward to employ the same argument in its behalf. 'No Act of Parliament,' he told them, 'could bar a king of his regality, as that no land should hold of him, or bar him

of the allegiance of his subjects or the relative on his part, as trust and power to defend his people; therefore Acts of Parliament to take away his royal power in the defence of his kingdom are void; they are void Acts of Parliament to bind the king not to command the subjects, their persons and goods, and I say, their money too, for no Acts of Parliament make any difference.' [1]

"Seven of the twelve judges, namely, Finch, Chief Justice of the Common Pleas, Jones, Berkley, Vernon, Crawley, Trevor, and Weston, gave judgment for the Crown. Brampston, Chief Justice of the King's Bench, and Davenport, Chief Baron of the Exchequer, pronounced for Hampden, but on technical reasons, and adhering to the majority on the principal question. Denham, another judge of the same court, being extremely ill, gave a short written judgment in favor of Hampden; but Justices Croke and Hutton, men of considerable reputation and experience, displayed a most praiseworthy intrepidity in denying, without the smallest qualification, the alleged prerogative of the Crown and the lawfulness of the writ for ship-money." [2]

[1] "The soil of the sea," said Finch in his opinion, "belongs to the king, who is lord and sole proprietor thereof. . . . The king holds this diadem of God only; all others hold their lands of him, and he of none but God." — ED.

[2] All these proceedings about ship-money, judicial and other, were declared illegal by Act of Parliament (Stat. 16 Car. I. c. 14), in May, 1641. The Act ran as follows:

"Whereas divers writs of late time issued under the great seal of England, commonly called *ship-writs*, for the charging of the ports, towns, cities, boroughs, and counties of this realm respectively, to provide and furnish certain ships for his Majesty's service: (2) And whereas upon the execution of the same writs and returns of *certioraries* thereupon made, and the sending the same by *mittimus* into the Court of Exchequer, process hath been thence made against sundry persons pretended to be charged by way of contribution, for the making up of certain sums assessed for the providing of the said ships, and in especial in Easter Term in the thirteenth year of the reign of our sovereign lord the king that now is, a writ of *scire facias* was awarded out of the Court of Exchequer, to the then sheriff of Buckinghamshire, against John Hampden, Esquire, to appear and show cause, why he should not be charged with a certain sum so assessed upon him; (3) upon whose appearance and demurrer to the proceedings therein, the barons of the Exchequer adjourned the same case into the Exchequer Chamber, where it was solemnly argued divers days, and at length it was there agreed by the greater part of all the justices of the Courts of King's Bench and Common Pleas, and of the barons of the Exchequer, there assembled, That the said John Hampden should be charged with the said sum so as aforesaid assessed on him; (4) the main grounds and reasons of the said justices and barons which so agree, being, that when the good and safety of the kingdom in general is concerned, and the whole kingdom in danger, the king might by writ under the great seal of England, command all the subjects of this his kingdom, at their charge, to provide and furnish such number of ships with men, victuals, and munition, and for such time as the king should think fit, for the defence and safeguard of the kingdom from such danger and peril, and that by law the king might compel the doing thereof, in case of refusal or refractoriness; (5) and that the king is the sole judge, both of the danger and when and how the same is to be prevented and avoided; (6) according to which grounds and reasons, all the justices of the said Courts of King's Bench and Common Pleas, and the said barons of the Exchequer, having been formerly consulted with by his Majesty's command, had set their hands to an extrajudicial opinion, expressed to the same purpose; which opinion, with their names thereunto, was also by his Majesty's command enrolled in the Courts of Chancery, King's Bench, Common Pleas and Exchequer, and likewise entered

THE Government of the Commonwealth of England, Scotland, and Ireland, and the Dominions thereto belonging, as it was publicly declared at Westminster, the 16th day of December, 1653, . . . at which time and place his Highness, Oliver Lord Protector of the said Commonwealth, took a solemn oath for observing the same. Published by his Highness the Lord Protector's Special Commandment. Printed in the year 1653.[1]

I. That the supreme legislative authority of the Commonwealth of England, Scotland, and Ireland, and the dominions thereto belonging, shall be and reside in one person, and the people assembled in Parliament; the style of which person shall be Lord Protector of the Commonwealth of England, Scotland, and Ireland.

among the remembrances of the Court of Star Chamber, and according to the said agreement of the said justices and barons, judgment was given by the barons of Exchequer, That the said John Hampden should be charged with the said sum so assessed on him; (7) and whereas some other actions and process depend, and have depended, in the said Court of Exchequer, and in some other courts against other persons, for the like kind of charge, grounded upon the said writs, commonly called *ship-writs*, all which writs and proceedings as aforesaid, were utterly against the law of the land;

"II. Be it therefore declared and enacted by the king's most excellent Majesty, and the lords and commons, in this present Parliament assembled, and by the authority of the same, That the said charge imposed upon the subject, for the providing and furnishing of ships, commonly called ship-money, and the said extrajudicial opinion of the said justices and barons, and the said writs, and every of them, and the said agreement or opinion of the greater part of the said justices and barons, and the said judgment given against the said John Hampden, were and are contrary to and against the laws and statutes of this realm, the right of property, the liberty of the subjects, former resolutions in Parliament, and the petition of right made in the third year of the reign of his Majesty that now is.

"III. And it is further declared and enacted by the authority aforesaid, That all and every the particulars prayed or desired in the said petition of right, shall from henceforth be put in execution accordingly, and shall be firmly and strictly holden and observed, as in the same petition they are prayed and expressed; (2) and that all and every the records and remembrances of all and every the judgment, enrolments, entry, and proceedings as aforesaid, and all and every the proceedings whatsoever, upon or by pretext or color of any of the said writs, commonly called *ship-writs*, and all and every the dependants on any of them, shall be deemed and adjudged to all intents, constructions, and purposes, to be utterly void and disannulled; and that all and every the said judgment, enrolments, entries, proceedings, and dependants of what kind soever, shall be vacated and cancelled in such manner and form as records use to be that are vacated."

On Jan. 30, 1648–49, came the execution of the king, and on the 17th of the next March the abolition of the office of king (2 Scobell, 7); on the 19th of the same March, the abolition of the House of Lords by "the Commons of England, assembled in Parliament" (2 Scobell, 8); and on the 19th of the next May (2 Scobell, 35) it was "declared and enacted by this present Parliament . . . that the people of England . . . are and shall be . . . a Commonwealth and Free State, and shall from henceforth be governed as [such] . . . by the Supreme Authority of this Nation, the Representatives of the people in Parliament, and by such as they shall appoint and constitute as officers and ministers under them." . . . — ED.

[1] This document, known as "The Instrument of Government," "was drawn up by Cromwell's leading supporters and accepted by himself." — GARDINER'S *Student's Hist. Eng.* 568. See 6 Somers's Tracts (2d ed.), 284, Gardiner's Const. Doc. Purit. Rev. lvi. 314. — ED.

II. That the exercise of the chief magistracy and administration of the government over the said countries and dominions, and the people thereof, shall be in the Lord Protector, assisted with a council; the number whereof shall not exceed twenty-one, nor be less than thirteen.

III. That all writs, processes, commissions, patents, grants, and other things, which now run in the name and style of the keepers of the liberty of England by authority of Parliament, shall run in the name and style of the Lord Protector, from whom, for the future, shall be derived all magistracy and honors in these three nations; and shall have the power of pardons (except in case of murder and treason), and benefit of all forfeitures for the public use: And shall govern the said countries and dominions in all things by the advice of the council, and according to these presents and the laws.

IV. That the Lord Protector, the Parliament sitting, shall dispose and order the militia and forces both by sea and land, for the peace and good of the three nations, by consent of Parliament; and that the Lord Protector, with the advice and consent of the major part of the council, shall dispose and order the militia for the ends aforesaid, in the intervals of Parliament.

V. That the Lord Protector, by the advice aforesaid, shall direct, in all things, concerning the keeping and holding of a good correspondence with foreign kings, princes, and States; and also, with the consent of the major part of the council, have the power of war and peace.

VI. That the laws shall not be altered, suspended, abrogated, or repealed, nor any new law made, nor any tax, charge, or imposition laid upon the people, but by common consent in Parliament, save only as is expressed in the 30th article.

VII. That there shall be a Parliament summoned to meet at Westminster upon the third day of September, one thousand six hundred fifty-four; and that successively a Parliament shall be summoned once in every third year, to be accounted from the dissolution of the preceding Parliament.

VIII. That neither the Parliament to be next summoned, nor any successive Parliaments, shall, during the time of five months, to be accounted from the day of their first meeting, be adjourned, prorogued, or dissolved, without their own consent. . . .

XVII. That the persons who shall be elected to serve in Parliament, shall be such (and no other than such) as are persons of known integrity, fearing God, and of good conversation, and being of the age of one and twenty years.

XVIII. That all and every person and persons, seized or possessed to his use, of any estate, real or personal, to the value of two hundred pounds, and not within the aforesaid exceptions, shall be capable to elect members to serve in Parliament for counties. . . .

XXII. That the persons chosen and assembled in manner aforesaid, or any sixty of them, shall be, and be deemed the Parliament of England, Scotland, and Ireland, and the supreme legislative power to be

and reside in the Lord Protector and such Parliament, in manner herein expressed.

XXIII. That the Lord Protector, with the advice of the major part of the council, shall at any other time than is before expressed, when the necessities of the State shall require it, summon Parliaments in manner before expressed, which shall not be adjourned, prorogued, or dissolved, without their own consent, during the first three months of their sitting: And in case of future war with any foreign State, a Parliament shall be forthwith summoned for their advice concerning the same.

XXIV. That all bills agreed unto by the Parliament shall be presented to the Lord Protector for his consent; and in case he shall not give his consent thereto within twenty days after they shall be presented to him, or give satisfaction to the Parliament, within the time limited, that then, upon declaration of the Parliament, that the Lord Protector hath not consented, nor given satisfaction, such bills shall pass into, and become laws, although he shall not give his consent thereunto; provided such bills contain nothing in them contrary to the matters contained in these presents. . . .

XXX. That the raising of money for defraying the charge of present extraordinary forces, both at land and sea, in respect of the present wars, shall be by consent in Parliament, and not otherwise, save only that the Lord Protector, with the consent of the major part of the council, for preventing the disorders and dangers which may otherwise fall out both at sea and land, shall have power, until the meeting of the first Parliament, to raise money for the purposes aforesaid, and also to make laws and ordinances for the peace and welfare of these nations, where it shall be necessary, which shall be binding and in force, until order shall be taken in Parliament concerning the same. . . .

XXXII. That the office of the Lord Protector, over these nations, shall be elective, and not hereditary; and upon the death of the Lord Protector, another fit person shall be forthwith elected to succeed him in the government, which election shall be by the council; who, immediately upon the death of the Lord Protector, shall assemble in the chamber where they usually sit in council; and having given notice to all their number of the cause of their assembling, shall, being thirteen at least present, proceed to the election, and before they depart out of the said chamber, shall elect a fit person to succeed in the government, and forthwith cause proclamation thereof to be made in all the three nations as shall be requisite: And the person that they or the major part of them shall elect, as aforesaid, shall be, and shall be taken to be Lord Protector over these nations of England, Scotland, and Ireland, and the dominions thereto belonging; provided that none of the children of the king, nor any of his line, or family, be elected to be Lord Protector, or other chief magistrate over these nations, or any of the dominions thereto belonging: And until the aforesaid election be past, the council shall take care of the government, and administer in all

things as fully as the Lord Protector, or the Lord Protector and council are enabled to do.

XXXIII. That Oliver Cromwell, Captain-General of the forces of England, Scotland, and Ireland, shall be, and is hereby declared to be Lord Protector of the Commonwealth of England, Scotland, and Ireland, and the dominions thereto belonging for his life.

XXXIV. That the Chancellor, Keeper, or Commissioners of the Great Seal, the Treasurer, Admiral, Chief Governors of Ireland and Scotland, and the Chief Justices of both the benches, shall be chosen by the approbation of Parliament, and in the intervals of Parliament, by the approbation of the major part of the council, to be afterward approved by the Parliament. . . .

XXXVII. That such as profess faith in God by Jesus Christ (though differing in judgment from the doctrine, worship, or discipline, publicly held forth) shall not be restrained from, but shall be protected in the profession of the faith, and exercise of their religion, so as they abuse not this liberty, to the civil injury of others, and to the actual disturbance of the public peace on their parts; provided this liberty be not extended to Popery or prelacy, nor to such as, under the profession of Christ, hold forth and practise licentiousness.

XXXVIII. That all laws, statutes, ordinances, and clauses in any law, statute, and ordinance to the contrary of the aforesaid liberty, shall be esteemed as null and void. . . .

XLI. That every successive Lord Protector over these nations shall take and subscribe a solemn oath, in the presence of the council, and such others as they shall call to them, That he will seek the peace, quiet, and welfare of these nations, cause law and justice to be equally administered, and that he will not violate or infringe the matters and things contained in this writing; and in all other things will, to his power, and to the best of his understanding, govern these nations, according to the laws, statutes, and customs.

XLII. That each person of the council shall, before they enter upon their trust, take and subscribe an oath, That they will be true and faithful in their trust, according to the best of their knowledge; and that, in the election of every successive Lord Protector, they shall proceed therein impartially, and do nothing therein for any promise, fear, favor, or reward.[1]

WHERE there is, then, a righteous and good constitution of government, there is first an orderly union of many understandings together, as the public and common supreme judicature or visible sovereignty, set

[1] See the Constitutional Bill of the First Parliament of the Protectorate (1654), Gardiner's Doc. Purit. Rev. lx. 353. The adoption of this was prevented by a dissolution. The Second Parliament, in 1657, presented amendments to the existing instrument under the name of "The Humble Petition and Advice" (2 Scobell, 378), including the establishment of a second chamber. Most of these were accepted by the Protector. Meantime interesting speculations were put forward by Vane and Harrington. — ED.

in a way of free and orderly exercise for the directing and applying the use of the ruling power or the sword to promote the interest and common welfare of the whole. . . .

A supreme judicature thus made the representative of the whole is that which we say will most naturally care and most equally provide for the common good and safety. . . . And if this which is so essential to the well-being and right constitution of government were once obtained, . . . what could be propounded afterwards, as to the form of administration, that would much stick? Would a standing council of State settled for life in reference to the safety of the commonwealth, and for the maintaining intercourse and commerce with foreign States, under the inspection and oversight of the supreme judicature, but of the same fundamental constitution with themselves, — would this be disliked? Admitting their orders were binding in the intervals of supreme national assemblies, so far only as consonant to the settled laws of the commonwealth; the vacancy of any of which, by death or otherwise, might be supplied by the vote of the major part of themselves. Nay, would there be any just exception to be taken, if, besides both these, it should be agreed, as another part of the fundamental constitution of the government, to place that branch of sovereignty which chiefly respects the execution of laws in a distinct office from that of the legislative power, and yet subordinate to them and to the laws, capable to be intrusted into the hands of one single person, if need require, or in a greater number, as the legislative power should think fit; and for the greater strength and honor unto this office, that the execution of all laws and orders, that are binding may go forth in his or their name; and all disobedience thereunto, or contempt thereof, be taken as done to the people's sovereignty, whereof he or they bear the image or representation, subordinate to the legislative power, and at their will to be kept up and continued in the hands of a single person or more, as the experience of the future good or evil of it shall require. . . .

And unto this the wisdom and honesty of the persons now in power may have an opportunity eminently to come into discovery; for in this case, and upon the grounds already laid, the very persons now in power are they unto whose lot it would fall to set about this preparatory work, and by their orders and directions to dispose the whole body and bring them into the meetest capacity to effect the same. The most natural way for which would seem to be by a general council, or convention of faithful, honest, and discerning men, chosen for that purpose, by the free consent of the whole body of adherents to this cause, in the several parts of the nations, and observing the time and place of meeting appointed to them, with other circumstances concerning their election, by order from the present ruling power, but considered as general of the army. Which convention is not properly to exercise the legislative power, but only to debate freely, and agree upon the particulars, that, by way of fundamental constitutions, shall be laid and inviolably observed, as the conditions upon which the whole body so represented

doth consent to cast itself into a civil and politic incorporation, and under the visible form and administration of government therein declared, and to be by each individual member of the body subscribed in testimony of his or their particular consent given thereunto. Which conditions so agreed, and amongst them an act of oblivion for one will be without danger of being broken or departed from, considering of what it is they are the conditions, and the nature of the convention wherein they are made, — which is of the people represented in their highest state of sovereignty, as they have the sword in their hands unsubjected unto the rules of civil government, but what themselves, orderly assembled for that purpose, do think fit to make. And, the sword, upon these conditions, subjecting itself to the supreme judicature thus to be set up, how suddenly might harmony, righteousness, love, peace, and safety unto the whole body follow hereupon, as the happy fruit of such a settlement, if the Lord have any delight to be amongst us. — Sir Henry Vane, *A Healing Question Propounded and Resolved*, published in 1656, 6 Somers's Tracts (2d ed.), 304.[1]

The power or function of the prerogative[2] is of two parts, the one of result [*i. e.*, of deciding, or coming to a result, upon the propositions of the Senate], in which it is the legislative power; the other, that of judicature, in which regard it is the highest court, and the last appeal in this commonwealth. . . . But the prerogative tribe has not only the result, but is the supreme judicature, and the ultimate appeal in this commonwealth. For the popular government that makes account to be of any standing, must make sure in the first place of the appeal to the people. As an estate in trust becomes a man's own if he be not answerable for it, so the power of a magistracy not accountable to the people from whom it was received, becoming of private use, the commonwealth loses her liberty. Wherefore the right of supreme judicature in the people (without which there can be no such thing as popular government) is confirmed by the constant practice of all commonwealths. — Harrington, *Oceana* (published in 1656); *Works* (3d ed.) 155, 158.[3]

Where the people are not overbalanced by one man, or by the few, they are not capable of any other superstructures of government, or of any other just and quiet settlement whatsoever, than of such only as consists of a senate as their councillors, of themselves or their representatives as sovereign lords, and of a magistracy answerable to the people, as distributors and executioners of the laws made by the people. And thus much is of absolute necessity to any or every government, that is or can be properly called a commonwealth, whether it be well or ill ordered.

[1] See Professor Hosmer's Life of Vane. — Ed.

[2] By this term Harrington means the Assembly of the Representatives of the People. — Ed.

[3] See an account of Harrington in 2 Pol. Sc. Quart. 1 (1885) by Professor Dwight.

But the necessary definition of a commonwealth, anything well ordered, is, that it is a government consisting of the Senate proposing, the people resolving, and the magistracy executing.

Magistracy is a style proper to the executive part: yet because in a discourse of this kind it is hardly avoidable, but that such as are of the proposing or resolving assemblies, will be sometimes comprised under this name or style, it shall be enough for excuse to say, that magistracy may be esteemed of two kinds; the one proper or executive, the other improper or legislative. — *Ib. The Art of Lawgiving*, 393 (1659).

The Humble Petition of Divers Well-affected Persons, delivered the 6th day of July, 1659. With the Parliament's Answer thereto.

To the Supreme Authority, the Parliament of the Commonwealth of England. The humble petition of divers well-affected persons shows:

That your petitioners have for many years observed the breathings and longings of this nation after rest and settlement, and that upon mistaken grounds they have been ready even to sacrifice and yield up part of their own undoubted right, to follow after an appearance of it. . . . Upon serious thoughts of the premises, your petitioners do presume with all humility, and submission to your wisdom, to offer to your Honors their principles and proposals concerning the government of this nation: whereupon, they humbly conceive, a just and prudent government ought to be established, *viz.*: —

1. That the constitution of the civil government of England by king, lords, and commons, being dissolved, whatever new constitution of government can be made or settled according to any rule of righteousness, it can be no other than a wise order or method, into which the free people's deputies shall be formed for the making of their laws, and taking care for their common safety and welfare in the execution of them: for, the exercise of all just authority over a free people, ought (under God) to arise from their own consent.

2. That the government of a free people ought to be so settled, that the governors and governed may have the same interest in preserving the government, and each other's properties and liberties respectively; that being the only sure foundation of a commonwealth's unity, peace, strength, and prosperity.

3. That there cannot be a union of the interests of a whole nation in the government, where those who shall sometimes govern, be not also sometimes in the condition of the governed; otherwise the governors will not be in a capacity to feel the weight of the government, nor the governed to enjoy the advantages of it: and then it will be the interest of the major part to destroy the government, as much as it will be the interest of the minor part to preserve it.

4. That there is no security that the supreme authority shall not fall into factions, and be led by their private interest to keep themselves always in power, and direct the government to their private advantages, if that supreme authority be settled in any single assembly whatsoever, that shall have the entire power of propounding, debating, and resolving laws.

5. That the sovereign authority in every government, of what kind soever, ought to be certain in its perpetual successions, revolutions, or descents; and without possibility (by the judgment of human prudence) of a death or failure of its being, because the whole form of the government is dissolved if that should happen, and the people in the utmost imminent danger of an absolute tyranny or a war among themselves, or rapine and confusion — And therefore where the government is popular, the assemblies in whom reside the supreme authority, ought never to die or dissolve, though the persons be annually changing: neither ought they to trust the sovereign care of the strength and safety of the people out of their own hands, by allowing a vacation to themselves, lest those that should be trusted be in love with such great authority, and aspire to be their masters, or else fear an account, and seek the dissolution of the commonwealth to avoid it.

6. That it ought to be declared as a fundamental order in the constitution of this commonwealth, that the Parliament being the supreme legislative power, is intended only for the exercise of all those acts of authority that are proper and peculiar to the legislative power; and to provide for a magistracy, to whom should appertain the whole executive power of the laws: and no case either civil or criminal to be judged in Parliament, saving that the last appeals in all cases, where appeals shall be thought fit to be admitted, be only to the popular assembly; and also that to them be referred the judgment of all magistrates in cases of maladministrations in their offices.

And in prosecution of these principles, your petitioners humbly propose for the settlement of this commonwealth, that it be ordained,

1. That the Parliament, or the supreme authority of England, be chosen by the free people, to represent them with as much equality as may be.

2. That a Parliament of England shall consist of two assemblies, the lesser of about three hundred, in whom shall reside the entire power of consulting, debating, and propounding laws: the other, to consist of a far greater number, in whom shall rest the sole power of resolving all laws so propounded.

3. That the free people of England, in their respective divisions at certain days and places appointed, shall forever annually choose one third part to each assembly, to enter into their authority, at certain days appointed: the same days, the authority of a third of each of the said assemblies to cease, only in the laying the first foundation in this commonwealth's constitution: the whole number of both the assemblies to be chosen by the people respectively, *viz.*, one third of each assembly to be chosen for one year, one third for two years, and one third for three years.

4. That such as shall be chosen, having served their appointed time in either of the said assemblies of Parliament, shall not be capable to serve in the same assembly during some convenient interval or vacation.

5. That the legislative power do wholly refer the execution of the laws to the magistracy, according to the sixth principle herein mentioned.

6. That in respect to religion and Christian liberty, it be ordained that the Christian religion by the appointment of all succeeding Parliaments, be taught, and promulgated to the nation, and public preachers thereof maintained: and that all that shall profess the said religion, though of different persuasions in parts of the doctrine, or discipline thereof, be equally protected in the peaceable profession, and public exercise of the same; and be equally capable of all elections, magistracies, preferments in the commonwealth, according to the order of the same. Provided always, that the public exercise of no religion contrary to Christianity be tolerated; nor the public exercise of any religion, though professedly Christian, grounded upon, or incorporated into the interest of any foreign State or prince. . . .

Wednesday, July the 6th, 1659. The House being informed, that divers gentlemen were at the door with a petition, they were called in, and one of the petitioners in behalf of himself and the rest said, We humbly present you a petition, to which we might have had many thousand hands, but the matter rather deserves your serious consideration than any public attestation; and therefore we do humbly present it to this honorable House. Which, after the petitioners were withdrawn, was read, and was entitled, The humble petition of divers well-affected persons.

Resolved, that the petitioners have the thanks of the House.

The petitioners were again called in, and Mr. Speaker gave them this answer: —

Gentlemen, the House has read over your petition, and find it without any private end, and only for the public interest; and I am commanded to let you know, that it lies much upon them to make such a settlement as may be most for the good of posterity: and they are about that work, and intend to go forward with it with as much expedition as may be. And for your parts, they have commanded me to give you thanks; and in their names I do give you the thanks of this House accordingly.

THO. ST. NICHOLAS, Clerk of the Parliament.

HARRINGTON, *Works* (3d ed.), 514.[1]

[1] Charles II. returned to Westminster, May 29, 1660. — ED.

GODDEN *v.* HALES.

KING'S BENCH. 1686.

[*Comberbach*, 21 ; s. c. 2 *Shower*, 475.][1]

DEBT upon the statute 25 Car. 2, cap. 2, for the penalty of £500, wherein the plaintiff declares, that whereas it was provided by the statute, &c. (setting forth the statute), notwithstanding which, the defendant having a commission to serve the king as a colonel of foot, and not having received the sacrament, nor taken the oaths and test, &c., within the times prescribed by the Act; that after the times expired, wherein he ought to have received the sacrament, and taken the oaths and tests, as aforesaid, he did execute the said office, and continued to act by color of the said commission, of which he was indicted and convicted at the assizes in Kent, whereby the action accrues to the plaintiff, for the penalty of £500. The defendant pleads, that before the times expired, &c., he had a dispensation under the broad seal to act, *non obstante* that statute; to which the plaintiff demurs.

Northy, *pro quer'*, Solicitor-General, for the defendant. . . .

At another day the Chief Justice [HERBERT] declared, that by the opinion of eleven of the judges, the case of 2 Hen. 7, of sheriffs holding above one year by dispensation, &c., is good law.

And as to the case in question, we have resolved the points following (Street only dissenting).

1. That the king is a sovereign (or absolute) prince.

2. That the laws of the land are the king's laws.

3. That to dispense with penal laws (where the subject hath no particular damage) for necessary and urgent occasions, is an inseparable prerogative of the king.

4. That the king is sole judge of such necessity [and] that no Act of Parliament could take away that power.

5. That this trust residing in him, came not from the people, but was a sovereign right of the king *ab antiquo*.

6. That the dispensation in this case is a good bar to the plaintiff's action, because it came within three months before any disability incurred. *Judicium quod quer' nil capiat per Billam.*[2]

[1] This report is made up from both of these volumes. In *Comb.* 21, the case is styled Godwin *v.* Hales. — ED.

[2] Shower's report gives Powell, with Street, as doubting. Coxe (Judic. Power, 166) remarks: "The decision in this case is celebrated in English history as intimately connected with the causes of the revolution of 1688. The abolition of the royal power of dispensing with any statute, made in the first year of William and Mary, was caused by the existence of this decision. The case is discussed at length by Macaulay, who criticises both the decision and the motives of the court with great severity. The second paragraph of the Bill of Rights in the Statute of 1 William and Mary, sess. 2, cap. 2, formally declares to be illegal what the decision declared to be legal."

By Stat. 1 Wm. & Mary, c. 6 (1688) the coronation oath binds the sovereign "to govern the people of this kingdom . . . according to the statutes in Parliament

95. MEN being, as has been said, by nature all free, equal, and independent, no one can be put out of his estate and subjected to the political power of another without his own consent, which is done by agreeing with other men, to join and unite into a community for their comfortable, safe, and peaceable living, one amongst another, in a secure enjoyment of their properties, and a greater security against any that are not of it. . . . 97. And thus every man, by consenting with others to make one body politic under one government, puts himself under an obligation to every one of that society to submit to the determination of the majority, and to be concluded by it; or else this original compact, whereby he with others incorporates into one society, would signify nothing, and be no compact if he be left free and under no other ties than he was in before in the state of nature. — LOCKE, *Two Treatises on Government*, book ii. c. viii. (Licensed for printing Aug. 23, 1689.)[1]

143. The legislative power is that which has a right to direct how the force of the commonwealth shall be employed for preserving the community and the members of it. But because those laws which are to be constantly executed, and whose force is always to continue, may be made in a little time; therefore there is no need that the legislative should be always in being, not having always business to do. And because it may be too great temptation to human frailty, apt to grasp at power, for the same persons who have the power of making laws to have also in their hands the power to execute them, whereby they may exempt themselves from obedience to the laws they make, and suit the law, both in its making and execution, to their own private advantage, and thereby come to have a distinct interest from the rest of the community, contrary to the end of society and government. Therefore in well-ordered commonwealths, where the good of the whole is so considered as it ought, the legislative power is put into the hands of divers persons who, duly assembled, have by themselves, or jointly with others, a power to make laws, which when they have done, being separated again, they are themselves subject to the laws they have made; which is a new and near tie upon them to take care that they make them for the public good.

144. But because the laws that are at once, and in a short time made, have a constant and lasting force, and need a perpetual execution, or

agreed on, and the laws and customs of the same." By the Bill of Rights, Stat. 1 Wm. & Mary, sess. 2, c. 2 (1689) "the pretended power of suspending of laws or the execution of laws, by regal authority, without consent of Parliament," and also that of "dispensing with laws or the execution of laws, by regal authority, as it hath been assumed and exercised of late," are declared illegal. By the Act of Settlement, Stat. 11 & 12 Wm. III. c. 2, s. 3 (1700), it was provided that "judges' commissions be made *Quamdiu se bene gesserint*, and their salaries ascertained and established; but upon the address of both Houses of Parliament it may be lawful to remove them."

For an account of the removal of judges in the seventeenth century, see 12 How. St. Tr. 257, *note*. — ED.

1 "With the Revolution came John Locke as its interpreter." H. MORLEY'S *Introduction to the Two Treatises on Government*. — ED.

an attendance thereunto, therefore it is necessary there should be a power always in being which should see to the execution of the laws that are made, and remain in force. And thus the legislative and executive power come often to be separated.

145. There is another power in every commonwealth which one may call natural, because it is that which answers to the power every man naturally had before he entered into society. For though in a commonwealth the members of it are distinct persons, still, in reference to one another, and, as such, are governed by the laws of the society, yet, in reference to the rest of mankind, they make one body, which is, as every member of it before was, still in the state of nature with the rest of mankind, so that the controversies that happen between any man of the society with those that are out of it are managed by the public, and an injury done to a member of their body engages the whole in the reparation of it. So that under this consideration the whole community is one body in the state of nature in respect of all other States or persons out of its community.

146. This, therefore, contains the power of war and peace, leagues and alliances, and all the transactions with all persons and communities without the commonwealth, and may be called federative if any one pleases. So the thing be understood, I am indifferent as to the name. . . .

149. Though in a constituted commonwealth standing upon its own basis and acting according to its own nature — that is, acting for the preservation of the community — there can be but one supreme power, which is the legislative, to which all the rest are and must be subordinate, yet the legislative being only a fiduciary power to act for certain ends, there remains still in the people a supreme power to remove or alter the legislative, when they find the legislative act contrary to the trust reposed in them. . . . And thus the community may be said in this respect to be always the supreme power, but not as considered under any form of government, because this power of the people can never take place till the government be dissolved.

150. In all cases whilst the government subsists, the legislative is the supreme power. For what can give laws to another must needs be superior to him, and since the legislative is no otherwise legislative of the society but by the right it has to make laws for all the parts, and every member of the society prescribing rules to their actions, and giving power of execution where they are transgressed, the legislative must needs be the supreme, and all other powers in any members or parts of the society derived from and subordinate to it.

151. In some commonwealths where the legislative is not always in being, and the executive is vested in a single person who has also a share in the legislative, there that single person, in a very tolerable sense, may also be called supreme; not that he has in himself all the supreme power, which is that of law-making, but because he has in him the supreme execution from whom all inferior magistrates derive all

their several subordinate powers, or, at least, the greatest part of them; having also no legislative superior to him, there being no law to be made without his consent, which cannot be expected should ever subject him to the other part of the legislative, he is properly enough in this sense supreme. But yet it is to be observed that though oaths of allegiance and fealty are taken to him, it is not to him as supreme legislator, but as supreme executor of the law made by a joint power of him with others, allegiance being nothing but an obedience according to law, which, when he violates, he has no right to obedience, nor can claim it otherwise than as the public person vested with the power of the law, and so is to be considered as the image, phantom, or representative of the commonwealth, acted by the will of the society declared in its laws, and thus he has no will, no power, but that of the law. But when he quits this representation, this public will, and acts by his own private will, he degrades himself, and is but a single private person without power and without will; the members owing no obedience but to the public will of the society.

152. The executive power placed anywhere but in a person that has also a share in the legislative is visibly subordinate and accountable to it, and may be at pleasure changed and displaced; so that it is not the supreme executive power that is exempt from subordination, but the supreme executive power vested in one, who having a share in the legislative, has no distinct superior legislative to be subordinate and accountable to, farther than he himself shall join and consent, so that he is no more subordinate than he himself shall think fit, which one may certainly conclude will be but very little. Of other ministerial and subordinate powers in a commonwealth we need not speak, they being so multiplied with infinite variety in the different customs and constitutions of distinct commonwealths, that it is impossible to give a particular account of them all. Only thus much which is necessary to our present purpose we may take notice of concerning them, that they have no manner of authority, any of them, beyond what is by positive grant and commission delegated to them, and are all of them accountable to some other power in the commonwealth.

153. It is not necessary, no, nor so much as convenient, that the legislative should be always in being; but absolutely necessary that the executive power should, because there is not always need of new laws to be made, but always need of execution of the laws that are made. When the legislative hath put the execution of the laws they make into other hands, they have a power still to resume it out of those hands when they find cause, and to punish for any maladministration against the laws. The same holds also in regard of the federative power, that and the executive being both ministerial and subordinate to the legislative, which, as has been showed, in a constituted commonwealth is the supreme. The legislative also in this case being supposed to consist of several persons (for if it be a single person it cannot but be always in being, and so will, as supreme, naturally have the supreme

executive power, together with the legislative), may assemble and exercise their legislative at the times that either their original constitution or their own adjournment appoints, or when they please, if neither of these hath appointed any time, or there be no other way prescribed to convoke them. For the supreme power being placed in them by the people, 't is always in them, and they may exercise it when they please, unless by their original constitution they are limited to certain seasons, or by an act of their supreme power they have adjourned to a certain time, and when that time comes they have a right to assemble and act again. — *Ib.*, cc. xii., xiii.

159. Where the legislative and executive power are in distinct hands, as they are in all moderated monarchies and well-framed governments, there the good of the society requires that several things should be left to the discretion of him that has the executive power. For the legislators not being able to foresee and provide by laws for all that may be useful to the community, the executor of the laws, having the power in his hands, has by the common law of nature a right to make use of it for the good of the society, in many cases where the municipal law has given no direction, till the legislative can conveniently be assembled to provide for it; nay, many things there are which the law can by no means provide for, and those must necessarily be left to the discretion of him that has the executive power in his hands, to be ordered by him as the public good and advantage shall require; nay, it is fit that the laws themselves should in some cases give way to the executive power, or rather to this fundamental law of Nature and government, *viz.*, that as much as may be all the members of the society are to be preserved. For since many accidents may happen wherein a strict and rigid observation of the laws may do harm, as not to pull down an innocent man's house to stop the fire when the next to it is burning; and a man may come sometimes within the reach of the law which makes no distinction of persons, by an action that may deserve reward and pardon; it is fit the ruler should have a power in many cases to mitigate the severity of the law, and pardon some offenders, since the end of government being the preservation of all as much as may be, even the guilty are to be spared where it can prove no prejudice to the innocent.

160. This power to act according to discretion for the public good, without the prescription of the law and sometimes even against it, is that which is called prerogative; for since in some governments the law-making power is not always in being and is usually too numerous, and so too slow for the despatch requisite to execution, and because, also, it is impossible to foresee and so by laws to provide for all accidents and necessities that may concern the public, or make such laws as will do no harm, if they are executed with an inflexible rigor on all occasions and upon all persons that may come in their way, therefore there is a latitude left to the executive power to do many things of choice which the laws do not prescribe.

161. This power, whilst employed for the benefit of the community and suitably to the trust and ends of the government, is undoubted prerogative, and never is questioned. For the people are very seldom or never scrupulous or nice in the point; they are far from examining prerogative whilst it is in any tolerable degree employed for the use it was meant — that is, the good of the people, and not manifestly against it. . . .

168. The old question will be asked in this matter of prerogative, "But who shall be judge when this power is made a right use of?" I answer: Between an executive power in being, with such a prerogative, and a legislative that depends upon his will for their convening, there can be no judge on earth. As there can be none between the legislative and the people, should either the executive or the legislative, when they have got the power in their hands, design, or go about to enslave or destroy them, the people have no other remedy in this, as in all other cases where they have no judge on earth, but to appeal to Heaven; for the rulers, in such attempts exercising a power the people never put into their hands, who can never be supposed to consent that anybody should rule over them for their harm, do that which they have not a right to do. And where the body of the people, or any single man, are deprived of their right, or are under the exercise of a power without right, having no appeal on earth they have a liberty to appeal to Heaven whenever they judge the cause of sufficient moment. And therefore, though the people cannot be judge, so as to have, by the constitution of that society, any superior power to determine and give effective sentence in the case, yet they have reserved that ultimate determination to themselves which belongs to all mankind, where there lies no appeal on earth, by a law antecedent and paramount to all positive laws of men, whether they have just cause to make their appeal to Heaven. — *Ib.*, c. xiv.[1]

WINTHROP *v.* LECHMERE.

PRIVY COUNCIL. 1727–28.

[4 *Conn. Hist. Soc. Coll.*, 94 *n.*; 5 *Mass. Hist. Soc. Coll.* (6th Series), 440–511.]

WAIT STILL WINTHROP, commonly called Wait Winthrop, formerly Chief Justice of the Superior Court of Judicature of Massachusetts, died intestate in 1717, leaving a considerable estate in Connecticut. His two children were John Winthrop of Connecticut, and Anne, wife of Thomas Lechmere of Boston. John became administrator of the estate, and claimed all the real estate, under the common law of England. Lechmere, in right of his wife, claiming a share of the real

[1] For certain passages from Montesquieu (1748), Rousseau (1762), and Blackstone (1765), see *ante*, p. 2. — ED.

estate under an Act of the colony of Connecticut, which divided an intestate's property among his children, began proceedings in the Probate Court of that colony to enforce his claim. After a long litigation the Superior Court of Connecticut, in 1725–26, vacated Winthrop's letters of administration, and substituted, in his place, Lechmere and his wife. Winthrop sought relief from the General Assembly, threatening an appeal to the King in Council. He was taken into custody for contempt; but escaped (as it was alleged), and went to England, where he brought his appeal. The General Assembly, in March, 1726, passed an Act authorizing Lechmere to sell a part of the real estate.

Winthrop's "Brief in Appeal," together with short memoranda of the arguments of counsel on the other side, are found in the volume of the Massachusetts Historical Society. mentioned above, pp. 440–496. The Decree is given in the same volume, pp. 496–511.

It appears (pp. 457, 461, 463) that Winthrop's claim, before the courts in Connecticut, was under "the law and custom of England . . . the said law of the colony notwithstanding," — "both by Act of Parliament and by the Royal Charter;" that he was denied an appeal (p. 460), "the court saying they were not under your Majesty's government, and their charter knew nothing of your Majesty in Council." He argued, in part, as follows (p. 484): "The appellant insists the Assembly granting the said Lechmere a power to sell the lands of the intestate to pay the debt and costs in Lechmere's petition to the Assembly mentioned without hearing your petitioner, the undoubted heir to such lands, and leaving Lechmere to sell what part thereof and in what manner he saw proper, is against the common and statute law of this realm, and destructive of the liberty and property of the subject, and against reason, and as such contrary to the royal charter of the province, and the Assembly fining the appellant in £20 for his opposing the said measures was equally unwarrantable and unjustifiable. . . .

"What Lechmere's counsel will insist on to support the whole of his proceedings is a printed Act they find amongst the Connecticut printed laws, fol. 60, entitled an Act for Settlement of Intestates' Estates. . . . [Here the statute is recited, by which it appears that an intestate's real and personal estate, after providing for the widow's dower, was to go equally to the children, except that the oldest son had a double portion.]

"But as to this Act we answer and insist (first) that it is an obsolete Act, made in the infancy of the province, and long since out of use and not of any force or regard in the province, and the time when it was made does not appear save that it was made when courts of assistants were also in use there, which have been long since abolished, which is plainly evidenced from the loss Lechmere was at what steps to take in this affair, and from the extraordinary applications of Lechmere for an interposition of the Assembly therein, and there is not the least proof made by Lechmere of this being a law in force or practised at this time in Connecticut, though we insisted before the

courts below that notwithstanding this law we were entitled to the whole real estate of our father; though if this law was not obsolete, we insist (secondly) that the same is void in itself as being not warranted by the Charter, and can no ways influence the present case. For by the Charter their power of making laws is restrained and limited in a very special manner (namely), such laws must be wholesome and reasonable, and [not] contrary to the laws of this realm of England, and then by the charter the inhabitants may have, take, possess, &c., lands, &c., and the same dispose of as other the liege people of the realm of England, and were to enjoy all liberties and immunities of natural-born subjects, and the soil of the whole province is granted to the governor and company, and their successors and assigns forever, upon trust and for the use and benefit of themselves and their associates, their heirs and assigns, to be holden of his Majesty, as of the manor of East Greenwich in free and common socage.

"By the common law of England, which is what the Charter has a view to, it is undoubted that real estates descend to the eldest son of him that was last seized in fee as his heir-at-law, and neither an administrator nor an ecclesiastical court have anything to do therewith, and by the law of England an only daughter cannot be co-heir with an only son, but the son is absolute and sole heir to the father, and must as such inherit his real estate undevised by will, and we take it that where an estate of inheritance is granted under the Great Seal of Great Britain, which this Charter does, that the same is descendible according to the course of the common law, and we also take it that all our plantations carry with them the common law of their mother country, which prevails in all the plantations, and we know of no part of the plantations but where real estates descend to the heir-at-law as with us, and the first governor, the appellant's grandfather, on receiving the Charter, was obliged to swear before a Master in Chancery that he and his successors would observe and keep the common law of England. There have been also several Acts of Parliament passed here which as we apprehend support the right of descent, and by the Charter the tenure of the lands in Connecticut is declared to be held under the Crown as lord of the fee under the most free tenure possible, and it is against reason as well as law that an only daughter should be co-heir with an only son. We therefore insist this law is null and void, as being contrary to the law of this realm, unreasonable, and against the tenor of their Charter, and consequently the province had no power to make such a law and the same is void.

"Note. The laws of Connecticut are not by their Charter directed to be laid before the Crown for their approbation or disallowance, so that there is no other way to avoid any laws they shall make but by seeing if they are agreeable to the powers of their Charter, which if they are not, then we apprehend they cannot be considered as any laws at all, since a formal repeal of them cannot be had otherwise than by voiding the Charter. . . .

"What we are to pray is,

"First, That the resolve of the General Assembly declaring Lechmere might and ought to be relieved by the Court of Probates may be declared null and void.

"Secondly, That the inventory tendered by us to the Court of Probates of all our father's personal estate may be declared a right and proper inventory, and ought to be accepted as such, and that the sentences rejecting the same may be reversed.

"Thirdly, That the sentence of the Superior Court granting administration to Mr. Lechmere and his wife may be reversed and set aside, and Lechmere's action demanding the same be dismissed.

"Fourthly, That the administration granted to Lechmere may be called in and vacated, and the administration before granted to the appellant ordered to stand.

"Fifthly, That the inventory exhibited by Mr. Lechmere and his wife of the appellant's real estate, and also of his charges, and the debt due to Lattemore, may be vacated and taken off the file, and the order allowing the same and directing the same to be recorded may be discharged.

"Sixthly, That the order of the General Assembly empowering the said Lechmere to sell the appellant's lands, and the order of the Superior Court founded thereon, dated 27 Sept., 1726, allowing of Lechmere's making such sale, and the sale itself, may be declared null and void, and expurged the record; and generally.

"Seventhly, That all which Mr. Lechmere hath done under the said administration, together with the said law for settling intestate's estates may be declared void, and that the appellant is entitled to succeed to the real estate of his father as heir-at-law, according to the common law of the land. . . .

"If they should oppose our going into the merits for that we ought to have appealed to the Assembly, that is overruled by his Majesty's having allowed us an appeal. Besides, we have before shown the Assembly to be no court of judicature, and that the judgment of the Superior Court is final there, and in all appeals from that province hither the same have been from the judgments of the Superior Court."

The Decree, Feb. 15, 1727–28 (p. 496), was as follows: —

"Upon reading this day at the Board a report from the Right Honorable the Lords of the Committee for hearing appeals from the plantations, dated the 20th day of December last, in the words following, *viz.* . . . [Here the matter of the petition is set forth at large.]

"Their Lordships having heard all parties concerned by their counsel learned in the law on the said petition and appeal, and there being laid before their Lordships an Act passed by the Governor and Company of that colony entitled An Act for the Settlement of Intestates' Estates, by which act (amongst other things) administrators of persons dying intestate are directed to inventory all the estate whatsoever

of the person so deceased, as well movable as not movable, and to deliver the same upon oath to the Court of Probates, and by the said Act (debts, funerals, and just expenses of all sorts, and the dower of the wife (if any) being first allowed) the said Court of Probates is empowered to distribute all the remaining estate of any such intestate, as well real as personal, by equal portions to and amongst the children and such as legally represent them, except the eldest son who is to have two shares or a double portion of the whole, the division of the estate to be made by three sufficient freeholders on oath, or any two of them, to be appointed by the Court of Probates: Their Lordships, upon due consideration of the whole matter, do agree humbly to report as their opinion to your Majesty, that the said Act for the Settlement of Intestates' Estates should be declared null and void, being contrary to the laws of England, in regard it makes lands of inheritance distributable as personal estates, and is not warranted by the Charter of that colony; and that the said three sentences of the 29th of June, 1725, of 28th September, 1725, and of the 22d day of March, 1725–6 . . . may be all reversed and set aside. . . . [Here follow other matters which are all included in what follows.]

"His Majesty, taking the same into his royal consideration, is pleased, with the advice of his Privy Council, to approve of the said report, and confirm the same in every particular part thereof, and pursuant thereunto to declare that the aforementioned Act entitled An Act for the Settlement of Intestates' Estates is null and void, and the same is hereby accordingly declared to be null and void and of no force or effect whatever. And his Majesty is hereby further pleased to order, that all the aforementioned sentences of the 29th of June, 1725, of the 28th of September, 1725, and of the 22d of March, 1725–6, and every of them, be and they are hereby reversed and set aside; and that the petitioner, John Winthrop, be and he is hereby admitted to exhibit an inventory of the personal estate only of the said intestate, and that the Court of Probates do not presume to reject such inventory, because it does not contain the real estate of the said intestate. And his Majesty doth hereby further order, that the aforementioned sentence of the 22d of March, 1725–6, vacating the said letters of administration granted to the petitioner and granting administration to the said Thomas and Anne Lechmere, be also reversed and set aside; and that the said letters of administration so granted to the said Thomas Lechmere and Anne his wife be called in and vacated; and that the said inventory of the said real estate exhibited by the said Thomas Lechmere and Anne his wife be vacated. And that the order of the 29th of April, 1726, approving of the said inventory, and ordering the same to be recorded, be discharged and set aside; and that the original letters of administration so granted to the petitioner be and they are hereby established and ordered to stand. And that all such costs as the petitioner hath paid unto the said Thomas Lechmere by direction of the said sentences, all, every, or any of them, be forth-

with repaid to him by the said Thomas Lechmere; and that the suit brought by the said Thomas Lechmere and Anne his wife, on which the said sentences were made, be and they are hereby dismissed; and that all acts and proceedings done and had under the said sentences, all, every, or any of them, or by virtue or pretence thereof, be and they are hereby discharged and set aside and declared null and void. And his Majesty is further pleased to declare, that the aforementioned Act of Assembly passed in May, 1726, empowering the said Thomas Lechmere to sell the said lands, is null and void; and also that the said order made by the said Superior Court, and bearing date the 27th of September, 1726, pursuant to the said Act of Assembly allowing the said Lechmere to sell of the said real estate to the value of ninety pounds current money there for his charges, and three hundred and eighteen pounds silver money, is likewise null and void; and the said Act of Assembly and order of the said Superior Court are accordingly hereby declared null and void, and of no force or effect whatever. And his Majesty doth hereby likewise further order, that the petitioner be immediately restored and put into the full, peaceable, and quiet possession of all such parts of the said real estate as may have been taken from him, under pretence of or by virtue or color of the said sentences, orders, acts, and proceedings, or any of them; and that the said Thomas Lechmere do account for and pay to the said petitioner the rents and profits thereof, and of every part thereof, received by him, or any one under him, for and during the time of such his unjust detention thereof. And the Governor and Company of his Majesty's Colony of Connecticut for the time being, and all other officers and persons whatsoever whom it may concern, are to take notice of his Majesty's royal pleasure hereby signified, and yield due obedience to every particular part thereof, as they will answer the contrary at their peril." [1]

[1] Coxe (Judic. Power, 212) expresses the opinion that this decree, in so far as it dealt with the Intestates' Act, was a legislative, and not a judicial proceeding; he concedes that in other respects it was judicial. As authority for this view, he refers to the fact that in a subsequent order in council of April 10, 1730, it "is expressly called 'a repeal' of that Act;" and he cites 4 Collections Conn. Hist. Soc. 201. This may well be doubted. The proceedings, given above in the text, speak for themselves. As regards the order of 1730, the passage cited by Coxe occurs in a recital of the petition of the Connecticut Commissioners, "humbly praying that notwithstanding the said Act is repealed," &c. The language of the Committee of the Council itself (p. 202) is different; it runs thus: "His Majesty was pleased to declare an Act . . . to be null and void."

It may be added that Winthrop, in a counter petition to the Committee of the Council, on occasion of the proceedings of 1730 (4 Conn. Hist. Soc. Coll. 393), uses the following language as regards the former case: —

"This Act being for the reasons above mentioned, in its own nature null, void, and repugnant to the very powers granted by King Charles the Second, it is a gross mistake in the petitioners to allege that the same was annulled by his Majesty's order in Council of the 5th [15th] of February, 1727. Whereas his Majesty did, upon counsel heard on both sides thereof, only relieve your memorialist as a subject and an inhabitant of the Province of Connecticut, who resorted to his royal justice for relief against

CAMPBELL *v.* HALL.

KING'S BENCH. 1774.

[*Cowper*, 204.]

THIS case was very elaborately argued four several times; and now on this day LORD MANSFIELD stated the case, and delivered the unanimous opinion of the court, as follows:

This is an action that was brought by the plaintiff, James Campbell, who is a natural-born subject of this kingdom, and who, upon the 3d of March, 1763, purchased a plantation in the island of Grenada: and it is brought against the defendant, William Hall, who was a collector for his Majesty of a duty of four and an half per cent upon all goods and sugars exported from the island of Grenada. And the action is brought to recover back a sum of money which was paid, as this duty of four and an half per cent, upon sugars that were exported from the island of Grenada, by and on account of the plaintiff. The action is an action for money had and received; and it is brought upon this ground; namely, that the money was paid to the defendant without any consideration; the duty, for which, and in respect of which he received it, not having been imposed by lawful or sufficient authority to warrant the same. It is stated by the special verdict, that that money still remains in the hands of the defendant, not paid over by him to the use of the king, but continued in his hands, and so continues with the privity and consent of his Majesty's Attorney-General, for the express purpose of trying the question as to the validity of imposing this duty.

It came on to be tried at Guildhall, and of course, from the nature of the question, both sides came prepared to have a special verdict; and a special verdict was found, which states as follows.

That the island of Grenada was taken by the British arms, in open war, from the French king.

That the island of Grenada surrendered upon capitulation, and that the capitulation on which it surrendered, was by reference to the capitulation upon which the island of Martinique had before surrendered.

The special verdict then states some articles of the capitulation, and particularly the 5th article, by which it is agreed, that Grenada should continue to be governed by its present laws until his Majesty's further pleasure be known. It next states the 6th article; where, to a de-

the oppression of a Court of Probates acting without any legal jurisdiction, under the pretended authority of an Act of Assembly, which being contrary to law and to their charter was in itself void and null, even before his Majesty for the future information of his Majesty's subjects in Connecticut was graciously pleased to declare it so."

This seems to be a just exposition of the nature of the decree in Winthrop *v.* Lechmere. The word "annulling," however, is often used to-day to describe the effect of judicial action in such cases, — as the equivalent of the phrase declaring null and void. — ED.

mand of the inhabitants of Grenada, requiring that they should be maintained in their property and effects, movable and immovable, of what nature soever, and that they should be preserved in their privileges, rights, honors, and exemptions; the answer is, the inhabitants, being subjects of Great Britain, will enjoy their properties and privileges in like manner as the other his Majesty's subjects in the other British Leeward Islands: so that the answer is, that they will have the consequences of their being subjects, and that they will be as much subjects as any of the other Leeward Islands.

Then it states another article of the capitulation; *viz.*, the 7th article, by which they demand, that they shall pay no other duties than what they before paid to the French king; that the capitation tax shall be the same, and that the expenses of the courts of justice, and of the administration of government, should be paid out of the king's demesne: in answer to which they are referred to the answer I have stated, as given to the foregoing article; that is, being subjects they will be entitled in like manner as the other his Majesty's subjects in the British Leeward Islands.

The next thing stated in the special verdict is, the treaty of peace signed the 10th February, 1763; and it states that part of the treaty of peace by which the island of Grenada is ceded, and some clauses which are not at all material for me to state.

The next instrument is a proclamation under the great seal, bearing date the 7th of October, 1763, wherein amongst other things it is said as follows:

Whereas it will greatly contribute to the speedy settling our said governments, of which the island of Grenada is one, that our loving subjects should be informed of our paternal care for the security of the liberties and properties of those who are and shall become inhabitants thereof: we have thought fit to publish and declare by this our proclamation, that we have in our letters-patent under our great seal of Great Britain, by which the said governments are constituted, given express power and direction to our governors of the said colonies respectively, that so soon as the state and circumstances of the said colonies will admit thereof, they shall, with the advice and consent of the members of our council, summon and call general assemblies, within the said governments respectively, in such manner and form as is used and directed in those colonies and provinces of America which are already under our immediate government; and we have also given power to the said governors, with the consent of our said councils, and the representatives of the people to be summoned as aforesaid, to make, constitute, and ordain laws, statutes, and ordinances, for the public peace, welfare, and good government of our said colonies and the inhabitants thereof, as near as may be agreeable to the laws of England, and under such regulations and restrictions as are used in our other colonies.

The next instrument stated in the special verdict, is the letters-patent

under the great seal, or rather a proclamation, bearing date the 26th March, 1764; wherein, the king recites a survey and division of the ceded islands, and that he had ordered them to be divided into allotments, as an invitation to purchasers to come in and purchase upon the terms and conditions specified in that proclamation.

The next instrument stated, is the letters-patent under the great seal, bearing date the 9th of April, 1764. In these letters there is a commission appointing General Melville governor, with a power to summon an assembly as soon as the state and circumstances of the island would admit, and to make laws with consent of the governor and council, with reference to the manner of the other assemblies of the king's provinces in America. This instrument is dated the 9th of April, 1764. The governor arrived in Grenada on the 14th December, 1764, and before the end of the year 1765, an assembly actually met in the island of Grenada. But before the arrival of the governor at Grenada, indeed before his departure from London, there is another instrument upon the validity of which the whole question turns, which instrument contains letters-patent under the great seal, bearing date the 20th July, 1764. Wherein, the king reciting, that whereas, in Barbadoes, and in all the British Leeward Islands, there was a duty of four and an half per cent upon all sugars, &c., exported; and reciting in these words; that whereas it is reasonable and expedient, and of importance to our other sugar islands, that the like duty should take place in our said island of Grenada; proceeds thus: We have thought fit, and our royal will and pleasure is, and we do hereby, by virtue of our prerogative royal, order, direct, and appoint, that from and after the 29th day of September next ensuing the date of these presents, a duty or impost of four and an half per cent in specie shall be raised and paid to us, our heirs and successors, upon all dead commodities, the growth and produce of our said island of Grenada, that shall be shipped off from the same, in lieu of all customs and import duties, hitherto collected upon goods imported and exported into and out of the said island, under the authority of his most Christian Majesty.

The special verdict then states that in fact this duty of four and an half per cent is paid in all the British Leeward Islands, and sets forth the several Acts of Assembly relative to these duties. They are public Acts: therefore. I shall not state them. as any gentleman may have access to them; they depend upon different circumstances and occasions, but are all referable to those duties in our islands. This, with what I set out with in the opening, is the whole of the special verdict that is material to the question.

The general question that arises out of all these facts found by the special verdict, is this: whether the letters-patent under the great seal, bearing date the 20th July, 1764, are good and valid to abolish the French duties; and in lieu thereof to impose the four and half per cent duty above mentioned, which is paid in all the British Leeward Islands?

It has been contended at the Bar, that the letters-patent are void on two points; the first is, that although they had been made before the proclamation of the 7th October, 1763, yet the king could not exercise such a legislative power over a conquered country.

The second point is, that though the king had sufficient power and authority before the 7th October, 1763, to do such legislative act, yet before the letters-patent of the 20th July, 1764, he had divested himself of that authority.

A great deal has been said, and many authorities cited, relative to propositions, in which both sides seem to be perfectly agreed; and which, indeed, are too clear to be controverted. The stating some of those propositions which we think quite clear, will lead us to see with greater perspicuity, what is the question upon the first point, and upon what hinge it turns. I will state the propositions at large, and the first is this:

A country conquered by the British arms becomes a dominion of the king in the right of his crown; and, therefore, necessarily subject to the legislature, the Parliament of Great Britain.

The 2d is, That the conquered inhabitants once received under the king's protection, become subjects, and are to be universally considered in that light, not as enemies or aliens.

The 3d, That the articles of capitulation upon which the country is surrendered, and the articles of peace by which it is ceded, are sacred and inviolable according to their true intent and meaning.

The 4th, That the law and legislative government of every dominion equally affects all persons and all property within the limits thereof; and is the rule of decision for all questions which arise there. Whoever purchases, lives, or sues there, puts himself under the law of the place. An Englishman in Ireland, Minorca, the Isle of Man, or the Plantations, has no privilege distinct from the natives.

The 5th, That the laws of a conquered country continue in force until they are altered by the conqueror: the absurd exception as to Pagans, mentioned in *Calvin's Case*, shows the universality and antiquity of the maxim. For that distinction could not exist before the Christian era; and in all probability arose from the mad enthusiasm of the Croisades. In the present case the capitulation expressly provides and agrees, that they shall continue to be governed by their own laws, until his Majesty's further pleasure be known.

The 6th and last proposition is, that if the king (and when I say the king, I always mean the king without the concurrence of Parliament) has a power to alter the old and to introduce new laws in a conquered country, this legislation being subordinate, that is, subordinate to his own authority in Parliament, he cannot make any new change contrary to fundamental principles: he cannot exempt an inhabitant from that particular dominion; as for instance, from the laws of trade, or from the power of Parliament, or give him privileges exclusive of his other subjects; and so in many other instances which might be put.

But the present change, if it had been made before the 7th October, 1763, would have been made recently after the cession of Grenada by treaty, and is in itself most reasonable, equitable, and political; for it is putting Grenada, as to duties, on the same footing with all the British Leeward Islands. If Grenada paid more it would have been detrimental to her; if less, it must be detrimental to the other Leeward Islands: nay, it would have been carrying the capitulation into execution, which gave the people of Grenada hopes, that if any new tax was laid on, their case would be the same with their fellow-subjects in the other Leeward Islands.

The only question then on this first point is, Whether the king had a power to make such change between the 10th of February, 1763, the day the treaty of peace was signed, and the 7th October, 1763? Taking these propositions to be true which I have stated, the only question is, Whether the king had of himself that power?

It is left by the Constitution to the king's authority to grant or refuse a capitulation: if he refuses, and puts the inhabitants to the sword or exterminates them, all the lands belong to him. If he receives the inhabitants under his protection and grants them their property, he has a power to fix such terms and conditions as he thinks proper. He is intrusted with making the treaty of peace: he may yield up the conquest, or retain it upon what terms he pleases. These powers no man ever disputed, neither has it hitherto been controverted that the king might change part or the whole of the law or political form of government of a conquered dominion.

To go into the history of the conquests made by the Crown of England.

The conquest and the alteration of the laws of Ireland have been variously and learnedly discussed by lawyers and writers of great fame, at different periods of time: but no man ever said, that the change in the laws of that country was made by the Parliament of England: no man ever said the Crown could not do it. The fact in truth, after all the researches which have been made, comes out clearly to be, as it is laid down by Lord Chief Justice Vaughan, that Ireland received the laws of England, by the charters and commands of Hen. 2, King John, Hen. 3, and he adds an *et cætera* to take in Ed. 1 and the subsequent kings. And he shows clearly the mistake of imagining that the charters of the 12th of John were by the assent of a Parliament of Ireland. Whenever the first Parliament was called in Ireland, that change was introduced without the interposition of the Parliament of England; and must, therefore, be derived from the Crown.

Mr. Barrington is well warranted in saying that the statute of Wales, 12th Ed. 1st, is certainly no more than regulations made by the king in his council, for the government of Wales, which the preamble says was then totally subdued. Though, for various political purposes, he feigned Wales to be a feoff of his crown; yet he governed it as a conquest. For Ed. 1st never pretended that he could, without the assent of Parliament, make laws to bind any part of the realm.

Berwick, after the conquest of it, was governed by charters from the Crown without the interposition of Parliament, till the reign of Jac. 1st.

All the alterations in the laws of Gascony, Guienne, and Calais, must have been under the king's authority; because all the Acts of Parliament relative to them are extant. For they were in the reign of Edward 3d, and all the Acts of Parliament of that time are extant. There are some Acts of Parliament relative to each of these conquests that I have named, but none for any change of their laws, and particularly with regard to Calais, which is alluded to as if their laws were considered as given by the Crown.

Besides the garrison, there are inhabitants, property, and trade in Gibraltar: ever since that conquest the king has made orders and regulations suitable to those who live, &c., or trade, or enjoy property in a garrison town.

The Attorney-General alluded to a variety of instances, and several very lately, in which the king had exercised legislation in Minorca: there, there are many inhabitants, much property, and trade. If it is said, that the king does it as coming in the place of the King of Spain, because their old constitution remains, the same argument holds here. For before the 7th October, 1763, the original Constitution of Grenada continued, and the king stood in place of their former sovereign.

After the conquest of New York, in which most of the old Dutch inhabitants remained, King Charles 2d changed the form of their constitution and political government, by granting it to the Duke of York, to hold of his Crown, under all the regulations contained in the letters-patent.

It is not to be wondered at that an adjudged case in point has not been produced. No question was ever started before, but that the king has a right to a legislative authority over a conquered country; it was never denied in Westminster Hall; it never was questioned in Parliament. Coke's Report of the arguments and resolutions of the judges in *Calvin's Case* lays it down as clear. If a king (says the book) comes to a kingdom by conquest, he may change and alter the laws of that kingdom; but if he comes to it by title and descent, he cannot change the laws of himself without the consent of Parliament. It is plain he alludes to his own country, because he alludes to a country where there is a parliament.

The authority also of two great names has been cited, who take the proposition for granted. In the year 1722, the Assembly of Jamaica being refractory, it was referred to Sir Philip Yorke and Sir Clement Wearge, to know "what could be done if the Assembly should obstinately continue to withhold all the usual supplies." They reported thus: "If Jamaica was still to be considered as a conquered island, the king had a right to levy taxes upon the inhabitants; but if it was to be considered in the same light as the other colonies, no tax could be imposed on the inhabitants but by an Assembly of the island, or by an Act of Parliament."

They considered the distinction in law as clear, and an indisputable consequence of the island being in the one state or in the other. Whether it remained a conquest, or was made a colony, they did not examine. I have upon former occasions traced the Constitution of Jamaica, as far as there are papers and records in the offices, and cannot find that any Spaniard remained upon the island so late as the Restoration; if any, there were very few. To a question I lately put to a person well informed and acquainted with the country, his answer was, there were no Spanish names among the white inhabitants, there were among the negroes. King Charles 2d by proclamation invited settlers there, he made grants of lands: he appointed at first a governor and council only: afterwards he granted a commission to the governor to call an assembly.

The constitution of every province, immediately under the king, has arisen in the same manner; not from grants, but from commissions to call assemblies: and, therefore, all the Spaniards having left the island or been driven out, Jamaica from the first settling was an English colony, who under the authority of the king planted a vacant island, belonging to him in right of his crown; like the cases of the island of St. Helena and St. John, mentioned by Mr. Attorney-General.

A maxim of constitutional law as declared by all the judges in *Calvin's Case*, and which two such men, in modern times, as Sir Philip Yorke and Sir Clement Wearge, took for granted, will require some authorities to shake.

But on the other side, no book, no saying, no opinion has been cited; no instance in any period of history produced, where a doubt has been raised concerning it. The counsel for the plaintiff no doubt labored this point from a diffidence of what might be our opinion on the second question. But upon the second point, after full consideration we are of opinion, that before the letters-patent of the 20th July, 1764, the king had precluded himself from the exercise of a legislative authority over the island of Grenada.

The first and material instrument is the proclamation of the 7th October, 1763. See what it is that the king there says, with what view, and how he engages himself and pledges his word.

"For the better security of the liberty and property of those who are or shall become inhabitants of our island of Grenada, we have declared by this our proclamation, that we have commissioned our governor (as soon as the state and circumstances of the colony will admit) to call an assembly to enact laws," &c. With what view is this made? It is to invite settlers and subjects: and why to invite. That they might think their properties, &c., more secure if the legislation was vested in an assembly, than under a governor and council only.

Next, having established the constitution, the proclamation of the 20th March, 1764, invites them to come in as purchasers: in further confirmation of all this, on the 9th April, 1764, three months before July, an actual commission is made out to the governor to call an

assembly as soon as the state of the island would admit thereof. You observe, there is no reservation in the proclamation of any legislature to be exercised by the king, or by the governor and council under his authority in any manner, until the assembly should meet; but rather the contrary: for whatever construction is to be put upon it, which, perhaps, may be very difficult through all the cases to which it may be applied, it alludes to a government by laws in being, and by courts of justice, not by a legislative authority, until an assembly should be called. There does not appear from the special verdict, any impediment to the calling an assembly immediately on the arrival of the governor, which was in December, 1764. But no assembly was called then or at any time afterwards, till the end of the year 1765.

We therefore think, that by the two proclamations and the commission to Governor Melville, the king had immediately and irrecoverably granted to all who were or should become inhabitants, or who had, or should acquire property in the island of Grenada, or more generally to all whom it might concern, that the subordinate legislation over the island should be exercised by an assembly with the consent of the governor and council, in like manner as the other islands belonging to the king.

Therefore, though the abolishing the duties of the French king and the substituting this tax in its stead, which according to the finding in this special verdict is paid in all the British Leeward Islands, is just and equitable with respect to Grenada itself, and the other British Leeward Islands, yet, through the inattention of the king's servants, in inverting the order in which the instruments should have passed, and been notoriously published, the last act is contradictory to, and a violation of the first, and is, therefore, void. How proper soever it may be in respect to the object of the letters-patent of the 20th July, 1764, to use the words of Sir Philip Yorke and Sir Clement Wearge, "it can only now be done, by the assembly of the island, or by an Act of the Parliament of Great Britain."

The consequence is, judgment must be given for the plaintiff.

SECTION II.

WRITTEN CONSTITUTIONS IN THE UNITED STATES.

NOTE TO PAXTON'S CASE OF THE WRIT OF ASSISTANCE[1] (QUINCY'S REP. 51). (1761.)

[*Quincy's Rep., Appendix I.* 520.]

BUT Otis, while he recognized the jurisdiction of Parliament over the Colonies, denied that it was the final arbiter of the justice and constitutionality of its own acts; and relying upon words of the greatest English lawyers, and putting out of sight the circumstances under which they were uttered, contended that the validity of statutes must be judged by the courts of justice; and thus foreshadowed the principle of American Constitutional Law, that it is the duty of the judiciary to declare unconstitutional statutes void.

His main reliance was the well-known statement of Lord Coke in *Dr. Bonham's Case* — "It appeareth in our books, that in many cases the common law will control Acts of Parliament and adjudge them to be utterly void; for where an Act of Parliament is against common right and reason or repugnant or impossible to be performed, the common law will control it and adjudge it to be void."[2] Otis seems also to have

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[1] By Horace Gray, Jr., Esq., now Mr. Justice Gray, of the Supreme Court of the United States.

I am indebted to the publishers, Messrs. Little, Brown & Co., and to Josiah Quincy, Esq., of Boston, the owner of the copyright, for permission to reprint here this valuable note. Quincy's Reports were published in 1865. — ED.

[2] 8 Rep. 118 *a*, quoted by Otis, *ante* [Quincy], 474. *Dr. Bonham's Case* (so far as is material to exhibit this point) was an action of false imprisonment, brought against the president and censors of the College of Physicians in London, for committing the plaintiff to jail for practising medicine in London without their license. The defendants justified, on the ground that it was granted in their charter, and since confirmed by Act of Parliament, that no one should practise medicine in London without license from them, under penalty of 100*s.* for each month, one half to the king, and one half to the college: and it was moreover granted that they should have the supervision of all physicians practising in London, and the punishment of them for malpractice, and the scrutiny of all medicines: "so that the punishment of the same physicians so delinquent in the premises might be by fine and imprisonment, and other suitable manner." Coke, C. J., Warburton & Daniel, JJ., gave judgment for the plaintiff upon two points: 1st. That the defendants had no power to commit the plaintiff for the cause alleged. 2d. That if they had such power, they had not pursued it. 116 *b*, 117 *a*, 121 *a*. The 2d point need not be further noticed here.

Of the first point "the cause and reason shortly was" that the clause giving the power to fine and imprison did not apply to those practising without license, but only to those who were guilty of malpractice. "And that was made manifest by five reasons, which were called *vividæ rationes*, because they had their vigor and life from th letters-patent and the Act itself," "by construction, and conferring all the parts of them together." 117 *a*. "And all these reasons were proved by two grounds or maxims in law: 1. *Generalis clausula non porrigitur ad ea quæ specialiter sunt comprehensa.*" 118 *b*. "2. *Verba posteriora propter certitudinem addita ad priora quæ certitudine indigent sunt referenda*" 119 *a*.

The fourth of the reasons thus derived from the whole context, and supported by

had in mind the equally familiar *dictum* of Lord Hobart — "Even an Act of Parliament made against natural equity, as to make a man judge in his own case, is void in itself:

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legal maxims for restraining the application of general words, was this: "The censors cannot be judges, ministers, and parties; judges to give sentence or judgment; ministers to make summons; and parties to have the moiety of the forfeiture, *quia aliquis non debet esse judex in propria causa, imo iniquum est aliquem suæ rei esse judicem;* and one cannot be judge and attorney for any of the parties." "And it appears in our books, that in many cases, the common law will control Acts of Parliament, and sometimes adjudge them to be utterly void: for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it, and adjudge such Act to be void." 118 *a.* And see *S. C.* 2 Brownl. 265.

When this passage was made one of the points of attack against him, Coke called the king's attention to the fact (which had been omitted in the questions drawn up by his enemies, Lord Chancellor Ellesmere and Sir Francis Bacon) that the words of his report did "not import any new opinion, but only a relation of such authorities of law, as had been adjudged and resolved in ancient and former times, and were cited in the argument of *Bonham's Case;*" "and therefore the beginning is, It appeareth in our books, etc. And so it may be explained, as it was truly intended." 6 Bacon's Works (ed. 1824), 400, 405, 407. One of the authorities thus referred to was the remark of Herle, C. J., in *Treyor* v. *Vaughan*, 8 E. 3, 30, that "some statutes are made against law and right, which they that made them, perceiving, would not put them in execution." The others are either cases in which a limited construction had been given to general words in order to avoid an absurdity; or instances of rejecting repugnant or unfavorable provisions, as in other English and American cases. *Case of Alton Woods*, 1 Rep. 47. *Cromwell's Case*, 4 Rep. 13. Jenk. Cent. 196, pl. 4. *Riddle* v. *White*, Gwillim's Tithe Cases, 1387. *United States* v. *Cantril*, 4 Cranch, 167. *Sullivan* v. *Robbins*, 3 Gray, 476. *Campbell's Case*, 2 Bland, 232. *Cheezem* v. *State*, 2 Ind. 149.

In a later case Coke is reported to have said "that Fortescue and Littleton and all others agreed, that the law consists of three parts: First, Common Law: Secondly, Statute Law, which corrects, abridges, and explains the common law: The third, Custom, which takes away the common law: but the common law corrects, allows, and disallows, both statute law and custom; for if there be repugnancy in statute, or unreasonableness in custom, the common law disallows and rejects it, as it appears by *Dr. Bonham's Case*," &c. *Rowles* v. *Mason*, 2 Brownl. 197, 198. In his first Institute he repeats the same classification, adding, "The common law hath no controller in any part of it, but the High Court of Parliament." Co. Lit. 115 *b.* Again he says, in a passage which seems to have been cited by Otis (*ante*, 56), "the surest construction of a statute is by the rule and reason of the common law." Co. Lit. 272 *b.* S. P. *Harbert's Case*, 3 Rep. 13 *b.* And in his second Institute, in commenting on the 12th chapter of Magna Charta, declaring that assizes should "not be taken except in their own counties," and on the apparently repugnant decision that "if a man be disseised of a commote or lordship marcher in Wales, holden of the king *in capite*," the assize should be taken in an adjoining county in England, he says, "the reason is notable, for the Lord Marcher, though he had *jura regalia*, yet could not he doe justice in his owne case." "Hereby it appeareth (that I may observe it once for all) that the best expositors of this and all other statutes are our bookes and use or experience." 2 Inst. 25.

The same rules of construction have prevailed ever since. Acts of Parliament are always to be construed according to the common law and natural right, even if it should be necessary for this purpose to adopt what would otherwise be a forced construction. *Fulmerston* v. *Steward*, Plow. 109. *Sheffield* v. *Ratcliffe*, Hob. 346. *Williams* v. *Pritchard*, 4 T. R. 3. *The King* v. *Inhabitants of Cumberland*, 6 T. R. 194. Dwarris on Sts. (2d ed.) 484, 623. The rule has been thus expressed by one of the most exact of modern English judges: "The rule by which we are to be guided in construing Acts of Parliament is to look at the precise words, and to construe them in their ordinary sense, unless it would lead to any absurdity or manifest injustice; and if it should, so to vary

for *jura naturæ sunt immutabilia*, and they are *leges legum*."[1] Lord Holt is reported to have said, "What my Lord Coke says in *Dr. Bonham's Case* in his 8 Rep is far from any extravagancy, for it is a very reasonable and true saying, That if an Act of Parliament should ordain that the same person should be party and judge, or what is the same thing, judge in his own cause, it would be a void Act of Parliament."[2]

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and modify them as to avoid that which it certainly could not have been the intention of the legislature should be done." Parke, B., in *Perry* v. *Skinner*, 2 M. & W. 476.

For an example of American opinion upon this subject, it is sufficient to quote from Chief Justice Marshall the following "principles in the exposition of statutes:" "An Act of Congress ought never to be construed to violate the Law of Nations if any other possible construction remains, and consequently can never be construed to violate neutral rights, or to affect neutral commerce, further than is warranted by the Law of Nations as understood in this country." "Every part of the statute is to be considered, and the intention of the legislature to be extracted from the whole;" and "where great inconvenience will result from a particular construction, that construction is to be avoided, unless the meaning of the legislature be plain, in which case it must be obeyed." *Murray* v. *The Charming Betsey*, 2 Cranch, 118. *United States* v. *Fisher*, *Ib.* 386.

The same doctrine has been applied to the construction of a written constitution. Chief Justice Parsons, and his associates (and afterwards in turn successors) Justices Sewall and Parker, in an opinion given to the Massachusetts House of Representatives in 1811, said: "The natural import of the words of any legislative Act, according to the common use of them, when applied to the subject-matter of the Act, is to be considered as expressing the intention of the legislature; unless the intention, so resulting from the ordinary import of the words, be repugnant to sound, acknowledged principles of national policy. And if that intention be repugnant to such principles of national policy, then the import of the words ought to be enlarged or restrained, so that it may comport with those principles; unless the intention of the legislature be clearly and manifestly repugnant to them. For although it is not to be presumed that a legislature will violate principles of public policy, yet an intention of the legislature, repugnant to those principles, clearly, manifestly and constitutionally expressed, must have the force of law." *Opinion of Justices*, 7 Mass. 524, 525.

Thus by weighing Coke's words, and comparing them with his own statements and later authorities, they are relieved from the misconstruction, which has occasioned modern commentators either, like Chancellor Kent, to praise a boldness which Coke never assumed, or, like Lord Campbell, to sneer at what they would not take the trouble to understand. 1 Kent Com. (6th ed.) 448. 2 Campbell's Lives of the Chancellors, 248, note. 1 Campbell's Lives of the Chief Justices, 290.

[1] *Day* v. *Savadge*, Hob. 87. The dispute there was upon the liability of a freeman of London to pay wharfage to the city, and the question was whether this should be tried by certificate of the mayor and aldermen according to the customs of London (which had been confirmed by Act of Parliament) or by a jury. The very paragraph which contains the *dictum* quoted in the text shows that there was another sufficient reason for ordering a trial by jury. That paragraph, which concludes the opinion, is thus: "By that that hath been said it appears, that though in pleading it were confessed that the custome of certificate of the customes of London is confirmed by Parliament, yet it made no change in this case, both because it is none of the customes intended, and because even an Act of Parliament, made against naturall equitie, as to make a man judge in his owne case, is void in it selfe, for *Jura naturæ sunt immutabilia*, and they are *leges legum*."

Bracton, with more accuracy, wrote, "*Jura enim naturalia dicuntur immutabilia, quia non possunt ex toto abrogari vel auferri, poterit tamen eis derogari vel detrahi in specie vel in parte.*" Lib. 1, c. 5, § 8.

[2] *City of London* v. *Wood*, 12 Mod. 687. Approved by Wilde, J., in *Commonwealth* v. *Worcester*, 3 Pick. 472, and by Metcalf, J., in *Williams* v. *Robinson*, 6 Cush. 335, 336.

Nemo debet esse judex in sua propria causa has always been a fundamental maxim of

The law was laid down in the same way, on the authority of the above cases, in Bacon's Abridgment, first published in 1735; in Viner's Abridgment, published 1741–51, from which Otis quoted it; and in Comyn's Digest, published 1762–7, but written more than twenty years before. And there are older authorities to the same effect. So that at the time of Otis's argument his position appeared to be supported by some of the highest authorities in the English law.[1]

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the common law. *Chancellor of Oxford's Case*, 8 H. 6, 18; Bro. Ab. Patent, 15. Lit. § 212. Co. Lit. 141 *a*. *Derby's Case*, 12 Rep. 114; 4 Inst. 213. 2 Rol. Ab. Judges, A. *Hesketh* v. *Braddock*, 3 Bur. 1858. *The Queen* v. *Justices of Hertfordshire*, 6 Q. B. 753. *Dimes* v. *Grand Junction Canal*, 3 H. L. Cas. 759. *Egerton* v. *Brownlow*, 4 H. L. Cas. 240. *Pearce* v. *Atwood*, 13 Mass. 340, 341. *Commonwealth* v. *McLane*, 4 Gray, 427. *Hush* v. *Sherman*, 2 Allen, 597. *Washington Ins. Co.* v. *Price*, Hopk. Ch. 1. *Peck* v. *Freeholders of Essex*, Spencer, 475; 1 Zab. 657. Governor Winthrop, when accused before the General Court of Massachusetts in 1645 for acts done by him as a magistrate, "coming in with the rest of the magistrates, placed himself beneath within the bar and so sat uncovered." 2 Winthrop's Hist. N. E. 224. And so did Lord Holt upon the trial in 1693 of a suit brought by the Crown to test his right as C. J. K. B. to appoint the chief clerk for enrolling pleas in that court. *Bridgman* v. *Holt*, Show. P. C. 111. Yet an interested judge may act if no other has jurisdiction of the matter. *Anon.* cited 8 H. 6, 19 *b*, and Bro. Ab. Judges, 6. *Great Charte* v. *Kennington*, 2 Stra. 1173; Bur. Set. Cas. 194. *The Queen* v. *Great Western Railway*, 13 Q. B. 327. *Ranger* v. *Great Western Railway*, 5 H. L. Cas. 88. *Commonwealth* v. *Ryan*, 5 Mass. 92. *Hill* v. *Wells*, 6 Pick. 109. *Commonwealth* v. *Emery*, 11 Cush. 411. *In re Leefe*, 2 Barb. Ch. 39. Or if he is expressly authorized by statute. *The King* v. *Justices of Essex*, 5 M. & S. 513. *Commonwealth* v. *Worcester*, 3 Pick. 472. *Commonwealth* v. *Reed*, 1 Gray, 474, 475. And an interested judge may do formal acts necessary to bring the case before the proper tribunal. *The King* v. *Yarpole*, 4 T. R. 71. *Dimes* v. *Grand Junction Canal*, 3 H. L. Cas. 787. *Jeffries* v. *Sewall*, 2 John Adams's Works, 138, 139. *Richardson* v. *Boston*, 1 Curt. C. C. 251. *Buckingham* v. *Davis*, 9 Maryland, 329. *Heydenfeldt* v. *Towns*, 27 Alab. 430. But if a judge causes a suit in which he is interested to be brought before him, his judgment therein will be void, although he is sole judge of the court. *Mayor of Hereford's Case*, cited 7 Mod. 1; 2 Ld. Raym 766; & 1 Salk. 201, 396. *Richardson* v. *Welcome*, 6 Cush. 332. Judge Rolle was of opinion that even consent of parties would not give jurisdiction to an interested judge, "because it is against natural reason." *Smith* v. *Hancock*, Style, 138. But it is now well settled that the objection of interest may be waived, unless it is made by constitution or statute an absolute disqualification. *Regina* v. *Cheltenham Commissioners*, 1 Q. B. 475. *Kent* v. *Charlestown*, 2 Gray, 281. *Tolland* v. *County Commissioners*, 13 Gray, 13. *Sigourney* v. *Sibley*, 21 Pick. 106. *Paddock* v. *Wells*, 2 Barb. Ch. 335. *Oakley* v. *Aspinwall*, 3 Comst. 547.

[1] Bac. Ab. Statutes, A. Vin. Ab. Statutes, E. 6 pl. 15; *ante*, 51. Com. Dig. Parliament, R. 27. Story's Miscellaneous Writings, 125–133. Doct. & Stud lib. 1, cc. 2, 6. 1 Finch, c. 6. Noy's Max. 19. John Milton, in his Defence of the People of England, appealed to "that fundamental maxim in our law, by which nothing is to be counted a law, that is contrary to the law of God, or of reason." 6 Milton's Prose Works (ed. 1851), 204.

Even Sir William Blackstone in his Commentaries, first published in 1765, admitted "that the rule is generally laid down that Acts of Parliament contrary to reason are void;" adding, however, "but if the Parliament will positively enact a thing to be done which is unreasonable, I know of no power that can control it." 1 Bl. Com. 91. And so the law was stated in the editions published during his life, the eighth and last of which was published in 1778. In the posthumous editions his statement is thus modified: "I know of no power in the ordinary forms of the Constitution, that is vested with authority to control it;" and the qualifying words appear in the corrections for the press made in his own handwriting in the margin of a copy of the eighth edition, now owned by Mr. Francis E. Parker of Boston. Perhaps the American Revolution

The same doctrine was repeatedly asserted by Otis,[1] and was a favorite in the Colonies before the Revolution.[2] There are later *dicta* of many eminent judges to the effect

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forced itself more distinctly upon the notice of the learned commentator between 1778 and his death in 1780.

Opposite the statements of the power of the Parliament in 1 Bl. Com. 49, 97, 161, 189, Quincy in his copy wrote "Qu," and references to Vattel's Law of Nations, Bk. 1, c. 3, pp. 15–19, and Furneaux's Letter to Blackstone, 81, 83. And at Blackstone's statement, "It must be owned that Mr. Locke and other theoretical writers have held that 'there remains still inherent in the people a supreme power to remove or alter the legislature, when they find the legislative Act contrary to the trust reposed in them; for when such trust is abused, it is thereby forfeited, and devolves to those who gave it.' But *however just* this conclusion may be *in theory*, we *cannot adopt it*, nor argue from it, under any dispensation of government at present actually existing."—1 Bl. Com. 161, 162—the words here printed in italics are underlined by Quincy, who adds in the margin, "*Tamen quære* whether a conclusion can be just in theory, that will not bear adoption in practice." This very passage affords another instance of Blackstone's careful revision of his work. In the sixth and subsequent editions the word "practically" is inserted before the word "adopt;" and for the words "argue from it" are substituted "take any legal steps for carrying it into execution."

[1] *Jeffries* v. *Sewall*, 2 John Adams's Works, 139. Rights of the British Colonies, 41, 61, 62, 71, 72, 73, 109, 110.

[2] In the controversy of Massachusetts with the other Confederated Colonies of New England in 1653 upon the right of the Confederation to make offensive war, all parties agreed that any acts or orders manifestly unjust or against the law of *God* were not binding. 10 Plym. Col. Rec. 215–223; 2 Hazard Hist. Coll. 270–283. In 1688 "the men of Massachusetts did much quote Lord Coke." Lambert MS. quoted in 2 Bancroft's Hist. U. S. 428. And in 1765, Hutchinson, speaking of the opposition to the Stamp Act, said, "The prevailing reason at this time is, that the Act of Parliament is against Magna Charta, and the natural rights of Englishmen, and therefore, according to Lord Coke, null and void." "Summary of the Disorders in the Massachusetts Province proceeding from an Apprehension that the Act of Parliament called the Stamp Act deprives the People of their Natural Rights," 26 Mass. Archives, 180, 183. And see Hutchinson to Jackson, September 12, 1765, quoted *ante*, 441; Arguments of Adams and Otis on the Memorial of Boston to the Governor and Council, *ante*, 200, 201, 205, 206; 2 John Adams's Works, 158, 159, note. Even the judges appointed by the Royal Governor do not seem to have been prepared to deny this principle. John Cushing, one of the associate justices, in a letter to Chief Justice Hutchinson, dated "In a hurry, Febr. 7, 1766," upon the question whether the courts should be opened without stamps, wrote, "Its true It is said an Act of Parliament against natural Equity is void. It will be disputed whether this is such an Act. It seems to me the main Question here is whether an Act which cannot be carried into execution should stop the Course of Justice, and that the Judges are more confined than with respect to an obsolete Act. If we admit evidence unstamped *ex necessitate* Q. if it can be said we do wrong." 25 Mass. Archives, 55. And in 1776, after the Governor had left, and the Council and House of Representatives had assumed the government, John Adams, in answering a letter of congratulation upon his own appointment as Chief Justice of Massachusetts, from William Cushing, his senior associate, and who upon Adams's declination became Chief Justice in his stead, and afterwards a Justice of the Supreme Court of the United States, wrote, "You have my hearty concurrence in telling the jury the nullity of Acts of Parliament." 9 John Adams's Works, 390, 391, & note.

In a case before the General Court of Virginia in 1772, George Mason, as reported by Thomas Jefferson, argued that the provision of the statute of that Colony of 1682, that "all Indians which shall hereafter be sold by our neighboring Indians, or any other trafiqueing with us as for slaves, are hereby adjudged, deemed and taken to be slaves," was "originally void, because contrary to natural right and justice," citing Coke and Hobart, *ubi sup.* The only authority cited on the other side was 1 Bl. Com.

that a statute may be void as exceeding the just limits of legislative power;[1] but it is believed there is no instance, except one case in South Carolina,[2] in which an Act of the Legislature has been set aside by the courts, except for conflict with some written constitutional provision.[3]

The reduction of the fundamental principles of government in the American States to the form of written constitutions, established by the people themselves, and beyond the control of their representatives, necessarily obliged the judicial department, in case of a conflict between a constitutional provision and a legislative act, to obey the Constitution as the fundamental law and disregard the statute. This duty was recognized, and unconstitutional acts set aside, by courts of justice, even before the adoption of the

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91. As the court held that the Act of 1682 had been repealed by a subsequent statute, it became unnecessary to decide the question. 2 Hening's Sts. at Large, 491. *Robin* v. *Hardaway*, Jefferson R. 114, 118, 123. And in the debates on the adoption of the Constitution of the United States, Patrick Henry said that the Virginia judges had opposed unconstitutional Acts of the Legislature. 4 Elliott's Deb. (2d ed.) 325. *Et vid. sup.* 519, note.

[1] Ellsworth, in 3 Madison Deb. 1400; 5 Elliot's Debates, 462. Chase, J. in *Calder* v. *Bull*, 3 Dall. 388. Marshall, C. J. and Johnson, J. in *Fletcher* v. *Peck*, 6 Cranch, 135, 136, 143. Thompson, J. in *Ogden* v. *Saunders*, 12 Wheat. 304. Story, J. in *Wilkinson* v. *Leland*, 2 Pet. 657, 658. *Ham* v. *M'Claws*, 1 Bay, 95. 5 Dane Ab. 248. Parker, C. J. in *Foster* v. *Essex Bank*, 16 Mass. 270, 271, and *Ross's Case*, 2 Pick. 169. Richardson, C. J. in *Opinion of Justices*, 4 N. H. 566. Prentiss, J. in *Lyman* v. *Mower*, 2 Verm. 519. Redfield, C. J. in *Hatch* v. *Vermont Central Railroad*, 25 Verm. 66. Hosmer, C. J. in *Goshen* v. *Stonington*, 4 Conn. 225. Spencer, C. J. in *Bradshaw* v. *Rogers*, 20 Johns. 106. Walworth, C. in *Varick* v. *Smith*, 5 Paige, 159, and *Cochran* v. *Van Surlay*, 20 Wend. 373. Bronson, C. J. in *Taylor* v. *Porter*, 4 Hill, 144, 145. Jewett, J. in *Powers* v. *Bergen*, 2 Selden, 367. Bland, C. in *Campbell's Case*, 2 Bland, 231, 232.

[2] In 1792 the Superior Court of South Carolina held that an Act passed by the legislature of the Colony in 1712, which took away the freehold of one man and vested it in another, was "against common right, as well as against Magna Charta," and "therefore *ipso facto* void." *Bowman* v. *Middleton*, 1 Bay, 252. [This case is, in truth, no exception. It is to be noticed that the decision pronounces the Act invalid *as of* 1712, when it was passed. At that time the authority of Parliament, and so of the statute of Magna Charta, was paramount in South Carolina. The terms of the decision are as follows: "The court (present, GRIMKE and BAY, Justices), who [*sic*], after a full consideration on the subject, were clearly of opinion, that the plaintiffs could claim no title under the Act in question, as it was against common right, as well as against Magna Charta, to take away the freehold of one man and vest it in another, and that, too, to the prejudice of third persons, without any compensation, or even a trial by the jury of the country, to determine the right in question. That the Act was, therefore, *ipso facto*, void. That no length of time could give it validity, being originally founded on erroneous principles. That the parties, however, might, if they chose, rely upon a possessory right, if they could establish it." It may be added that at the time of this decision the Constitution of the State expressly affirmed the principle of "common right," which is here in question. — ED.]

[3] It was said by Chief Justice Parsons, and repeated by Chief Justice Shaw, that "the legislature may make all laws not repugnant to the Constitution." *Stoughton* v. *Baker*, 4 Mass. 529. *Commonwealth* v. *Alger*, 7 Cush. 101. And see *Opinion of Justices*, 7 Mass. 525; Patterson, J. in *Vanhorne* v. *Dorrance*, 3 Dall. 308; Iredell, J. in *Calder* v. *Bull*, 3 Dall. 398, 399; Washington, J. in *Beach* v. *Woodhull*, Pet. C. C. 6; Baldwin, J. in *Bennett* v. *Boggs*, Bald. 74; 1 Kent Com. 448; Verplanck, Senator, in *Cochran* v. *Van Surlay*, 20 Wend. 382; Bronson, J. in *People* v. *Fisher*, 24 Wend. 220; Cowen, J. in *Butler* v. *Palmer*, 1 Hill N. Y. 329, 330; Gibson, C. J. in *Harvey* v. *Thomas*, 10 Watts, 66, 67; Rogers, J. in *Commonwealth* v. *M'Closkey*, 2 Rawle, 374; Huston, J. in *Braddee* v. *Brownfield*, 2 W. & S. 285.

Constitution of the United States.[1] Since the ratification of that Constitution the power of the courts to declare unconstitutional statutes void has become too well settled to require an accumulation of authorities.[2] But as the office of the judiciary is to decide particular cases, and not to issue general edicts, only so much of a statute is to be declared void as is repugnant to the Constitution and covers the case before the court, unless the constitutional and unconstitutional provisions are so interwoven as to convince the court that the legislature would not have passed the one without the other.[3]

THERE will be found, in the Appendix to Part I. (*infra*, p. 381), the text of the Constitution of the United States and its amendments, and that of Massachusetts, without its amendments. Such passages, also, are there given from all the other State constitutions which preceded that of the United States, and from the colonial charters of Connecticut and Rhode Island, as are likely to be instructive for the purposes of this book. There are added, as indicating the conceptions which find expression in the more recent instruments, those parts of a typical modern constitution — that of Colorado, adopted in 1876, "the year of the Independence of the United States, the one hundredth" — which are most characteristic. The relative length of the older and the later instruments may be seen by comparing the original Constitution of Massachusetts, which fills a little over sixteen pages of Poore's Charters and Constitutions, with that of Colorado, which covers a little more than twenty-nine pages.

Finally the Appendix has certain interesting parts of an American Constitution outside the United States, *viz.*, that of Colombia.

The Constitution of Massachusetts has a peculiar interest, not only as being the original Constitution of the State, and the oldest of all American instruments now in force, but also as being the first anywhere submitted to a popular vote and approved by the people.[4]

[1] The very few reports which have been preserved of the judicial decisions of that period afford two such examples. In 1786 the judges of the Superior Court of the State of Rhode Island refused to act under a statute of the General Assembly, which provided for the trial of an offence upon information before the judges without a jury, contrary to the Constitution of the State as embodied in the Royal Charter of Charles 2. *Trevett* v. *Weeden*, reported by James M. Varnum, Providence, 1787; 2 Chandler's Crim Trials, 279 *& seq.* And in 1787 the judges of the Superior Court of North Carolina set aside an Act of that State, which deprived a citizen of his property without trial by jury, in violation of the State Constitution of 1776. *Den* v. *Singleton*, Martin N. C. 49.

[2] Federalist, No. 78. *Vanhorne* v. *Dorrance*, 2 Dall. 308. *Cooper* v. *Telfair*, 4 Dall. 19. *Marbury* v. *Madison*, 1 Cranch, 177–180. 1 Wilson's Works, 461, 462. 3 Story on Const. U. S. §§ 1570, 1608. 1 Kent Com. 449–454.

[3] *Bank of Hamilton* v. *Dudley*, 2 Pet. 526. *Commonwealth* v. *Knox*, 6 Mass. 77. *Wellington, petitioner*, 16 Pick. 95–97. *Commonwealth* v. *Kimball*, 24 Pick. 361. *Norris* v. *Boston*, 4 Met. 288. *Fisher* v. *McGirr*, 1 Gray, 21. *Warren* v. *Mayor & Aldermen of Charlestown*, 2 Gray, 98, 99. *Jones* v. *Robbins*, 8 Gray, 338, 339.

[4] John Adams wrote, while this instrument was in preparation: "There never was an example of such precautions as are taken by this wise and jealous people in the formation of their government. None was ever made so perfectly upon the principle of the people's rights and equality. It is Locke, Sidney, and Rousseau and De Mably reduced to practice, in the first instance."— 4 *Works of John Adams*, 216. Adams was

Omitting Connecticut and Rhode Island, which lived under their colonial charters until 1818 and 1842 respectively, Massachusetts was the last of the original States in actually adopting a written constitution. Ten, and, if Vermont be counted, eleven constitutions had previously gone into operation; but none of them had been submitted to the popular vote. The Massachusetts Legislature, in 1778, had submitted the draft of a constitution to the people, but it was rejected. So, also, in 1779, in New Hampshire, a proposed second constitution was submitted to the people and rejected. The facts relating to all the States will be found carefully gathered in Jameson, Constitutional Conventions (4th ed. 1887), ss. 126–157, and in the Table, *Ib.* 643. See also the notes, under the various instruments, in Poore's Charters and Constitutions.

Of this reference to the popular vote, sometimes called "the constituting referendum," and by the French the "plébiscite constituant," it has been said by a recent writer:[1] "L'organisation de l'exercice du pouvoir constituant, telle que la consacrent actuellement les législations américaines, appartient tout entière à la Nouvelle-Angleterre. Elle est basée, non seulement sur le principe que l'autorité constituante appartient au peuple, mais encore sur cette autre conception, ramenée dans le droit moderne par la Réforme puritaine, que cette autorité ne peut être représentée."

COMMONWEALTH *v.* CATON ET AL.

COURT OF APPEALS OF VIRGINIA. 1782.

[4 *Call*, 5.]

THIS case came before the court[2] by adjournment from the General Court, and was as follows:

John Caton, Joshua Hopkins, and John Lamb were condemned for treason, by the General Court, under the Act of Assembly concerning that offence, passed in 1776, which takes from the executive the power of granting pardon in such cases.[3] The House of Delegates by

a member of the convention which framed the Constitution, and had a leading part in preparing it. "I had the honor," he wrote, in 1780, "to be the principal engineer." *Works, ubi supra.* — ED.

[1] *L'Établissement et la Révision des Constitutions aux États-Unis d'Amérique*, by Charles Borgeaud; Annales de l'École Libre des Sciences Politiques (1893).

[2] Which at that time consisted of the judges of the High Court of Chancery; those of the General Court; and those of the Admiralty assembled together. *Ch. Rev.* 102, And the sitting members, upon the present occasion, were EDMUND PENDLETON, GEORGE WYTHE, and JOHN BLAIR, judges of the High Court of Chancery; PAUL CARRINGTON, BARTHOLOMEW DANDRIDGE, PETER LYONS, and JAMES MERCER, judges of the General Court; and RICHARD CARY, one of the judges of the Court of Admiralty.

[3] The words of the Act are, "The Governor, or in case of his death, inability, or necessary absence, the councillor who acts as president, shall in no wise have or exer-

resolution of the 18th of June, 1782, granted them a pardon, and sent it to the Senate for concurrence; which they refused. The men, however, were not executed, but continued in jail under the sentence; and, in October, 1782, the Attorney-General moved in the General Court, that execution of the judgment might be awarded. The prisoners pleaded the pardon granted by the House of Delegates. The Attorney-General denied the validity of the pardon, as the Senate had not concurred in it: and the General Court adjourned the case, for novelty and difficulty, to the Court of Appeals.

The resolution of the House of Delegates was in the following words:

"IN THE HOUSE OF DELEGATES,
"Tuesday the 18th of June, 1782.

"Resolved that James Lamb, Joshua Hopkins, and John Caton, who stand convicted and attainted of treason by judgment of the General Court, at their last session, and appear to be proper objects of mercy, be and are hereby declared to be pardoned for the said treason, and exempted from all pains and penalties for the same; provided they and each of them repair to the county of Augusta within —— days from this time, and continue within the said county during their natural lives respectively. Ordered that Mr. Patrick Henry do carry the said resolution to the Senate and desire their concurrence."

The cause was argued in the Court of Appeals by *Mr. Randolph*, the Attorney-General, for the Commonwealth, and by *Mr. Hardy* and several other distinguished gentlemen for the prisoners.

For the Commonwealth it was contended, that the pardon was void, as the Senate had not concurred. That the clause in the Constitution might be read two ways, either of which would destroy the pardon. One was, to throw the words, "or the law shall otherwise particularly direct," into a parenthesis; which would confine the separate power of the Lower House to cases of impeachment only; and would leave those where the assembly had taken it from the executive to the direction of the laws made for the purpose. The other was, to take the whole sentence as it stands, and then the construction will, according to the obvious meaning of the Constitution, be that, although the House of Delegates must originate the resolution, the Senate must in all cases concur, or it will have no effect. For it would be absurd to suppose, that the same instrument which required the whole legislature to make a law, should authorize one branch to repeal it.

For the prisoners, it was contended, that the language of the Constitution embraced both sets of cases, as well those of impeachment, as those where the assembly should take the power of pardoning from the executive: and, in both, that the direction was express that the

cise a right of granting pardon to any person or persons convicted in manner aforesaid, but may suspend the execution until the meeting of the General Assembly, who shall determine whether such person or persons are proper objects of mercy or not, and order accordingly." — *Ch. Rev.* 40.

power of pardoning belonged to the House of Delegates. That the words of the Constitution, and not conjectures drawn from the supposed meaning of the framers of it, should give the rule. That the Act of Assembly was contrary to the plain declaration of the Constitution; and therefore void. That the prisoners were misguided and unfortunate men; and that the construction ought, in favor of life, to incline to the side of mercy.

The Attorney-General, in reply, insisted, that compassion for the prisoners could not enter into the case; and that the Act of Assembly pursued the spirit of the Constitution. But that, whether it did or not, the court were not authorized to declare it void. *Cur. adv. vult.*

WYTHE, J. Among all the advantages which have arisen to mankind from the study of letters, and the universal diffusion of knowledge, there is none of more importance than the tendency they have had to produce discussions upon the respective rights of the sovereign and the subject; and upon the powers which the different branches of government may exercise. For, by this means, tyranny has been sapped, the departments kept within their own spheres, the citizens protected, and general liberty promoted. But this beneficial result attains to higher perfection, when those who hold the purse and the sword, differing as to the powers which each may exercise, the tribunals, who hold neither, are called upon to declare the law impartially between them. For thus the pretensions of each party are fairly examined, their respective powers ascertained, and the boundaries of authority peaceably established. Under these impressions, I approach the question which has been submitted to us; and although it was said the other day, by one of the judges, that, imitating that great and good man Lord Hale, he would sooner quit the Bench than determine it, I feel no alarm; but will meet the crisis as I ought; and, in the language of my oath of office, will decide it, according to the best of my skill and judgment.

I have heard of an English Chancellor who said, and it was nobly said, that it was his duty to protect the rights of the subject against the encroachments of the Crown, and that he would do it, at every hazard. But if it was his duty to protect a solitary individual against the rapacity of the sovereign, surely, it is equally mine, to protect one branch of the legislature, and, consequently, the whole community, against the usurpations of the other; and, whenever the proper occasion occurs, I shall feel the duty, and fearlessly perform it. Whenever traitors shall be fairly convicted, by the verdict of their peers, before the competent tribunal, if one branch of the legislature, without the concurrence of the other, shall attempt to rescue the offenders from the sentence of the law, I shall not hesitate, sitting in this place, to say to the General Court, *Fiat justitia, ruat cœlum*; and, to the usurping branch of the legislature, you attempt worse than a vain thing; for although you cannot succeed, you set an example which may

convulse society to its centre. Nay more, if the whole legislature, an event to be deprecated, should attempt to overleap the bounds prescribed to them by the people, I, in administering the public justice of the country, will meet the united powers at my seat in this tribunal; and, pointing to the Constitution, will say to them, here is the limit of your authority, and hither shall you go, but no further.

Waiving, however, longer discussion upon those subjects, and proceeding to the question immediately before us, the case presented is, that three men, convicted of treason against the State, and condemned by the General Court, have pleaded a pardon, by the House of Delegates, upon which that House insists, although the Senate refuses to concur; and the opinion of the court is asked, whether the General Court should award execution of the judgment, contrary to the allegation of the prisoners, that the House of Delegates alone have the power to pardon them, under that article of the Constitution which says, "But he (the Governor) shall, with the advice of the Council of State, have the power of granting reprieves or pardons, except where the prosecution shall have been carried on by the House of Delegates, or the law shall otherwise particularly direct; in which *cases*, no reprieve or pardon shall be granted, but by resolve of the House of Delegates."

Two questions are made,

1. Whether this court has jurisdiction in the case?
2. Whether the pardon is valid?

The first appears, to me, to admit of no doubt; for the Act constituting this court is express, that the court shall have jurisdiction "In such cases as shall be removed before them, by adjournment from the other courts before mentioned, when questions, in their opinion new and difficult, occur." *Chan. Rev.* 102: which emphatically embraces the case under consideration.

The sole inquiry therefore is, whether the pardon be valid?

If we consider the genius of our institutions, it is clear that the pretensions of the House of Delegates cannot be sustained. For, throughout the whole structure of the government, concurrence of the several branches of each department is required to give effect to its operations. Thus the Governor, with the advice of the Council of State, may grant pardons, commission officers, and embody the militia; but he can do neither without the assent of the council: the two branches of the legislature may pass laws, but a bill passed by one of them has no force: and the two houses of assembly may elect a judge; but an appointment, by one of them only, would be useless. This general requisition of union seems of itself to indicate that nothing was intended to be done, in any department, without it; and, accordingly, the fourth section of the Constitution declares, that "The legislature shall be formed of two distinct branches, who, *together*, shall be a complete legislature;" and the eighth, "that all laws shall originate in the House of Delegates, to be approved or rejected by the Senate." Thus requiring, in conformity to the regulations throughout the whole fabric

of government, an union of the two branches, to constitute a legislature; and an union of sentiment in the united body, to give effect to their acts. And it is not to be believed, that, when this union was so steadfastly demanded, even in the smallest cases, it was meant to be dispensed with, in one of the first magnitude, and which might involve the vital interests of the community.

But if we advert to the motive for the regulation, the necessity for concurrence will be more apparent. For it is obvious, that the contests in England between the House of Commons and the Crown, relative to impeachments, gave rise to it, as the king generally pardoned the offender, and frustrated the prosecution. With this in view, the power of pardoning cases of that kind was taken from the executive here, and committed to other hands, in order that the evil complained of there might be removed. But the interpretation contended for by the House of Delegates, in effect, reverses the object. Thus the object was to put a check to prerogative in one department; the effect is to remove all check, and establish prerogative in another department. The object was to prevent disappointment, by one department, of the national will; the effect is to enable less than a department to defeat it. . . .

These arguments receive some illustration from the twentieth section of the Constitution, recognizing the power of the whole legislature, and not one branch, to abolish penalties and forfeitures: which is contravened by the other construction; for, if the House of Delegates can remit part of the penalty, they may the whole, as well the forfeiture of the goods, as the corporal suffering. An idea utterly inconsistent with the recognition of a power, in the whole legislature, to do it.

Every view of the subject, therefore, repels the construction of the House of Delegates; and, accordingly, the practice is said to have been against it, ever since the formation of the government: which seems to have been the understanding upon the present occasion; for the resolution provides that it shall be sent to the Senate for concurrence.

This mode of considering the subject obviates the objection made by the prisoners' counsel, relative to the constitutionality of the law concerning treason; for, according to the interpretation just discussed, there is nothing unconstitutional in it.

I am, therefore, of opinion, that the pardon pleaded by the prisoners is not valid; and that it ought to be so certified to the General Court.

PENDLETON, President. . . . The question, upon the merits, is whether by the paper stated in the record as the resolution of the House of Delegates, these three unhappy men stand pardoned of the treason of which they are attainted in the General Court, or still remain subject to the execution of the judgment which passed against them upon their conviction? If the exclusive power of the House of Delegates on this occasion was to be admitted, it would be difficult to maintain that this resolution should operate as a pardon, since those who made it, by sending it to the Senate for their con-

currence, appear to have suspended its operation until the concurrence of the Senate should be obtained, which not having happened, the force of it stands as yet suspended; or rather the Senate, by rejecting this, and the House of Delegates not passing another, their power remains unexercised, and the attainder retains its full force. But, as I do not make this the ground of my judgment, I shall pass to the two great points into which the question has been divided, whether, if the constitution of government and the Act declaring what shall be treason are at variance on this subject, which shall prevail and be the rule of judgment? And then, whether they do contravene each other? The constitution of other governments, in Europe or elsewhere, seem to throw little light upon this question, since we have a written record of that which the citizens of this State have adopted as their social compact; and beyond which we need not extend our researches. It has been very properly said, on all sides, that this Act, declaring the rights of the citizens, and forming their government, divided it into three great branches, the legislative, executive, and judiciary, assigning to each its proper powers, and directing that each shall be kept separate and distinct, must be considered as a rule obligatory upon every department, not to be departed from on any occasion. But how far this court, in whom the judiciary powers may in some sort be said to be concentrated, shall have power to declare the nullity of a law passed in its forms by the legislative power, without exercising the power of that branch, contrary to the plain terms of that constitution, is indeed a deep, important, and I will add, a tremendous question, the decision of which might involve consequences to which gentlemen may not have extended their ideas. I am happy in being of opinion there is no occasion to consider it upon this occasion; and still more happy in the hope that the wisdom and prudence of the legislature will prevent the disagreeable necessity of ever deciding it, by suggesting the propriety of making the principles of the Constitution the great rule to direct the spirit of their laws.

It was argued by the counsel for the prisoners, that the interpretation, now to be made, ought, in favor of life, to incline to the side of mercy, and that compassion for the misguided and unfortunate ought to have some influence on our decision.

Mercy — divine attribute! Often necessary to the best, sometimes due to the worst, and from the infirmities of our nature always to be regarded, when circumstances will admit of it. But how, in public concerns, this is to be accomplished with just attention to the general welfare, has, in every age, been a *desideratum* with statesmen and legislators. For, in human associations, other considerations, as well as the dictates of mercy, must be attended to. Compassion for the individual must frequently yield to the safety of the community. Society proceeds upon that principle. Men surrender part of their natural rights to insure protection for the residue against domestic violence, and hostilities from abroad; which can only be effected by the due

execution of wholesome laws calculated to maintain the rights of private citizens, and the integrity of the State. But how would this be promoted by letting loose, notorious offenders to burn, to rob, and to murder, or to aid a foreign foe in his unjust attempts upon the liberties of the country? Mercy, in such cases, to one, would be cruelty to the rest.

Aware of this, the makers of the Constitution, considering that although, in representative governments, the laws should be mild, they ought to be rigidly executed; and that, although a power to pardon, which had often been abused in England, should exist somewhere, it ought never to be exercised without proper cause, framed the clause now under consideration; which provides that the Governor, or Chief Magistrate, "shall not, under any pretence, exercise any power or prerogative by virtue of any law, statute, or custom of England; but he shall, with the advice of the Council of State, have the power of granting reprieves and pardons:" not in all cases indiscriminately, but in such only as were least liable to abuse; the rest were confided to agents less exposed to temptation.

Thus the power was, in general, committed to the executive: but as to cases concerning the conduct of public officers, and those which policy might suggest to the legislature as proper to be taken from the Chief Magistrate and his council, it was thought a safer depository, beyond the reach of the various passions and motives which might influence a few individuals, would be found in the General Assembly; and therefore the clause excepts cases of impeachment, and those which the law might otherwise provide for. In these, the power of pardoning is reserved to the representatives of the people: but whether to one or both Houses is the important question. A question which should be decided according to the spirit, and not by the words of the Constitution.

The language of the clause is inaccurate, and admits of both the constructions mentioned by the Attorney-General, that is to say, 1. By throwing the words, "or the law shall otherwise particularly direct," into a parenthesis, to confine the power of pardoning, by resolution of the House of Delegates alone, to cases of impeachment only; and to leave those which the General Assembly might take from the executive, to the direction of the laws made for the purpose. 2. By taking the clause altogether, to make the representatives of the people the source of mercy, provided the consent of the Senate was obtained. Either view of the subject satisfies the present inquiry; but I prefer the first, as most congenial to the spirit, and not inconsistent with the letter, of the Constitution.

The treason law appears to have been framed upon this idea; and, in passing it, the legislature have, in my opinion, pursued, and not violated, the Constitution. Indeed, the House of Delegates appear to have understood it so themselves, as they sent the resolution to the

Senate for their concurrence, which not having been obtained, the resolution is of no force, and the pardon falls to the ground.

CHANCELLOR BLAIR and the rest of the judges were of opinion, that the court had power to declare any resolution or Act of the Legislature, or of either branch of it, to be unconstitutional and void; and that the resolution of the House of Delegates, in this case, was inoperative, as the Senate had not concurred in it. That this would be the consequence clearly if the words, "or the law shall otherwise particularly direct," were read in a parenthesis; for then the power of pardoning by the House of Delegates would be expressly confined to cases of impeachment by that House; and, if read without the parenthesis, then the only difference would be, that the assent of the two Houses would be necessary; for it would be absurd to suppose that it was intended by the Constitution that the Act of the whole Legislature should be repealed by the resolution of one branch of it, against the consent of the other.

The certificate to the General Court was as follows: —

"The court proceeded, pursuant to an order of the court of Thursday last, to render their judgment on the adjourned question, from the General Court, in the case of John Caton, Joshua Hopkins, and James Lamb; whereupon it is ordered to be certified, to the said General Court, as the opinion of this court, that the pardon, by resolution of the House of Delegates, severally pleaded and produced in the said court, by the said John Caton, Joshua Hopkins, and James Lamb, as by the record of their case appears, is invalid."

N. B. — It is said, that this was the first case in the United States, where the question relative to the *nullity* of an unconstitutional law was ever discussed before a judicial tribunal: and the firmness of the judges (particularly of MR. WYTHE) was highly honorable to them, and will always be applauded, as having incidentally fixed a precedent, whereon a general practice, which the people of this country think essential to their rights and liberty, has been established.[1]

[1] For an account of the earliest constitutional cases in the States see a valuable article in 19 Am. Law Rev. 175 (1885), by William M. Meigs, Esq., of the Philadelphia Bar. The earliest judicial decision of the point that judges may disregard legislative Acts at variance with the Constitution, appears to have been given in *Holmes* v. *Walton*, in New Jersey in 1780, — an unreported case, cited in 4 Halstead, 444. The exact date was determined by Professor Scott, of Rutgers College, a few years ago; see 2 Am. Hist. Assoc. Papers, 45 (1886). As to a dubious unreported Virginia case of 1778, see 19 Am. Law Rev. 178. Of reported cases the earliest are given in this book. In Coxe's Jud. Power and Unconst. Legis. 219-271, there is a valuable consideration of the early precedents in the States. — ED.

RUTGERS *v.* WADDINGTON.[1]

MAYOR'S COURT, CITY OF NEW YORK. August 27, 1784.

THIS was an action of trespass brought against the defendant, upon an Act of the Legislature of this State, passed the seventeenth of March, one thousand seven hundred and eighty-three, for the occupation of a brew-house and malt-house of the plaintiff, from the thirteenth day of August, one thousand seven hundred and seventy-eight, until the time of passing the Act above mentioned. The cause came on to be argued upon demurrer, before the HONORABLE JAMES DUANE, ESQ., Mayor, RICHARD VARRICK, ESQ., Recorder, BENJAMIN BLAGGE, WILLIAM W. GILBERT, WILLIAM NEILSON, THOMAS RANDAL, and THOMAS IVERS, ESQUIRES, aldermen, on Tuesday, the twenty-ninth day of June past.

The counsel for the plaintiff were *Mr. Lawrence*, assisted by the *Attorney-General*, *Mr. Wilcox*, and *Mr. Troupe*. Those for the defendant were *Mr. Hamilton*, assisted by *Mr. B. Livingston*, and *Mr. Lewis*.

Mr. Lawrence opened the pleadings and arguments on the part of the plaintiff, and was followed by *Mr. Wilcox*. *Mr Livingston*, *Mr. Lewis*, and *Mr. Hamilton*, were next successively heard, in behalf of the defendant, and were replied to by *Mr. Lawrence*, *Mr. Troupe*, and the *Attorney-General*. The arguments on both sides were elaborate, and the authorities numerous.

The court took time to advise, until Tuesday, the twenty-seventh day of August, and then the Honorable the Mayor proceeded to deliver the judgment of the court, as follows: —

In the case of *Elizabeth Rutgers* versus *Joshua Waddington*, which we gave notice should be determined this day, the court now proceed to judgment. It is represented to be a controversy of high importance; from the value of the property, which in this and other actions depends on the same principles; from involving in it questions which must affect the national character: — questions whose decision will record the spirit of our courts to posterity! Questions which embrace the whole law of nations!

It were to be wished, that a cause of this magnitude was not to receive its first impression from a court of such a limited jurisdiction, as that in which we preside; — from magistrates actively engaged in establishing the police of a disordered city, and in other duties, which cut them off from those studious researches which great and intricate questions require. If we err in our opinion, it will be a consolation, that it has been intimated, "to be probable, whatever may be the determination that it will not end here."

[1] Pamphlet, New York. Printed by Samuel Loudon. 1784. Edited, with an Historical Introduction, by Henry B. Dawson. Morrisania, N. Y. 1866.

The counsel on both sides, who have managed this cause, and by whose diligence and abilities, so much learning, on an uncommon subject, hath been drawn into view, have spared us much labor.

We cannot but express the pleasure which we have received, in seeing young gentlemen, just called to the Bar, from the active and honorable scenes of a military life, already so distinguished as public speakers, so much improved in an arduous science.

That in a contest (which we are told) is not considered without temporary prepossession, we may express our sentiments with more deliberation and correctness; and that nothing to be offered by us, may be misunderstood or misapplied, we have taken the trouble to preserve our remarks by committing them to paper.

The action is grounded on a statute of this State, entitled, "an Act for granting a more effectual relief in cases of certain trespasses," passed the seventeenth day of March, one thousand seven hundred and eighty-three; and the declaration charges, 1st, the substance of the Act, *viz.*, "That it shall and may be lawful for any person or persons, who are, or were inhabitants of this State, and who, by reason of the invasion of the enemy, left his, her, or their place or places of abode, who have not voluntarily put themselves respectively into the power of the enemy, since they respectively left their places of abode, his, her, or their heirs, executors, or administrators, to bring an action of trespass against any person or persons, who may have occupied, injured, or destroyed his, her, or their estate, either real or personal, within the power of the enemy."

2. Complains that the defendant, on the thirtieth day of August, 1778, with force and arms, &c., occupied one brew-house, and one malt-house of the plaintiff, situate in the east ward of the city of New York, and within the jurisdiction of this court, and his occupation thereof so continued, from the said 13th day of August, in the year 1778, until the 17th day of March, in the year 1783.

3. And also, that he the said Joshua, with force and arms, &c., afterwards, to wit, the same 13th day of August, 1778, and at divers days and times, between the said 13th day of August, 1778, and the 17th day of March, 1783, occupied one other brew-house, and one other malt-house, of her the said Elizabeth, within the city and ward, and within the jurisdiction, &c., *et alia enormia*, to the great damage, &c., against the peace, &c. And the said Elizabeth avers, —

1st. That there was open war between the King of Great Britain, his vassals, &c., and the people of the State of New York aforesaid, on the 10th day of September, 1776, to wit, at the east ward, &c., and within, &c., and that the said open war continued from the said day until the time of passing the Act aforesaid.

2d. That the King of Great Britain, his vassals, &c., and the enemy mentioned and intended in the said Act are one and the same and not different.

3d. That she was an inhabitant of the State of New York, and

that the place of her abode was the city of New York, in the State of New York, on the tenth day of September, in the year last aforesaid, to wit, in the east ward, &c., and within the jurisdiction, &c.

4th. That by reason of the invasion of the enemy, she the said Elizabeth afterwards, to wit, the said tenth day of September, in the year aforesaid, left her said place of abode, to wit, in the ward aforesaid and within, &c.

5th. That she did not, at any time after she left her said place of abode, as aforesaid, voluntarily put herself within the power of the enemy aforesaid.

6th. That the brew-house and malt-house aforesaid were parcel of the real estate of the said Elizabeth, and at the days and times they were occupied by the said Joshua were in the power of the enemy, to wit, at the east ward, &c., and within, &c.

Wherefore the said Elizabeth saith she is made worse, and hath sustained damage to eight thousand pounds *et inde*, &c.

The defendant to this charge, as to the force and arms and whatsoever is against the peace, and as to the whole of the trespass aforesaid, except as to the occupying the said brew-house and malt-house of the said Elizabeth, on the twenty-eighth day of September, 1778, and continuing the occupation thereof until the seventeenth day of March, 1783, he pleads not guilty and takes issue.

And as to the occupying the brew-house and malt-house, on the aforesaid twenty-eighth day of September, 1778, and continuing the occupation thereof until the last day of April, 1780, inclusively, the said defendant saith, that the said Elizabeth *actionem non, quia dicit*, that long before the said twenty-seventh day of September, 1778, to wit, on the fourth day of July, 1776, in (substance) the Declaration of Independence by Congress [*sic*], who did then and there declare, that the United Colonies were, and of right ought to be free and independent States; that they were absolved from all allegiance to the British Crown, and that all political connection between them and the State of Great Britain was, and ought to be totally dissolved, &c. That the said declaration was on the ninth of July, in the year aforesaid, approved of by the Convention of the State of New York: and afterwards, on the 8th day of May, 1777, the same was recognized and confirmed by the legislature of this State.

That upon the 10th day of September, 1776, and from that time until after the last day of April, 1783, there being open war between, &c., the army of the said king, on the 10th day of September, 1776, conquered the city of New York, and continued in uninterrupted possession thereof, from that time until and after the last day of April, 1778; and the said army so being in possession, the said brew-house and malt-house, by virtue of authority from the commander-in-chief of the said army, on the 10th day of June, 1778, was taken possession of by the commissary-general of the said army, for the use of the said army — as by the laws, &c., of nations in time of war he lawfully

might do — and that the said commissary on, &c., at, &c., gave his license and permission to Benjamin Waddington and Evelyn Pierrepont, residing in the said city as British merchants, under the protection of the said British army, and having been from their birth and still being subjects of the King of Great Britain, to enter into, use, and occupy the said malt-house and brew-house, from the said 28th day of September, 1778, inclusively, to the last day of April, 1780, inclusively: by virtue whereof they entered and occupied the premises, from the first of the two last-mentioned days to the last inclusively; and the defendant as their servant and at their command, from time to time, and at divers times from the first to the last of those days, entered into and occupied the said brew-house and malt-house, for the benefit of the said Benjamin and Evelyn: *Quæ est eadem*, &c. whereof the plaintiff complains, in the first count of her declaration.

And as to the occupying the said brew-house and malt-house, from the last day of April, 1780, to the 17th of March, 1783, he pleads over again the Declaration of Independence of these States; the approbation thereof by the Constitution of the State; and the recognition and confirmation thereof by the Convention; the conquest of the city of New York by the British; and that the brew-house and malt-house being out of the possession of the plaintiff, the commander-in-chief of the said army, on the last day of April, 1780, gave his license and permission (as by the laws of nations he might lawfully do) to the said Benjamin and Evelyn (describing them as in the other plea) to enter into and occupy the said brew-house and malt-house, from the last day of April, 1780, until the said license and permission should be revoked; paying therefore to such person as the commander-in-chief should authorize to receive the same, at the rate of one hundred and fifty pounds for each year, in quarterly payments, &c.

He then avers that they accordingly entered and occupied the said brew-house and malt-house, on the 1st day of May, 1780, and continued the occupation thereof until the 17th day of March, 1783, till when the said license remained in force; and then avers as before, that he as their servant, and at their command, from time to time and at divers times, between the two last-mentioned days, did enter and occupy the said brew-house and malt-house, &c., *quæ est eadem*, &c., concluding with an averment, that the said Benjamin and Evelyn did pay the said one hundred and fifty pounds a year to John Smith, appointed by the said commander-in-chief to receive the same.

For further plea to the whole of the trespass, according to the form of the statute, the defendant saith, that the plaintiff *actionem non*, &c. Because he saith, that after the passing the Act of the Legislature of this State, in the declaration mentioned, to wit, on the 3d day of September, 1783, at, &c., a certain definitive treaty of peace, between the King of Great Britain and his subjects, and the United States and the subjects and citizens thereof and of each of them, was entered into, made and concluded by plenipotentiaries on the part of the said

king and States respectively (naming them) in virtue of full powers, &c., which definitive treaty, on the 14th day of January, 1784, at Annapolis, &c., by the United States of America in Congress, then and there assembled in due form, was ratified and confirmed; and afterwards on the same day, announced and published by proclamation under the seal of the United States, to all the good citizens of the said United States; enjoining all magistracies, legislatures, &c. to carry into effect the said definitive treaty, &c., *prout*, &c. In virtue of which said definitive treaty, all right, claim, &c., which either of the said contracting parties, and the subjects and citizens of either of them might otherwise have had to any compensation, recompense, retribution, or indemnity whatsoever, for or by reason of any injury, or damage, whether to the public or individuals, which either of the said contracting parties, and the subjects and citizens of either might have done or caused to be done to the other, in consequence of, or in anywise relating to the war between them, from the time of the commencement to the determination thereof, were mutually and reciprocally, virtually and effectually, relinquished, renounced, and released to each other, &c. — And he avers, as in his other plea, that from the time of his birth, and at all times since, he hath been and still is a subject of the King of Great Britain: and between the times in his plea mentioned, as a subject of the said king, resided in the city of New York, using the art, trade, &c., of a merchant, under the protection of the army of the said king, then waging war against the said State; *et hoc paratus est verificari:* wherefore he prays judgment whether the said plaintiff, her action against him ought to have or maintain; with this, that the said Joshua will verify that the whole of the trespass by him supposed to be committed, is for certain acts, &c., by him supposed to have been done while he was residing as a subject of the said king, and under the protection of the army of the said king, and in relation to the war aforesaid.

The plaintiff replies as to the plea of the defendant, as to the residue of the trespass, by him done as aforesaid, by him above pleaded in bar, that she by reason thereof ought not to be barred from her said action; because she says, that by the Act, &c., for granting a more effectual relief in cases of certain trespasses, in her declaration in part recited, it is also among other things enacted, that no defendant or defendants shall be admitted to plead in justification any military order, or command whatsoever of the enemy, for such occupancy: and avers, that the said commissary-general and commander-in-chief were, at the time of giving the permission or license, subjects to the said King of Great Britain, the enemy mentioned and intended by the Act aforesaid, and in the military service of the said king: wherefore seeing that the said Joshua hath acknowledged the trespass by him done as aforesaid, the said Elizabeth prays judgment and her damages, &c.

And as to the further plea of the said Joshua, to the whole of the trespass aforesaid by him pleaded in bar, the plaintiff demurs.

And the defendant on his part demurs to the plea of the plaintiff last above pleaded.

The pleadings close with joinders in demurrer, in the usual forms.

From these pleadings, and the arguments which they have produced, three questions are presented for our consideration: —

1st. Whether the plaintiff's case is within the letter and intent of the statute on which this action is grounded?

IIdly. Whether the laws of nations give the captors, and defendant under them, rights which control the operation of the statute and bar the present suit?

IIIdly. Whether there is such an amnesty included or implied in the definitive treaty of peace, as virtually or effectually relinquishes or releases the plaintiff's demand under the said statute? . . . [In a long and learned opinion, the court answers the first question in the affirmative, and the second and third in the negative. As regards, however, the act of the commander-in-chief in giving possession from April, 1780, to March, 1783, unlike the previous act of the commissary-general, it was held that it had relation to the war and was according to the laws of war, and was covered by the amnesty implied in making the treaty; and that as regards this period the plaintiff could not recover. The course of reasoning, so far as the subject now in hand is concerned, is shown by the passages which follow.]

We must acknowledge there appears to us very great force in the observation arising from the federal compact. By this compact these States are bound together as one great independent nation; and with respect to their common and national affairs, exercise a joint sovereignty, whose will can only be manifested by the acts of their delegates in Congress assembled. As a nation they must be governed by one common law of nations; for on any other principles how can they act with regard to foreign powers; and how shall foreign powers act towards them? It seems evident that abroad they can only be known in their federal capacity. What then must be the effect? What the confusion? if each separate State should arrogate to itself a right of changing at pleasure those laws, which are received as a rule of conduct, by the common consent of the greatest part of the civilized world.

We shall deduce only one inference from what hath been here observed — that to abrogate or alter any one of the known laws or usages of nations, by the authority of a single State, must be contrary to the very nature of the confederacy, and the evident intention of the articles, by which it is established, as well as dangerous to the Union itself. . . .

It has been further objected, that Congress could form no treaty of peace to reach our internal police.

There is a great distinction between the authority of the treaty, and its operation and effects.

The first we hold to be sacred and shall never, as far as we have power, suffer it to be violated or questioned.

It is the great charter of America — it has formally and forever released us from foreign domination — it has confirmed our sovereignty and independence; and ascertained our extensive limits.

Our Union, as has been properly observed, is known and legalized in our Constitution, and adopted as a fundamental law in the first Act of our Legislature. The federal compact hath vested Congress with full and exclusive powers to make peace and war. This treaty they have made and ratified, and rendered its obligation perpetual.

And we are clearly of opinion, that no State in this Union can alter or abridge, in a single point, the federal articles or the treaty.

But the operation and effects of the treaty, within our own State, are fit subjects of inquiry and decision: according to its spirit and true meaning we must determine our judgment; nor shall any man, by any act of ours, be deprived of the benefits which, on a fair and reasonable construction, he ought to derive from it.

On this occasion, we say with the sage, *Fiat justitia ruat cœlum*. . . .

The counsel for the defendant, by stating a number of pointed cases, showed clearly, from the nature of things, that the statute must admit of exceptions. Mr. Attorney-General, one of the counsel for the plaintiff, who argued the cause very ably, admitted that many cases may be out of the statute, though the plaintiff's is not of the number.

Thus, then, it seems to be agreed, on both sides, that the provision in the statute, being general, cannot extend to all cases, and must therefore receive a reasonable interpretation according to the intention; and not according to the latitude of expression of the legislature: it follows as a necessary consequence, that the interpretation is the province of the court, and, however difficult the task, that we are bound to perform it.

The authorities which have been cited on the part of the defendant, not only establish this general principle, but bring forward a number of judicial decisions, wherein the courts of justice have exercised that power.

On the other side, the uncontrollable power of the legislature, and the sanctity of its laws, have been earnestly pressed by the counsel for the plaintiff; and a great number of authorities have been quoted to establish an opinion, that the courts of justice in no case ought to exercise a discretion in the construction of a statute.

However contradictory these authorities may appear to superficial observers, they are not only capable of being reconciled, but the result of the whole will appear to be wise, suited to human imperfection and easily explained.

The supremacy of the legislature need not be called into question;

if they think fit positively to enact a law, there is no power which can control them. When the main object of such a law is clearly expressed, and the intention manifest, the judges are not at liberty, although it appears to them to be unreasonable, to reject it; for this were to set the judicial above the legislative, which would be subversive of all government.

But when a law is expressed in general words, and some collateral matter, which happens to arise from those general words, is unreasonable, there the judges are in decency to conclude, that the consequences were not foreseen by the legislature; and therefore they are at liberty to expound the statute by equity, and only *quoad hoc* to disregard it.

When the judicial make these distinctions, they do not control the legislature; they endeavor to give their intention its proper effect.

This is the substance of the authorities, on a comprehensive view of the subject; this is the language of Blackstone in his celebrated commentaries, and this is the practice of the courts of justice, from which we have copied our jurisprudence, as well as the models of our own internal judicatories. To apply these general remarks to the particular case under our consideration. — The American prisoners of war, in the power of the enemy, were quartered in the houses of the exiles: they in fact occupied those houses by a military order or command, and are included within the general description of the statute, which, according to the letter, extends to all persons without any exception, who have so occupied or injured such houses. But can we force ourselves to believe, that the legislature could have been so unjust and oppressive as to add to the sufferings of the patriot soldier, consigned, after fighting the battles of his country, to a long captivity, by making him pay for fetters which he had worn in the service of his country, or for want of means, to undergo a second loss of liberty?

That the legislative, judicial, and executive powers of government should be independent of each other, is essential to liberty.

This principle entered deeply into our excellent Constitution, and was one of the inducements to the establishment of the Council of Revision, that the judicial and executive of whom it is composed, might have the means of guarding their respective rights, against the encroachments of the legislature, whether by design, "or by haste or unadvisedness." For this and other purposes, all bills, which have passed the Senate and Assembly, before they become laws, are to be presented to the council for their revisal and consideration; that if it should appear improper to them that any bill should become a law, it may be returned with their objections for further consideration, and become subject to the approbation of two-thirds of the members of each House, before it can be a law.

From this passage of our Constitution, Mr. Attorney seems to regard this determination of the Council of Revision on the law in question,

in the light of a judicial decision, by which this court ought to be guided, for the sake of uniformity in the dispensation of justice. But surely the respect, which we owe to this honorable council, ought not to carry us such lengths; it is not to be supposed, that their assent or objection to a bill can have the force of an adjudication; for what in such a case would be the fate of a law which prevailed against their sentiments? Besides, in the hurry of a session, and especially *flagrante bello*, they have neither leisure nor means to weigh the extent and consequences of a law whose provisions are general, at least not with that accuracy and solemnity which must be necessary to render their reasons incontrovertible, and their opinions absolute. The institution of this council is sufficiently useful and salutary, without ascribing to their proceedings, effects so extraordinary; nor is it probable, that the high judicial powers themselves, would in the seat of judgment always be precluded, even by their own opinion given in the Council of Revision; for instance, if they had consented to a bill, general in its provision, and in the administration of justice they discovered that, according to the letter, it comprehended cases which rendered its operation unseasonable, mischievous, and contrary to the intention of the legislature, would they not give relief? Surely it cannot be questioned.

Upon the whole, this being a statute is obligatory, and being general in its provisions, collateral matter arises out of the general words, which happens to be unseasonable. The court is therefore bound to conclude, that such a consequence was not foreseen by the legislature, to explain it by equity, and to disregard it in that point only, where it would operate thus unseasonably.

The questions then, whether this statute hath in any respect revoked the law of nations, or is repealed by the definitive treaty of peace, or foreign to the circumstances of the case: neither will happen, nor ought to be apprehended.

There is not a tittle in the treaty to which the statute is repugnant. The amnesty is constructive, and made out by reasoning from the law of nations to the treaty.

The repeal of the law of nations, or any interference with it, could not have been in contemplation, in our opinion, when the legislature passed this statute; and we think ourselves bound to exempt that law from its operation: first, because there is no mention of the law of nations, nor the most remote allusion to it, throughout the whole statute; secondly, because it is a subject of the highest national concern and of too much moment to have been intended to be struck at in silence; and to be controlled implicatively under the generality of the terms of the provision; thirdly, because the provision itself is so indefinite, that without any control it would operate in other cases unreasonably, to the oppression of the innocent, and contrary to humanity; when it is a known maxim "that a statute ought to be so construed, that no man who is innocent be punished or endamaged;" fourthly, because the statute

if they think fit positively to enact a law, there is no power which can control them. When the main object of such a law is clearly expressed, and the intention manifest, the judges are not at liberty, although it appears to them to be unreasonable, to reject it; for this were to set the judicial above the legislative, which would be subversive of all government.

But when a law is expressed in general words, and some collateral matter, which happens to arise from those general words, is unreasonable, there the judges are in decency to conclude, that the consequences were not foreseen by the legislature; and therefore they are at liberty to expound the statute by equity, and only *quoad hoc* to disregard it.

When the judicial make these distinctions, they do not control the legislature; they endeavor to give their intention its proper effect.

This is the substance of the authorities, on a comprehensive view of the subject; this is the language of Blackstone in his celebrated commentaries, and this is the practice of the courts of justice, from which we have copied our jurisprudence, as well as the models of our own internal judicatories. To apply these general remarks to the particular case under our consideration. — The American prisoners of war, in the power of the enemy, were quartered in the houses of the exiles: they in fact occupied those houses by a military order or command, and are included within the general description of the statute, which, according to the letter, extends to all persons without any exception, who have so occupied or injured such houses. But can we force ourselves to believe, that the legislature could have been so unjust and oppressive as to add to the sufferings of the patriot soldier, consigned, after fighting the battles of his country, to a long captivity, by making him pay for fetters which he had worn in the service of his country, or for want of means, to undergo a second loss of liberty?

That the legislative, judicial, and executive powers of government should be independent of each other, is essential to liberty.

This principle entered deeply into our excellent Constitution, and was one of the inducements to the establishment of the Council of Revision, that the judicial and executive of whom it is composed, might have the means of guarding their respective rights, against the encroachments of the legislature, whether by design, "or by haste or unadvisedness." For this and other purposes, all bills, which have passed the Senate and Assembly, before they become laws, are to be presented to the council for their revisal and consideration; that if it should appear improper to them that any bill should become a law, it may be returned with their objections for further consideration, and become subject to the approbation of two-thirds of the members of each House, before it can be a law.

From this passage of our Constitution, Mr. Attorney seems to regard this determination of the Council of Revision on the law in question,

in the light of a judicial decision, by which this court ought to be guided, for the sake of uniformity in the dispensation of justice. But surely the respect, which we owe to this honorable council, ought not to carry us such lengths; it is not to be supposed, that their assent or objection to a bill can have the force of an adjudication; for what in such a case would be the fate of a law which prevailed against their sentiments? Besides, in the hurry of a session, and especially *flagrante bello*, they have neither leisure nor means to weigh the extent and consequences of a law whose provisions are general, at least not with that accuracy and solemnity which must be necessary to render their reasons incontrovertible, and their opinions absolute. The institution of this council is sufficiently useful and salutary, without ascribing to their proceedings, effects so extraordinary; nor is it probable, that the high judicial powers themselves, would in the seat of judgment always be precluded, even by their own opinion given in the Council of Revision; for instance, if they had consented to a bill, general in its provision, and in the administration of justice they discovered that, according to the letter, it comprehended cases which rendered its operation unseasonable, mischievous, and contrary to the intention of the legislature, would they not give relief? Surely it cannot be questioned.

Upon the whole, this being a statute is obligatory, and being general in its provisions, collateral matter arises out of the general words, which happens to be unseasonable. The court is therefore bound to conclude, that such a consequence was not foreseen by the legislature, to explain it by equity, and to disregard it in that point only, where it would operate thus unseasonably.

The questions then, whether this statute hath in any respect revoked the law of nations, or is repealed by the definitive treaty of peace, or foreign to the circumstances of the case: neither will happen, nor ought to be apprehended.

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under our consideration doth not contain even the common *non obstante* clause, though it is so frequent in our statute book, — "and it is an established maxim, where two laws are seemingly repugnant, and there be no clause of *non obstante* in the latter, they shall, if possible, have such construction, that the latter may not repeal the former by implication;" fifthly, because although it is a true rule that *posteriores leges prioribus derogant*, to use the language of Sir Thomas Powis in the *Duchess of Hamilton's Case*, — at the same time it must be remembered, that repeals by implication are disfavored by law, and never allowed of but where the inconsistency and repugnancy are plain, glaring, and unavoidable: for these repeals carry along with them a tacit reflection upon the legislature, that they should ignorantly, and without knowing it, make one Act repugnant to and inconsistent with another; and such repeals have ever been interpreted so as to repeal as little of the precedent law as possible.

The plaintiff's counsel, who themselves argued in favor of this last proposition, adduced several authorities to support it.

Whoever then is clearly exempted from the operation of this statute by the law of nations, this court must take it for granted, could never have been intended to be comprehended within it by the legislature. . . .

We have gone further perhaps into many important subjects, which have been brought into view by this controversy, than was strictly necessary; but it is time that the law of nations and the nature and effects of treaties should be understood: and in the infancy of our republic, every proper opportunity should be embraced to inculcate a sense of national obligation, and a reverence for institutions, on which the tranquillity of mankind, considered as members of different States and communities, so essentially depends.

Besides the maxim *interest reipublicæ ut sit finis litium*, never applied more forcibly than it now doth to us in our present circumstances; and it is hoped by being thus explicit, we may ease the minds of a multitude of suitors whose causes are depending here under this statute — at all events we shall relieve this court from an unusual weight of judicial examination, which a want of time renders incompatible with our other public and indispensable duties.

Upon the whole, it is the opinion of this court, that the plea of the defendant as to the occupancy of the plaintiff's brew-house and malt-house, between the 28th day of September, 1778, and the last day of April, 1780; and the last plea of the defendant as to the whole of the trespass, charged in the plaintiff's declaration, are insufficient in the law; and that only the plea of the defendant in justification of the occupancy between the last day of April, 1780, and the 17th day of March, 1783, is good and sufficient in the law.

Let judgment be entered accordingly.[1]

[1] See Mr. Dawson's introduction for an account of the excitement to which this opinion gave rise. A meeting was called, and an address "To the People of the

TREVETT *v.* WEEDEN.[1] not applic.

SUPERIOR COURT OF JUDICATURE OF RHODE ISLAND. 1786.

UPON the last Monday of September, in the eleventh year of the Independence of the United States, in the city of Newport, and State of Rhode Island, &c., was heard, before the Superior Court of Judicature, Court of Assize, and General Jail-Delivery, a certain information, John Trevett against John Weeden, for refusing to receive the paper bills of this State, in payment for meat sold in market, equivalent to silver or gold; and upon the day following, the court delivered the unanimous opinion of the judges, that the information was not cognizable before them. [Coxe (Jud. Power and Unconst. Legis. 245) adds this: "The following constitutes the whole of the brief extant report of what was said by them:[2] 'The court adjourned to next morning, upon opening of which, Judge Howell, in a firm, sen-

States" was issued Nov. 4, 1784, bitterly complaining of the decision. The writers say: "From what has been said we think that no one can doubt of the meaning of the law. It remains to inquire whether a court of judicature can consistently, with our Constitution and laws, adjudge contrary to the plain and obvious meaning of a statute. That the Mayor's Courts have done so in this case we think is manifest from the aforegoing remarks. That there should be a power vested in courts of judicature, whereby they might control the supreme legislative power, we think is absurd in itself. Such power in courts would be destructive of liberty, and remove all security of property. The design of courts of justice in our government from the very nature of their institution, is to *declare* laws, not to *alter* them. Whenever they depart from this design of their institution, they confound legislative and judicial powers. The laws govern where a government is free; and every citizen knows what remedy the laws give him for every injury. But this cannot be the case where courts, if they deem a law to be unreasonable, may set it aside. Here, however plainly the law may be in his favor, he cannot be certain of redress until he has the opinion of the court." This address was signed by Melancton Smith, Thomas Tucker, Peter Riker, Daniel Shaw, Jonathan Lawrence, Adam Gilchrist, Jr., Anthony Rutgers, John Wiley, Peter T. Curtenius. The House of Assembly of the State at about the same time, by a vote of 25 to 15, adopted a preamble and the following resolution: "'*Resolved*, that the judgment aforesaid is, in its tendency, subversive of all law and good order, and leads directly to anarchy and confusion; because if a court instituted for the benefit and government of a corporation may take upon them to dispense with and act in direct violation of a plain and known law of the State, all other courts, either superior or inferior, may do the like; and therewith will end all our dear-bought rights and privileges, and legislatures become useless.' It is said," continues the editor, "that Mr. Waddington, alarmed at these manifestations, and at the threatened appeal and writ of error, soon after compromised with Mrs. Rutgers; and the entire subject became matter of history, and, soon after, was entirely forgotten by the great body of those who were most interested in the great political principles which have been involved — even those who had been most active in condemning the action of the court, appear to have thought no more of the subject."

For comments on this case see Coxe, Jud. Power & Unconst. Legis. 223. See also the *Symsbury Case*, Kirby (Conn.), 444, 447 (1785), and *Ib.* 452 (1784). — ED.

[1] Pamphlet, by James M. Varnum. Providence: John Carter. 1787. An account of the case is given in 2 Chandler's Crim Tr. 269. — ED.

[2] Providence "Gazette," Oct. 7, 1786: compare American Museum, vol. 5, p. 36.

sible, and judicious speech, assigned the reasons which induced him to be of the opinion that the information was not cognizable by the court — declared himself independent as a judge — the penal law to be repugnant[1] and unconstitutional — and therefore gave it as his opinion that the court could not take cognizance of the information! Judge Devol was of the same opinion. Judge Tillinghast took notice of the striking repugnancy of the expressions of the act — Without trial by jury, according to the laws of the land — and on that ground gave his judgment the same way. Judge Hazard voted against taking cognizance. The Chief Justice declared the judgment of the court without giving his own opinion.' "]

That this important decision may be fully comprehended, it will be necessary to recur to the Acts of the General Assembly, which superinduced the trial. At the last May session, an Act was made for emitting the sum of one hundred thousand pounds, lawful money, in bills, upon land security, which should pass in all kinds of business and payments of former contracts, upon par with silver and gold, estimating an ounce of coined silver at six shillings and eightpence. Another Act was passed in the June following, subjecting every person who should refuse the bills in payment for articles offered for sale, or should make a distinction in value between them and silver and gold, or who should in any manner attempt to depreciate them, to a penalty of one hundred pounds, lawful money; one moiety to the State, and the other moiety to the informer; to be recovered before either of the Courts of General Sessions of the Peace, or the Superior Court of Judicature, &c.

Experience soon evinced the inadequacy of this measure to the objects of the administration: and at a session of the General Assembly, specially convened by his Excellency the Governor, upon the third Monday of the following August, another Act was passed, in addition to and amendment of that last mentioned, wherein it is provided, that the fine of one hundred pounds be varied; and that for the future the fine should not be less than six, nor exceed thirty pounds, for the first offence. The mode of prosecution and trial was also changed, agreeably to the following clauses: "That the complainant shall apply to either of the judges of the Superior Court of Judicature, &c., within this State, or to either of the judges of the Inferior Court of Common Pleas within the county where such offence shall be committed, and lodge his certain information, which shall be issued by the judge in the following form," &c. It is then provided, that the person complained of come before a court to be specially convened by the judge, in three days; "that the said court, when so convened, shall proceed to the trial of said offender, and they are hereby authorized so to do, without any jury, by a majority of the judges present, according to the laws of the land, and to make adjudication and determination, and that three members be sufficient to constitute a court, and that the judgment of

[1] "Unjust," in the Museum's text.

the court, if against the offender so complained of, be forthwith complied with, or that he stand committed to the county jail, where the said court may be sitting, till sentence be performed, and that the said judgment of said court shall be final and conclusive, and from which there shall be no appeal; and in said process no essoin, protection, privilege, or injunction shall be in anywise prayed, granted, or allowed."

In consequence of a supposed violation of this Act, John Trevett exhibited his complaint to the Hon. Paul Mumford, Esq., Chief Justice of the Superior Court, at his chamber, who caused a special court to be convened; but as the information was given during the term of the court, it was referred into the term for consideration and final determination.

John Weeden, being demanded and present in court, made the following answer: "That it appears by the Act of the General Assembly, whereon said information is founded, that the said Act hath expired, and hath no force: also, for that by the said Act the matters of complaint are made triable before special courts, uncontrollable by the Supreme Judiciary Court of the State; and also for that the court is not, by said Act, authorized and empowered to impanel a jury to try the facts charged in the information; and so the same is unconstitutional and void." . . . [Omitting only the verbatim report of the writer's argument, the report continues at page 37 as follows]: —

The consequences of the foregoing determination were immediately felt. The shops and stores were generally opened, and business assumed a cheerful aspect. Few were the exceptions to a general congratulation, and lavish indeed were the praises bestowed upon the court. The dread and the idea of informations were banished together, while a most perfect confidence was placed in judicial security. The paper currency obtained a more extensive circulation, as every one found himself at liberty to receive or refuse it. The markets, which had been illy supplied, were now amply furnished, and the spirit of industry was generally diffused. Every prospect teemed with returning happiness, and nothing appeared wanting to restore union and harmony among the contending parties.

The demon however of discord was not entirely subdued; for upon the next succeeding week a summons was issued from both Houses of Assembly, requiring an immediate attendance of the judges, "to render their reasons for adjudging an Act of the General Assembly unconstitutional, and so void." Three of the judges attended, the other two being unwell. This circumstance induced the Assembly to dismiss them at that time, but they were directed to appear at the October session next following.

Accordingly three of the judges attended, and gave notice in writing to both Houses, "that they waited their pleasure." They were informed that the Assembly was ready to hear them, and would proceed immediately upon the business for which they were in attendance.

Certain ceremonies being adjusted, and the records of the court produced, the Honorable Mr. Howell, the youngest justice, addressed himself to the Assembly in a very learned, sensible, and elaborate discourse, in which he was upwards of six hours upon the floor.

He observed, that the order by which the judges were before the House might be considered as calling upon them to assist in matters of legislation, or to render the reasons of their judicial determination, as being accountable to the legislature for their judgment.

That in the former point of view, the court was ever ready, as constituting the legal counsellors of the State, to render every kind of assistance to the legislative, in framing new or repealing former laws: [1] but that for the reasons of their judgment upon any question judicially before them, they were accountable only to God and their own consciences.

Under the first head, the honorable gentleman pointed out the objectionable parts of the Act upon which the information was founded, and most clearly demonstrated, by a variety of conclusive arguments, that it was unconstitutional, had not the force of a law, and could not be executed. His arguments were enforced by many authorities of the first eminence, in addition to those produced upon the trial. But as this part of the subject hath in a great measure been anticipated, we shall not enter into a further detail, concluding that the legal defence of the court, in showing "that they were not accountable to the legislature for the reasons of their judgment," will be more interesting to the public.

Here it was observed, that the legislature had assumed a fact, in their summons to the judges, which was not justified or warranted by the records. The plea of the defendant, in a matter of mere surplusage, mentions the Act of the General Assembly as "unconstitutional, and so void;" but the judgment of the court simply is, "that the information is not cognizable before them." Hence it appears that the plea hath been mistaken for the judgment.

Whatever might have been the opinion of the judges, they spoke by their records, which admitted of no addition or diminution. They might have been influenced respectively by different reasons, as the whole Act was judicially before them, of which, it being general, they could judge by inspection, without confining themselves to the particular points stated in the plea. It would be out of the power, therefore, of the General Assembly to determine upon the propriety of the court's judgment, without a particular explanation. If this could be required in one instance, it might in all; and so the legislative would become the Supreme Judiciary. A perversion of power totally subversive of civil liberty!

If it be conceded, that the equal distribution of justice is as requisite to answer the purposes of government as the enacting of salutary laws,

[1] See *infra*, Note on Advisory Opinions, p. 175. — Ed.

it is evident that the judiciary power should be as independent as the legislative. And consequently the judges cannot be answerable for their opinion, unless charged with criminality. . . .

JUDGE TILLINGHAST observed, that nothing could have induced the gentlemen of the court to accept the office to which they were appointed, but a regard to the public good; that their perquisites were trifling, and their salaries not worth mentioning. The only recompense they expected, or could receive, was a consciousness of rectitude, which had supported them, and he was confident would support them, through every change of circumstances; that melancholy indeed would be the condition of the citizens, if the Supreme Judiciary of the State was liable to reprehension, whenever the caprice or the resentment of a few leading men should direct a public inquiry!

That, as one member of the court, he felt himself perfectly independent, while moving in the circle of his duty; and however he might be affected for the honor of the State, he was wholly indifferent about any consequences that might possibly respect himself.

That the opinion he had given resulted from mature reflection and the clearest conviction; that his conscience testified to the purity of his intentions, and he was happy in the persuasion, that his conduct met the approbation of his God!

JUDGE HAZARD. My brethren have so fully declared my sentiments upon this occasion, that I have nothing to add by way of argument. It gives me pain that the conduct of the court seems to have met the displeasure of the administration. But their obligations were of too sacred a nature for them to aim at pleasing but in the line of their duty.

It is well known that my sentiments have fully accorded with the general system of the legislature in emitting the paper currency; but I never did, I never will, depart from the character of an honest man, to support any measures, however agreeable in themselves. If there could have been a prepossession in my mind, it must have been in favor of the Act of the General Assembly; but it was not possible to resist the force of conviction. The opinion I gave upon the trial was dictated by the energy of truth: I thought it right — I still think so. Be it as it may, we derived our understanding from the Almighty, and to Him only are we accountable for our judgment.

To the observations of the judges, succeeded a very serious and interesting debate among the members, wherein many arguments and observations were adduced on both sides. At length a question was taken, "whether the Assembly was satisfied with the reasons given by the judges in support of their judgment?" It was determined in the negative.

A motion was then made, and seconded, "for dismissing the judges from their office." . . . [A memorial and protest from the judges, dated Nov. 4, 1786, was here presented to the Assembly, and Mr. Varnum was allowed to address the House in support of it.]

The claim and demand of the judges, as stated in their memorial,

and enforced by their counsel, were followed by a concise, but rational debate, in which the fury of passion, excepting in one or two instances, surrendered to cool reflection, and prepared the way for vindicating the honor of the law, and the dignity of the State. In vain did any endeavor to recall the mind to a predetermined resolution! Truth, "which is lodged in a secret corner of the heart," exerted her gentle influence, while prejudice and malice retired abashed!

A motion was made by an honorable member, seconded, and agreed to, that the opinion of the Attorney-General be taken, and the sentiments of the other professional gentlemen requested, whether constitutionally, and agreeably to law, the General Assembly can suspend, or remove from office, the judges of the Supreme Judiciary Court, without a previous charge and statement of criminality, due process, trial, and conviction thereon? . . . [Addresses were then made by "Mr. Channing, the Attorney-General," and three others, to the effect that the judges could only be removed by impeachment or other regular process.] The two professional gentlemen in the House, the Honorable Mr. Marchant and Mr. Bourne, confirmed the sentiments of their brethren, in the leading points, by a masterly display of legal talents.

The only question remaining was, whether the judges should be discharged from any further attendance upon the General Assembly, as no accusation appeared against them? The question was put, and decided by a very great majority, "that as the judges are not charged with any criminality in rendering the judgment, upon the information, Trevett against Weeden, they are therefore discharged from any further attendance upon this Assembly, on that account." [1]

DEN d. BAYARD AND WIFE *v.* SINGLETON.

COURT OF CONFERENCE OF NORTH CAROLINA.[2] 1787.

[1 *Martin, N. C.* 42.]

EJECTMENT. This action was brought for the recovery of a valuable house and lot, with a wharf and other appurtenances, situate in the town of Newbern.

The defendant pleaded *Not guilty*, under the common rule.

He held under a title derived from the State, by a deed, from a Superintendent Commissioner of confiscated estates.

At May Term, 1786, *Nash*, for the defendant, moved that the suit

[1] Coxe, Jud. Power and Unconst. Legis., 237–38 (and so *passim*), treats this case as one arising under an unwritten constitution. This view seems to be inadmissible. Before the Revolution, the charter of Rhode Island, so far as it went, was a written constitution. It continued to have the same character throughout. — ED.

[2] This seems to have been the name of the highest court in the State, before 1805. But the name is not given in Martin's Reports. See 4 *Green Bag*, 457. — ED.

be dismissed, according to an Act of the last session, entitled an Act to secure and quiet in their possession all such persons, their heirs and assigns, who have purchased or may hereafter purchase lands and tenements, goods and chattels, which have been sold or may hereafter be sold by commissioners of forfeited estates, legally appointed for that purpose, 1785, 7, 553.

The Act requires the courts, in all cases where the defendant makes affidavit that he holds the disputed property under a sale from a commissioner of forfeited estates, to dismiss the suit on motion.

The defendant had filed an affidavit, setting forth that the property in dispute had been confiscated and sold by the commissioner of the district.

This brought on long arguments from the counsel on each side, on constitutional points.

The court made a few observations on our Constitution and system of government.

ASHE, J. observed, that at the time of our separation from Great Britain, we were thrown into a similar situation with a set of people shipwrecked and cast on a marooned island, — without laws, without magistrates, without government, or any legal authority — that being thus circumstanced, the people of this country, with a general union of sentiment, by their delegates, met in Congress, and formed that system or those fundamental principles comprised in the Constitution, dividing the powers of government into separate and distinct branches, to wit: the legislative, the judicial, and executive, and assigning to each, several and distinct powers, and prescribing their several limits and boundaries: this he said without disclosing a single sentiment upon the cause of the proceeding, or the law introduced in support of it. *Cur. adv. vult.*

At May Term, 1787, *Nash's* motion was resumed, and produced a very lengthy debate from the Bar.

Whereupon the court recommended to the parties to consent to a fair decision of the property in question, by a jury according to the common law of the land, and pointed out to the defendant the uncertainty that would always attend his title, if this cause should be dismissed without a trial; as upon a repeal of the present Act (which would probably happen sooner or later), suit might be again commenced against him for the same property, at the time when evidences, which at present were easy to be had, might be wanting. But this recommendation was without effect.

Another mode was proposed for putting the matter in controversy on a more constitutional footing for a decision, than that of the motion under the aforesa[illegible] The court then, after every reasonable endeavor had been us[illegible] in vain for avoiding a disagreeable difference between the legislature and the judicial powers of the State, at length with much apparent reluctance, but with great deliberation and

firmness, gave their opinion separately, but unanimously, for overruling the aforementioned motion for the dismission of the said suits.

In the course of which the judges observed, that the obligation of their oaths, and the duty of their office required them, in that situation, to give their opinion on that important and momentous subject; and that notwithstanding the great reluctance they might feel against involving themselves in a dispute with the legislature of the State, yet no object of concern or respect could come in competition or authorize them to dispense with the duty they owed the public, in consequence of the trust they were invested with under the solemnity of their oaths.

That they therefore were bound to declare that they considered, that whatever disabilities the persons under whom the plaintiffs were said to derive their titles, might justly have incurred, against their maintaining or prosecuting any suits in the courts of this State; yet that such disabilities in their nature were merely personal, and not by any means capable of being transferred to the present plaintiffs, either by descent or purchase; and that these plaintiffs, being citizens of one of the United States, are citizens of this State, by the confederation of all the States; which is to be taken as a part of the law of the land, unrepealable by any Act of the General Assembly.

That by the Constitution every citizen had undoubtedly a right to a decision of his property by a trial by jury. For that if the legislature could take away this right, and require him to stand condemned in his property without a trial, it might with as much authority require his life to be taken away without a trial by jury, and that he should stand condemned to die, without the formality of any trial at all; that if the members of the General Assembly could do this, they might with equal authority, not only render themselves the legislators of the State for life, without any further election of the people, from thence transmit the dignity and authority of legislation down to their heirs male forever.

But that it was clear, that no Act they could pass, could by any means repeal or alter the Constitution, because, if they could do this, they would at the same instant of time destroy their own existence as a legislature, and dissolve the government thereby established. Consequently the Constitution (which the judicial power was bound to take notice of as much as of any other law whatever), standing in full force as the fundamental law of the land, notwithstanding the Act on which the present motion was grounded, the same act must of course, in that instance, stand as abrogated and without any effect.

Nash's motion was overruled.

And at this term the cause was tried. . . .

[The rest of the case, being immaterial as regards the present topic, is omitted.][1]

[1] See Coxe's comments on this case, Jud. Power & Unconst. Legis., 248 *et seq.*; and especially the letters of Iredell, afterwards a judge of the Supreme Court of the

WEDNESDAY, March 21, 1787. . . . On the report of the Secretary to the United States for the Department of Foreign Affairs . . . Congress unanimously agreed to the following resolutions: —

Resolved, That the legislatures of the several States cannot of right pass any Act or Acts, for interpreting, explaining, or construing a national treaty or any part or clause of it; nor for restraining, limiting, or in any manner impeding, retarding, or counteracting the operation and execution of the same; for that on being constitutionally made, ratified, and published, they become in virtue of the confederation, part of the law of the land, and are not only independent of the will and power of such legislatures, but also binding and obligatory on them.

Resolved, That all such Acts or parts of Acts as may be now existing in any of the States, repugnant to the treaty of peace, ought to be forthwith repealed, as well to prevent their continuing to be regarded as violations of that treaty, as to avoid the disagreeable necessity there might otherwise be of raising and discussing questions touching their validity and obligation.

Resolved, That it be recommended to the several States to make such repeal rather by describing than reciting the said Acts, and for that purpose to pass an Act declaring in general terms, that all such Acts and parts of Acts, repugnant to the treaty of peace between the United States and his Britannic Majesty, or any article thereof, shall be, and thereby are repealed, and that the courts of law and equity in all causes and questions cognizable by them respectively, and arising from or touching the said treaty, shall decide and adjudge according to the true intent and meaning of the same, anything in the said Acts or parts of Acts to the contrary thereof in anywise notwithstanding. — 12 *Journals of Congress* (ed. 1801), 23; COXE, *Jud. Power and Unconst. Leg.*, 387.

Friday, April 13, 1787. . . . The Secretary for Foreign Affairs having, in pursuance of an order of Congress, reported the draught of a letter to the States accompanying the resolutions, passed the 21st day of March, 1787, the same was taken into consideration and unanimously agreed to as follows: . . . Our national Constitution having committed to us the management of the national concerns with foreign States and powers, it is our duty to take care that all the rights which they ought to enjoy within our jurisdiction by the laws of nations and the faith of treaties, remain inviolate. . . .

Let it be remembered that the Thirteen Independent Sovereign States have, by express delegation of power, formed and vested in us a general, though limited, sovereignty, for the general and national purposes specified in the confederation. In this sovereignty they cannot severally participate (except by their delegates) nor with it have concurrent

United States, written in August, 1786, and August, 1787, and reprinted by Coxe (pp. 253–263) from McRee's Life and Correspondence of James Iredell. — ED.

jurisdiction; for the ninth article of the confederation most expressly conveys to us the sole and exclusive right and power of determining on war and peace, and of entering into treaties and alliances, &c.

When, therefore, a treaty is constitutionally made, ratified, and published by us, it immediately becomes binding on the whole nation, and superadded to the laws of the land, without the intervention of State legislatures. Treaties derive their obligation from being compacts between the sovereign of this and the sovereign of another nation; whereas laws or statutes derive their force from being the Acts of a legislature competent to the passing of them. Hence it is clear that treaties must be implicitly received and observed by every member of the nation; for as State legislatures are not competent to the making of such compacts or treaties, so neither are they competent in that capacity, authoritatively to decide on or ascertain the construction and sense of them. When doubts arise respecting the construction of State laws, it is not unusual nor improper for the State legislatures, by explanatory or declaratory Acts to remove those doubts. But the case between laws and compacts or treaties is in this widely different; for when doubts arise respecting the sense and meaning of a treaty, they are so far from being cognizable by a State legislature, that the United States in Congress assembled, have no authority to settle and determine them; for as the legislature only, which constitutionally passes a law, has power to revise and amend it, so the sovereigns only, who are parties to the treaty, have power by mutual consent and posterior articles, to correct or explain it. . . .

How far such legislative Acts would be valid and obligatory even within the limits of the State passing them, is a question which we hope never to have occasion to discuss. Certain, however, it is that such Acts cannot bind either of the contracting sovereigns, and consequently cannot be obligatory on their respective nations. . . .

Thus much we think it useful to observe, in order to explain the principles on which we have unanimously come to the following resolution, *viz.* . . . [Here is recited the first of the three resolutions given above.]

As the treaty of peace, so far as it respects the matters and things provided for in it, is a law to the United States which cannot by all or any of them be altered or changed, all State Acts establishing provisions relative to the same objects which are incompatible with it, must in every point of view be improper. Such Acts do nevertheless exist; but we do not think it necessary either to enumerate them particularly, or to make them severally the subjects of discussion. It appears to us sufficient to observe and insist, that the treaty ought to have free course in its operation and execution, and that all obstacles interposed by State Acts be removed. We mean to act with the most scrupulous regard to justice and candor towards Great Britain, and with an equal degree of delicacy, moderation, and decision towards the States who have given occasion to these discussions.

For these reasons we have in general terms . . . [Here the second resolution is inserted.]

Although this resolution applies strictly only to such of the States as have passed the exceptionable Acts alluded to, yet to obviate all future disputes and questions, as well as to remove those which now exist, we think it best that every State without exception should pass a law on the subject. We have therefore . . . [Here the third resolution is inserted.]

Such laws would answer every purpose and be easily formed. The more they were of the like tenor throughout the States the better. They might each recite . . . [Here is inserted the draught of a statute, embodying what the resolutions advised.]

Such a general law would, we think, be preferable to one that should minutely enumerate the Acts and clauses intended to be repealed, because omissions might accidentally be made in the enumeration, or questions might arise, and perhaps not be satisfactorily determined, respecting particular Acts or clauses, about which contrary opinions may be entertained. By repealing in general terms all Acts and clauses repugnant to the treaty, the business will be turned over to its proper department, *viz.*, the judicial, and the courts of law will find no difficulty in deciding whether any particular Act or clause is or is not contrary to the treaty. . .

By order of Congress.

(Signed) ARTHUR ST. CLAIR, President.[1]

— *Ib.* 32; COXE, *ubi supra*, 388.

NOTE.

PASSAGES FROM THE FEDERALIST.

ONE of the principal objections inculcated by the more respectable adversaries to the Constitution, is its supposed violation of the political maxim, that the legislative, executive, and judiciary departments ought to be separate and distinct. . . . In order to form correct ideas on this important subject, it will be proper to investigate the sense in which the preservation of liberty requires that the three great departments of power should be separate and distinct. The oracle who is always consulted and cited on this subject is the celebrated Montesquieu. If he be not the author of this invaluable precept in the science of politics, he has the merit at least of displaying and recommending it most effectually to the attention of mankind. Let us endeavor, in the first place, to ascertain his meaning on this point. The British Constitution was to Montesquieu what Homer has been to the didactic writers on epic poetry. . . . This great political critic appears to have viewed the Constitution of England as the standard, or to use his own expression, as the mirror of political liberty; and to have delivered, in the form of elementary truths, the several characteristic principles of that particular system. That we may be sure, then, not to mistake his meaning in this case, let us

[1] See Mass. Stat. 1786, c. 86, passed, in the form recommended by Congress, on April 30, 1787. — ED.

recur to the source from which the maxim was drawn. On the slightest view of the British Constitution, we must perceive that the legislative, executive, and judiciary departments are by no means totally separate and distinct from each other. The executive magistrate forms an integral part of the legislative authority. He alone has the prerogative of making treaties with foreign sovereigns, which, when made, have, under certain limitations, the force of legislative Acts. All the members of the judiciary department are appointed by him, can be removed by him on the address of the two Houses of Parliament, and form, when he pleases to consult them, one of his constitutional councils. One branch of the legislative department forms also a great constitutional council to the executive chief, as, on another hand, it is the sole depositary of judicial power in cases of impeachment, and is invested with the supreme appellate jurisdiction in all other cases. The judges, again, are so far connected with the legislative department as often to attend and participate in its deliberations, though not admitted to a legislative vote. From these facts, by which Montesquieu was guided, it may clearly be inferred that, in saying "There can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates," or, "if the power of judging be not separated from the legislative and executive powers," he did not mean that these departments ought to have no partial agency in, or no control over, the acts of each other. His meaning, as his own words import, and still more conclusively as illustrated by the example in his eye, can amount to no more than this, that where the whole power of one department is exercised by the same hands which possess the whole power of another department, the fundamental principles of a free constitution are subverted. . . . If we look into the constitutions of the several States, we find that, notwithstanding the emphatical and, in some instances, the unqualified terms in which this axiom has been laid down, there is not a single instance in which the several departments of power have been kept absolutely separate and distinct. — *The Federalist* (Lodge's ed.), No. 47 [1] (MADISON).

It is agreed on all sides, that the powers properly belonging to one of the departments ought not to be directly and completely administered by either of the other departments. It is equally evident, that none of them ought to possess, directly or indirectly, an overruling influence over the others, in the administration of their respective powers. It will not be denied, that power is of an encroaching nature, and that it ought to be effectually restrained from passing the limits assigned to it. After discriminating, therefore, in theory, the several classes of power, as they may in their nature be legislative, executive, or judiciary, the next and most difficult task is to provide some practical security for each, against the invasion of the others. What this security ought to be, is the great problem to be solved. Will it be sufficient to mark, with precision, the boundaries of these departments, in the constitution of the government, and to trust to these parchment barriers against the encroaching spirit of power? This is the security which appears to have been principally relied on by the compilers of most of the American constitutions. But experience assures us, that the efficacy of the provision has been greatly overrated; and that some more adequate defence is indispensably necessary for the more feeble, against the more powerful, members of the government. The legislative department is everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex. . . . In a representative republic, where the executive magistracy is carefully limited, both in the extent and the duration of its power; and where the legislative power is exercised by an assembly, which is inspired, by a supposed influence over the people, with an intrepid confidence in its own strength; which is sufficiently numerous to feel all the passions which actuate a multitude, yet not so numerous as to be incapable of pursuing the objects of its passions, by means which reason prescribes; it is against the enterprising ambition of this department that the people ought to indulge all their jealousy and exhaust all

[1] For comments on the Federalist, a collection of papers published at intervals in 1787 and 1788, with the object of securing the adoption of the Federal Constitution, see Maine, Popular Govt., Essay IV. I have inserted here all such parts of the Federalist as seem important for the purposes of this book. — ED.

their precautions. The legislative department derives a superiority in our governments from other circumstances. Its constitutional powers being at once more extensive, and less susceptible of precise limits, it can, with the greater facility, mask, under complicated and indirect measures, the encroachments which it makes on the co-ordinate departments. It is not unfrequently a question of real nicety in legislative bodies, whether the operation of a particular measure will, or will not, extend beyond the legislative sphere. On the other side, the executive power being restrained within a narrower compass, and being more simple in its nature, and the judiciary being described by landmarks still less uncertain, projects of usurpation by either of these departments would immediately betray and defeat themselves. Nor is this all: as the legislative department alone has access to the pockets of the people, and has in some constitutions full discretion, and in all a prevailing influence, over the pecuniary rewards of those who fill the other departments, a dependence is thus created in the latter, which gives still greater facility to encroachments of the former. — *Ib.* No. 48 (MADISON).

To what expedient, then, shall we finally resort, for maintaining in practice the necessary partition of power among the several departments, as laid down in the Constitution? The only answer that can be given is, that as all these exterior provisions are found to be inadequate, the defect must be supplied, by so contriving the interior structure of the government as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places. — Without presuming to undertake a full development of this important idea, I will hazard a few general observations, which may perhaps place it in a clearer light, and enable us to form a more correct judgment of the principles and structure of the government planned by the convention. In order to lay a due foundation for that separate and distinct exercise of the different powers of government, which to a certain extent is admitted on all hands to be essential to the preservation of liberty, it is evident that each department should have a will of its own; and consequently should be so constituted that the members of each should have as little agency as possible in the appointment of the members of the others. Were this principle rigorously adhered to, it would require that all the appointments for the supreme executive, legislative, and judiciary magistracies should be drawn from the same fountain of authority, the people, through channels having no communication whatever with one another. Perhaps such a plan of constructing the several departments would be less difficult in practice than it may in contemplation appear. Some difficulties, however, and some additional expense would attend the execution of it. Some deviations, therefore, from the principle must be admitted. In the constitution of the judiciary department in particular, it might be inexpedient to insist rigorously on the principle: first, because peculiar qualifications being essential in the members, the primary consideration ought to be to select that mode of choice which best secures these qualifications; secondly, because the permanent tenure by which the appointments are held in that department, must soon destroy all sense of dependence on the authority conferring them. . . . But the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. . . . A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions. . . . But it is not possible to give to each department an equal power of self-defence. In republican government, the legislative authority necessarily predominates. The remedy for this inconveniency is to divide the legislature into different branches; and to render them, by different modes of election and different principles of action, as little connected with each other as the nature of their common functions and their common dependence on the society will admit. It may even be necessary to guard against dangerous encroachments by still further precautions. As the weight of the legislative authority requires that it should be thus divided, the weakness of the executive may require, on the other hand, that it should be fortified. An absolute negative on the legislature appears, at first view, to be the natural defence with which the executive magistrate should be armed. But

perhaps it would be neither altogether safe nor alone sufficient On ordinary occasions it might not be exerted with the requisite firmness, and on extraordinary occasions it might be perfidiously abused. — *Ib.* No. 51 (HAMILTON or MADISON).

A review of the principal objections that have appeared against the proposed court for the trial of impeachments, will not improbably eradicate the remains of any unfavorable impressions which may still exist in regard to this matter. The first of these objections is, that the provision in question confounds legislative and judiciary authorities in the same body, in violation of that important and well-established maxim which requires a separation between the different departments of power. The true meaning of this maxim has been discussed and ascertained in another place, and has been shown to be entirely compatible with a partial intermixture of those departments for special purposes, preserving them, in the main, distinct and unconnected. This partial intermixture is even, in some cases, not only proper but necessary to the mutual defence of the several members of the government against each other. An absolute or qualified negative in the executive upon the acts of the legislative body, is admitted, by the ablest adepts in political science, to be an indispensable barrier against the encroachments of the latter upon the former. And it may, perhaps, with no less reason be contended, that the powers relating to impeachments are, as before intimated, an essential check in the hands of that body upon the encroachments of the executive. The division of them between the two branches of the legislature, assigning to one the right of accusing, to the other the right of judging, avoids the inconvenience of making the same persons both accusers and judges; and guards against the danger of persecution, from the prevalency of a factious spirit in either of those branches. As the concurrence of two thirds of the Senate will be requisite to a condemnation, the security to innocence, from this additional circumstance, will be as complete as itself can desire. It is curious to observe, with what vehemence this part of the plan is assailed, on the principle here taken notice of, by men who profess to admire, without exception, the Constitution of this State [New York]; while that Constitution makes the Senate, together with the chancellor and judges of the Supreme Court, not only a court of impeachments, but the highest judicatory in the State, in all causes, civil and criminal. The proportion, in point of numbers, of the chancellor and judges to the senators, is so inconsiderable, that the judiciary authority of New York, in the last resort, may, with truth, be said to reside in its Senate. If the plan of the convention be, in this respect, chargeable with a departure from the celebrated maxim which has been so often mentioned, and seems to be so little understood, how much more culpable must be the Constitution of New York.[1] — *Ib.* No. 66 (HAMILTON).

There is an idea, which is not without its advocates, that a vigorous Executive is inconsistent with the genius of republican government. The enlightened well-wishers to this species of government must at least hope that the supposition is destitute of foundation; since they can never admit its truth, without at the same time admitting the condemnation of their own principles. Energy in the Executive is a leading character in the definition of good government. It is essential to the protection of the community against foreign attacks; it is not less essential to the steady administration of the laws; to the protection of property against those irregular and high-handed combinations which sometimes interrupt the ordinary course of justice; to the security of liberty against the enterprises and assaults of ambition, of faction, and of anarchy. Every man the least conversant in Roman story, knows how often that republic was obliged to take refuge in the absolute power of a single man, under the formidable title of Dictator, as well against the intrigues of ambitious individuals who aspired to the tyranny, and the seditions of whole classes of the community whose conduct threatened the existence of all government, as against the invasions of external enemies who menaced the conquest and destruction of Rome. There can be no

[1] In that of New Jersey, also, the final judiciary authority is in a branch of the legislature. In New Hampshire, Massachusetts, Pennsylvania, and South Carolina, one branch of the legislature is the court for the trial of impeachments. — PUBLIUS.

need, however, to multiply arguments or examples on this head. A feeble Executive implies a feeble execution of the government. A feeble execution is but another phrase for a bad execution; and a government ill executed, whatever it may be in theory, must be, in practice, a bad government. Taking it for granted, therefore, that all men of sense will agree in the necessity of an energetic Executive, it will only remain to inquire, what are the ingredients which constitute this energy? How far can they be combined with those other ingredients which constitute safety in the republican sense? And how far does this combination characterize the plan which has been reported by the convention? The ingredients which constitute energy in the Executive are, first, unity; secondly, duration; thirdly, an adequate provision for its support; fourthly, competent powers. The ingredients which constitute safety in the republican sense are, first, a due dependence on the people; secondly, a due responsibility. Those politicians and statesmen who have been the most celebrated for the soundness of their principles and for the justice of their views, have declared in favor of a single Executive and a numerous legislature. They have, with great propriety, considered energy as the most necessary qualification of the former, and have regarded this as most applicable to power in a single hand; while they have, with equal propriety, considered the latter as best adapted to deliberation and wisdom, and best calculated to conciliate the confidence of the people and to secure their privileges and interests. That unity is conducive to energy will not be disputed. Decision, activity, secrecy, and despatch will generally characterize the proceedings of one man in a much more eminent degree than the proceedings of any greater number; and in proportion as the number is increased, these qualities will be diminished. — *Ib.* No. 70 (HAMILTON).

The last of the requisites to energy, which have been enumerated, are competent powers. Let us proceed to consider those which are proposed to be vested in the President of the United States. The first thing that offers itself to our observation, is the qualified negative of the President upon the Acts or resolutions of the two Houses of the legislature; or, in other words, his power of returning all bills with objections, to have the effect of preventing their becoming laws, unless they should afterwards be ratified by two thirds of each of the component members of the legislative body. The propensity of the legislative department to intrude upon the rights, and to absorb the powers, of the other departments, has been already suggested and repeated; the insufficiency of a mere parchment delineation of the boundaries of each, has also been remarked upon; and the necessity of furnishing each with constitutional arms for its own defence, has been inferred and proved. From these clear and indubitable principles results the propriety of a negative, either absolute or qualified, in the Executive, upon the acts of the legislative branches. Without the one or the other, the former would be absolutely unable to defend himself against the depredations of the latter. He might gradually be stripped of his authorities by successive resolutions, or annihilated by a single vote. And in the one mode or the other, the legislative and executive powers might speedily come to be blended in the same hands. If even no propensity had ever discovered itself in the legislative body to invade the rights of the Executive, the rules of just reasoning and theoretic propriety would of themselves teach us, that the one ought not to be left to the mercy of the other, but ought to possess a constitutional and effectual power of self-defence. But the power in question has a further use. It not only serves as a shield to the Executive, but it furnishes an additional security against the enaction of improper laws. It establishes a salutary check upon the legislative body, calculated to guard the community against the effects of faction, precipitancy, or of any impulse unfriendly to the public good, which may happen to influence a majority of that body. — *Ib.* No. 73 (HAMILTON).

The President is to have power, "by and with the advice and consent of the Senate, to make treaties, provided two thirds of the senators present concur" . . . With regard to the intermixture of powers, I shall rely upon the explanations already given in other places, of the true sense of the rule upon which that objection is founded; and shall take it for granted, as an inference from them, that the union of the Executive with the Senate, in the article of treaties, is no infringement of that rule. I venture to add, that

the particular nature of the power of making treaties indicates a peculiar propriety in that union. Though several writers on the subject of government place that power in the class of executive authorities, yet this is evidently an arbitrary disposition; for if we attend carefully to its operation, it will be found to partake more of the legislative than of the executive character, though it does not seem strictly to fall within the definition of either of them. The essence of the legislative authority is to enact laws, or, in other words, to prescribe rules for the regulation of the society; while the execution of the laws, and the employment of the common strength, either for this purpose or for the common defence, seem to comprise all the functions of the executive magistrate. The power of making treaties is, plainly, neither the one nor the other. It relates neither to the execution of the subsisting laws, nor to the enaction of new ones; and still less to an exertion of the common strength. Its objects are contracts with foreign nations, which have the force of law, but derive it from the obligations of good faith. They are not rules prescribed by the sovereign to the subject, but agreements between sovereign and sovereign. The power in question seems therefore to form a distinct department, and to belong, properly, neither to the legislative nor to the Executive. The qualities elsewhere detailed as indispensable in the management of foreign negotiations point out the Executive as the most fit agent in those transactions; while the vast importance of the trust, and the operation of treaties as laws, plead strongly for the participation of the whole or a portion of the legislative body in the office of making them. — *Ib.* No. 75 (HAMILTON).

We have now completed a survey of the structure and powers of the executive department, which, I have endeavored to show, combines, as far as republican principles will admit, all the requisites to energy. The remaining inquiry is: Does it also combine the requisites to safety, in a republican sense, — a due dependence on the people, a due responsibility? The answer to this question has been anticipated in the investigation of its other characteristics, and is satisfactorily deducible from these circumstances; from the election of the President once in four years by persons immediately chosen by the people for that purpose; and from his being at all times liable to impeachment, trial, dismission from office, incapacity to serve in any other, and to forfeiture of life and estate by subsequent prosecution in the common course of law. But these precautions, great as they are, are not the only ones which the plan of the convention has provided in favor of the public security. In the only instances in which the abuse of the executive authority was materially to be feared, the Chief Magistrate of the United States would, by that plan, be subjected to the control of a branch of the legislative body. What more could be desired by an enlightened and reasonable people? — *Ib.* No. 77 (HAMILTON).

We proceed now to an examination of the judiciary department of the proposed government. . . .

According to the plan of the convention, all judges who may be appointed by the United States are to hold their offices during good behavior; which is conformable to the most approved of the State constitutions, and among the rest, to that of this State [New York]. Its propriety having been drawn into question by the adversaries of that plan, is no light symptom of the rage for objection, which disorders their imaginations and judgments. The standard of good behavior for the continuance in office of the judicial magistracy, is certainly one of the most valuable of the modern improvements in the practice of government. In a monarchy it is an excellent barrier to the despotism of the prince; in a republic it is a no less excellent barrier to the encroachments and oppressions of the representative body. And it is the best expedient which can be devised in any government, to secure a steady, upright, and impartial administration of the laws.

Whoever attentively considers the different departments of power must perceive, that, in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them. The Executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties

and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither force nor will, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.

This simple view of the matter suggests several important consequences. It proves incontestably, that the judiciary is beyond comparison the weakest of the three departments of power;[1] that it can never attack with success either of the other two; and that all possible care is requisite to enable it to defend itself against their attacks. It equally proves, that though individual oppression may now and then proceed from the courts of justice, the general liberty of the people can never be endangered from that quarter; I mean so long as the judiciary remains truly distinct from both the legislature and the Executive. For I agree, that "there is no liberty, if the power of judging be not separated from the legislative and Executive powers."[2] And it proves, in the last place, that as liberty can have nothing to fear from the judiciary alone, but would have everything to fear from its union with either of the other departments; that as all the effects of such a union must ensue from a dependence of the former on the latter, notwithstanding a nominal and apparent separation; that as, from the natural feebleness of the judiciary, it is in continual jeopardy of being overpowered, awed, or influenced by its co-ordinate branches; and that as nothing can contribute so much to its firmness and independence as permanency in office, this quality may therefore be justly regarded as an indispensable ingredient in its constitution, and, in a great measure, as the citadel of the public justice and the public security.[3]

The complete independence of the courts of justice is peculiarly essential in a limited constitution. By a limited constitution, I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no *ex-post-facto* laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all Acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.

Some perplexity respecting the rights of the courts to pronounce legislative Acts void, because contrary to the Constitution, has arisen from an imagination that the doctrine would imply a superiority of the judiciary to the legislative power. It is urged that the authority which can declare the Acts of another void, must necessarily be superior to the one whose Acts may be declared void. As this doctrine is of great importance in all the American constitutions, a brief discussion of the ground on which it rests cannot be unacceptable.

There is no position which depends on clearer principles, than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative Act, therefore, contrary to the Constitution, can be valid. To deny this, would be to affirm, that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves; that men acting by virtue of powers, may do not only what their powers do not authorize, but what they forbid.

If it be said that the legislative body are themselves the constitutional judges of their own powers, and that the construction they put upon them is conclusive upon the

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[1] The celebrated Montesquieu, speaking of them, says: "Of the three powers above mentioned, the judiciary is next to nothing." — *Spirit of Laws*, vol. i. page 186. — PUBLIUS.

[2] *Idem*, page 181. — PUBLIUS.

[3] This number of the Federalist was published in May, 1788. In May, 1787, the General Assembly of Rhode Island is said to have removed from office four of the judges who had decided the case of *Trevett* v. *Weeden*, *ante*, p. 73 (2 Arnold's Hist R. I. 536), retaining only the Chief Justice. This is understood to mean that these judges at the annual election by the legislature were dropped. — ED.

other departments, it may be answered, that this cannot be the natural presumption, where it is not to be collected from any particular provisions in the Constitution. It is not otherwise to be supposed, that the Constitution could intend to enable the representatives of the people to substitute their will to that of their constituents. It is far more rational to suppose, that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular Act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.

Nor does this conclusion by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both; and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former. They ought to regulate their decisions by the fundamental laws, rather than by those which are not fundamental

This exercise of judicial discretion, in determining between two contradictory laws, is exemplified in a familiar instance. It not uncommonly happens, that there are two statutes existing at one time, clashing in whole or in part with each other, and neither of them containing any repealing clause or expression. In such a case, it is the province of the courts to liquidate and fix their meaning and operation. So far as they can, by any fair construction, be reconciled to each other, reason and law conspire to dictate that this should be done; where this is impracticable, it becomes a matter of necessity to give effect to one, in exclusion of the other. The rule which has obtained in the courts for determining their relative validity is, that the last in order of time shall be preferred to the first. But this is a mere rule of construction, not derived from any positive law, but from the nature and reason of the thing. It is a rule not enjoined upon the courts by legislative provision, but adopted by themselves, as consonant to truth and propriety, for the direction of their conduct as interpreters of the law. They thought it reasonable, that between the interfering acts of an equal authority, that which was the last indication of its will should have the preference.

But in regard to the interfering acts of a superior and subordinate authority, of an original and derivative power, the nature and reason of the thing indicate the converse of that rule as proper to be followed. They teach us that the prior act of a superior ought to be preferred to the subsequent act of an inferior and subordinate authority; and that accordingly, whenever a particular statute contravenes the Constitution, it will be the duty of the judicial tribunals to adhere to the latter and disregard the former.

It can be of no weight to say that the courts, on the pretence of a repugnancy, may substitute their own pleasure to the constitutional intentions of the legislature. This might as well happen in the case of two contradictory statutes; or it might as well happen in every adjudication upon any single statute. The courts must declare the sense of the law; and if they should be disposed to exercise will instead of judgment, the consequence would equally be the substitution of their pleasure to that of the legislative body. The observation, if it prove anything, would prove that there ought to be no judges distinct from that body.

If, then, the courts of justice are to be considered as the bulwarks of a limited constitution against legislative encroachments, this consideration will afford a strong argument for the permanent tenure of judicial offices, since nothing will contribute so much as this to that independent spirit in the judges which must be essential to the faithful performance of so arduous a duty.

This independence of the judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors, which the arts of design-

ing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves, and which, though they speedily give place to better information, and more deliberate reflection, have a tendency, in the mean time, to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community. Though I trust the friends of the proposed Constitution will never concur with its enemies,[1] in questioning that fundamental principle of republican government, which admits the right of the people to alter or abolish the established Constitution, whenever they find it inconsistent with their happiness, yet it is not to be inferred from this principle, that the representatives of the people, whenever a momentary inclination happens to lay hold of a majority of their constituents, incompatible with the provisions in the existing Constitution, would, on that account, be justifiable in a violation of those provisions; or that the courts would be under a greater obligation to connive at infractions in this shape, than when they had proceeded wholly from the cabals of the representative body. Until the people have, by some solemn and authoritative Act, annulled or changed the established form, it is binding upon themselves collectively, as well as individually; and no presumption, or even knowledge, of their sentiments, can warrant their representatives in a departure from it, prior to such an Act. But it is easy to see, that it would require an uncommon portion of fortitude in the judges to do their duty as faithful guardians of the Constitution, where legislative invasions of it had been instigated by the major voice of the community.

But it is not with a view to infractions of the Constitution only, that the independence of the judges may be an essential safeguard against the effects of occasional ill humors in the society. These sometimes extend no farther than to the injury of the private rights of particular classes of citizens, by unjust and partial laws. Here also the firmness of the judicial magistracy is of vast importance in mitigating the severity and confining the operation of such laws. It not only serves to moderate the immediate mischiefs of those which may have been passed, but it operates as a check upon the legislative body in passing them; who, perceiving that obstacles to the success of iniquitous intention are to be expected from the scruples of the courts, are in a manner compelled, by the very motives of the injustice they meditate, to qualify their attempts. This is a circumstance calculated to have more influence upon the character of our governments, than but few may be aware of. The benefits of the integrity and moderation of the judiciary have already been felt in more States than one; and though they may have displeased those whose sinister expectations they may have disappointed, they must have commanded the esteem and applause of all the virtuous and disinterested. Considerate men, of every description, ought to prize whatever will tend to beget or fortify that temper in the courts; as no man can be sure that he may not be to-morrow the victim of a spirit of injustice, by which he may be a gainer to-day. And every man must now feel, that the inevitable tendency of such a spirit is to sap the foundations of public and private confidence, and to introduce in its stead universal distrust and distress.

That inflexible and uniform adherence to the rights of the Constitution, and of individuals, which we perceive to be indispensable in the courts of justice, can certainly not be expected from judges who hold their offices by a temporary commission. Periodical appointments, however regulated, or by whomsoever made, would, in some way or other, be fatal to their necessary independence. If the power of making them was committed either to the Executive or legislature, there would be danger of an improper complaisance to the branch which possessed it; if to both, there would be an unwillingness to hazard the displeasure of either; if to the people, or to persons chosen by them for the special purpose, there would be too great a disposition to consult popularity, to justify a reliance that nothing would be consulted but the Constitution and the laws.

There is yet a further and a weightier reason for the permanency of the judicial offices, which is deducible from the nature of the qualifications they require. It has

[1] *Vide* "Protest of the Minority of the Convention of Pennsylvania," Martin's Speech, etc. — PUBLIUS.

been frequently remarked, with great propriety, that a voluminous code of laws is one of the inconveniences necessarily connected with the advantages of a free government. To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them; and it will readily be conceived from the variety of controversies which grow out of the folly and wickedness of mankind, that the records of those precedents must unavoidably swell to a very considerable bulk, and must demand long and laborious study to acquire a competent knowledge of them. Hence it is, that there can be but few men in the society who will have sufficient skill in the laws to qualify them for the stations of judges. And making the proper deductions for the ordinary depravity of human nature, the number must be still smaller of those who unite the requisite integrity with the requisite knowledge. These considerations apprise us, that the government can have no great option between fit character; and that a temporary duration in office, which would naturally discourage such characters from quitting a lucrative line of practice to accept a seat on the bench, would have a tendency to throw the administration of justice into hands less able, and less well qualified, to conduct it with utility and dignity. In the present circumstances of this country, and in those in which it is likely to be for a long time to come, the disadvantages on this score would be greater than they may at first sight appear; but it must be confessed, that they are far inferior to those which present themselves under the other aspects of the subject.

Upon the whole, there can be no room to doubt that the convention acted wisely in copying from the models of those constitutions which have established good behavior as the tenure of their judicial offices, in point of duration; and that so far from being blamable on this account, their plan would have been inexcusably defective, if it had wanted this important feature of good government. The experience of Great Britain affords an illustrious comment on the excellence of the institution. — *Ib.* No. 78 [1] (HAMILTON).

There ought always to be a constitutional method of giving efficacy to constitutional provisions. What, for instance, would avail restrictions on the authority of the State legislatures, without some constitutional mode of enforcing the observance of them? The States, by the plan of the convention, are prohibited from doing a variety of things, some of which are incompatible with the interests of the Union, and others with the principles of good government. The imposition of duties on imported articles, and the emission of paper money, are specimens of each kind. No man of sense will believe, that such prohibitions would be scrupulously regarded, without some effectual power in the government to restrain or correct the infractions of them. This power must either be a direct negative on the State laws, or an authority in the federal courts to overrule such as might be in manifest contravention of the articles of Union. There is no third course that I can imagine. The latter appears to have been thought by the convention preferable to the former, and, I presume, will be most agreeable to the States. As to the second point, it is impossible, by any argument or comment, to make it clearer than it is in itself. If there are such things as political axioms, the propriety of the judicial power of a government being co-extensive with its legislative, may be ranked among the number. The mere necessity of uniformity in the interpretation of the national laws, decides the question. — *Ib.* No. 80 (HAMILTON).

That there ought to be one court of supreme and final jurisdiction, is a proposition which is not likely to be contested. The reasons for it have been assigned in another place, and are too obvious to need repetition. The only question that seems to have been raised concerning it, is, whether it ought to be a distinct body or a branch of the legislature. The same contradiction is observable in regard to this matter which has been remarked in several other cases. The very men who object to the Senate as a court of impeachments, on the ground of an improper intermixture of powers, advocate, by implication at least, the propriety of vesting the ultimate decision of all causes, in the whole or in a part of the legislative body.

[1] Compare Federalist, No. 44. — ED.

The arguments, or rather suggestions, upon which this charge is founded, are to this effect: "The authority of the proposed Supreme Court of the United States, which is to be a separate and independent body, will be superior to that of the legislature. The power of construing the laws according to the spirit of the Constitution will enable that court to mould them into whatever shape it may think proper; especially as its decisions will not be in any manner subject to the revision or correction of the legislative body. This is as unprecedented as it is dangerous. In Britain, the judicial power, in the last resort, resides in the House of Lords, which is a branch of the legislature; and this part of the British government has been imitated in the State constitutions in general. The Parliament of Great Britain, and the legislatures of the several States, can at any time rectify, by law, the exceptionable decisions of their respective courts. But the errors and usurpations of the Supreme Court of the United States will be uncontrollable and remediless." This, upon examination, will be found to be made up altogether of false reasoning upon misconceived fact.

In the first place, there is not a syllable in the plan under consideration which directly empowers the national courts to construe the laws according to the spirit of the Constitution, or which gives them any greater latitude in this respect than may be claimed by the courts of every State. I admit, however, that the Constitution ought to be the standard of construction for the laws, and that wherever there is an evident opposition, the laws ought to give place to the Constitution. But this doctrine is not deducible from any circumstance peculiar to the plan of the convention, but from the general theory of a limited Constitution; and as far as it is true, is equally applicable to most, if not to all the State governments. There can be no objection, therefore, on this account, to the federal judicature which will not lie against the local judicatures in general, and which will not serve to condemn every constitution that attempts to set bounds to legislative discretion.

But perhaps the force of the objection may be thought to consist in the particular organization of the Supreme Court; in its being composed of a distinct body of magistrates, instead of being one of the branches of the legislature, as in the government of Great Britain and that of the State. To insist upon this point, the authors of the objection must renounce the meaning they have labored to annex to the celebrated maxim, requiring a separation of the departments of power. It shall, nevertheless, be conceded to them, agreeably to the interpretation given to that maxim in the course of these papers, that it is not violated by vesting the ultimate power of judging in a part of the legislative body. But though this be not an absolute violation of that excellent rule, yet it verges so nearly upon it, as on this account alone to be less eligible than the mode preferred by the convention. From a body which had even a partial agency in passing bad laws, we could rarely expect a disposition to temper and moderate them in the application. The same spirit which had operated in making them, would be too apt in interpreting them; still less could it be expected that men who had infringed the Constitution in the character of legislators, would be disposed to repair the breach in the character of judges. Nor is this all. Every reason which recommends the tenure of good behavior for judicial offices, militates against placing the judiciary power, in the last resort, in a body composed of men chosen for a limited period. There is an absurdity in referring the determination of causes, in the first instance, to judges of permanent standing; in the last, to those of a temporary and mutable constitution. And there is a still greater absurdity in subjecting the decisions of men, selected for their knowledge of the laws, acquired by long and laborious study, to the revision and control of men who, for want of the same advantage, cannot but be deficient in that knowledge. The members of the legislature will rarely be chosen with a view to those qualifications which fit men for the stations of judges; and as, on this account, there will be great reason to apprehend all the ill consequences of defective information, so, on account of the natural propensity of such bodies to party divisions, there will be no less reason to fear that the pestilential breath of faction may poison the fountains of justice. The habit of being continually marshalled on opposite sides will be too apt to stifle the voice both of law and of equity.

These considerations teach us to applaud the wisdom of those States who have com-

mitted the judicial power, in the last resort, not to a part of the legislature, but to distinct and independent bodies of men. Contrary to the supposition of those who have represented the plan of the convention, in this respect, as novel and unprecedented, it is but a copy of the Constitutions of New Hampshire, Massachusetts, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, and Georgia; and the preference which has been given to those models is highly to be commended.

It is not true, in the second place, that the Parliament of Great Britain, or the legislatures of the particular States, can rectify the exceptionable decisions of their respective courts, in any other sense than might be done by a future legislature of the United States. The theory, neither of the British, nor the State constitutions, authorizes the revisal of a judicial sentence by a legislative Act. Nor is there anything in the proposed Constitution, more than in either of them, by which it is forbidden. In the former, as well as in the latter, the impropriety of the thing, on the general principles of law and reason, is the sole obstacle. A legislature, without exceeding its province, cannot reverse a determination once made in a particular case; though it may prescribe a new rule for future cases. This is the principle, and it applies in all its consequences, exactly in the same manner and extent, to the State governments, as to the national government now under consideration. Not the least difference can be pointed out in any view of the subject.

It may in the last place be observed that the supposed danger of judiciary encroachments on the legislative authority, which has been upon many occasions reiterated, is in reality a phantom. Particular misconstructions and contraventions of the will of the legislature may now and then happen; but they can never be so extensive as to amount to an inconvenience, or in any sensible degree to affect the order of the political system. This may be inferred with certainty, from the general nature of the judicial power, from the objects to which it relates, from the manner in which it is exercised, from its comparative weakness, and from its total incapacity to support its usurpations by force. And the inference is greatly fortified by the consideration of the important constitutional check which the power of instituting impeachments in one part of the legislative body, and of determining upon them in the other, would give to that body upon the members of the judicial department. This is alone a complete security. There never can be danger that the judges, by a series of deliberate usurpations on the authority of the legislature, would hazard the united resentment of the body intrusted with it, while this body was possessed of the means of punishing their presumption, by degrading them from their stations. While this ought to remove all apprehensions on the subject, it affords, at the same time, a cogent argument for constituting the Senate a court for the trial of impeachments. — *Ib.* No. 81 (HAMILTON).

VANHORNE'S LESSEE *v.* DORRANCE.

CIRCUIT COURT OF THE UNITED STATES, PENNSYLVANIA DISTRICT. 1795.

[2 *Dallas*, 304.]

THIS was a cause of great expectation, involving several important questions of constitutional law, in relation to the territorial controversy between the States of Pennsylvania and Connecticut. After a trial, which continued for fifteen days, the presiding judge delivered the following charge to the jury, comprising a full review of all the important facts and principles that had occurred during the discussion.

PATTERSON, J. Having arrived at the last stage of this long and

interesting cause, it now becomes the duty of the court to sum up the evidence, and to declare the law arising upon it. A mass of testimony has been brought forward in the course of the trial, the far greater part of which is altogether immaterial, and can be of no use in forming a decision. The great points, on which the cause turns, are of a legal nature; they are questions of law; and, therefore, for the sake of the parties, as well as for my own sake, they ought to be put in a train for ultimate adjudication by the Supreme Court. In the administration of justice it is a consolatory idea, that no opinion of a single judge can be final and decisive; but that the same may be removed before the highest tribunal for revision, where, if erroneous, it will be rectified. For the sake of clearness, I shall consider,

1st. The title of the plaintiff.

2d. The title of the defendant. . . .

Such is the title upon which the plaintiff rests his cause. It is clearly deduced and legally correct; and, therefore, unless sufficient appears on the part of the defendant, will entitle the plaintiff to your verdict. To repel the plaintiff's right, and to establish his own, the defendant sets up a title.

1st. Under Connecticut. 2d. Under the Indians. 3d. Under Pennsylvania. . . . [Under the first two the defendant is declared to have no title.]

III. The title which the defendant sets up under Pennsylvania.

This is the keystone of the defendant's title, as one of his counsel very properly expressed it. It required no great sagacity to perceive that the defendant's hope of success was founded on a law of Pennsylvania, commonly called "the quieting and confirming Act." . . . To aid you, gentlemen, in forming a verdict, I shall consider:

I. The constitutionality of the confirming Act; or, in other words, whether the legislature had authority to make that Act?

Legislation is the exercise of sovereign authority. High and important powers are necessarily vested in the legislative body; whose Acts, under some forms of government, are irresistible and subject to no control. In England, from whence most of our legal principles and legislative notions are derived, the authority of the Parliament is transcendent and has no bounds.

"The power and jurisdiction of Parliament, says Sir Edward Coke, is so transcendent and absolute, that it cannot be confined, either for causes or persons, within any bounds. And of this high court, he adds, it may be truly said, *Si antiquitatem spectes, est vetustissima; si dignitatem, est honoratissima; si jurisdictionem, est capacissima.* It has sovereign and uncontrollable authority in the making, confirming, enlarging, restraining, abrogating, repealing, reviving, and expounding of laws, concerning matters of all possible denominations, ecclesiastical or temporal, civil, military, maritime, or criminal: this being the place where that absolute, despotic power which must in all governments reside somewhere, is intrusted by the Constitution of these

kingdoms. All mischiefs and grievances, operations and remedies, that transcend the ordinary course of the laws, are within the reach of this extraordinary tribunal. It can regulate or new model the succession to the Crown, as was done in the reign of Henry VIII. and William III. It can alter the established religion of the land, as was done in a variety of instances, in the reigns of King Henry VIII. and his three children. It can change and create afresh even the Constitution of the kingdom and of Parliaments themselves, as was done by the Act of Union, and the several statutes for triennial and septennial elections. It can, in short, do everything that is not naturally impossible; and therefore some have not scrupled to call its power, by a figure rather too bold, the omnipotence of Parliament. True it is, that what the Parliament doth, no authority upon earth can undo." — 1 *Bl. Com.* 160.

From this passage it is evident that, in England, the authority of the Parliament runs without limits, and rises above control. It is difficult to say what the Constitution of England is; because, not being reduced to written certainty and precision, it lies entirely at the mercy of the Parliament: it bends to every governmental exigency; it varies and is blown about by every breeze of legislative humor or political caprice. Some of the judges in England have had the boldness to assert that an Act of Parliament, made against natural equity, is void; but this opinion contravenes the general position, that the validity of an Act of Parliament cannot be drawn into question by the judicial department: it cannot be disputed, and must be obeyed. The power of Parliament is absolute and transcendent; it is omnipotent in the scale of political existence. Besides, in England there is no written constitution, no fundamental law, nothing visible, nothing real, nothing certain, by which a statute can be tested. In America the case is widely different: every State in the Union has its Constitution reduced to written exactitude and precision.

What is a constitution? It is the form of government, delineated by the mighty hand of the people, in which certain first principles of fundamental laws are established. The Constitution is certain and fixed; it contains the permanent will of the people, and is the supreme law of the land; it is paramount to the power of the legislature, and can be revoked or altered only by the authority that made it. The life-giving principle and the death-doing stroke must proceed from the same hand. What are legislatures? Creatures of the Constitution; they owe their existence to the Constitution: they derive their powers from the Constitution: it is their commission; and, therefore, all their acts must be conformable to it, or else they will be void. The Constitution is the work or will of the people themselves, in their original, sovereign, and unlimited capacity. Law is the work or will of the legislature in their derivative and subordinate capacity. The one is the work of the creator, and the other of the creature. The Constitution fixes limits to the exercise of legislative authority, and

prescribes the orbit within which it must move. In short, gentlemen, the Constitution is the sun of the political system, around which all legislative, executive, and judicial bodies must revolve. Whatever may be the case in other countries, yet in this there can be no doubt, that every Act of the Legislature, repugnant to the Constitution, is absolutely void.

In the second article of the Declaration of Rights, which was made part of the late Constitution of Pennsylvania, it is declared, "that all men have a natural and unalienable right to worship Almighty God, according to the dictates of their own consciences and understanding; and that no man ought or of right can be compelled, to attend any religious worship, or erect or support any place of worship, or maintain any ministry, contrary to or against his own free will and consent; nor can any man who acknowledges the being of a God be justly deprived or abridged of any civil right as a citizen, on account of his religious sentiments or peculiar mode of religious worship; and that no authority can, or ought to be, vested in or assumed by any power whatever, that shall, in any case, interfere with, or in any manner control, the right of conscience in the free exercise of religious worship." — *Dec. of Rights*, *Art.* 2.

In the thirty-second section of the same Constitution, it is ordained, "that all elections, whether by the people or in general assembly, shall be by ballot, free and voluntary." — *Const. Penn.* § 32.

Could the legislature have annulled these articles, respecting religion, the rights of conscience, and elections by ballot? Surely, no. As to these points, there was no devolution of power; the authority was purposely withheld, and reserved by the people to themselves. If the legislature had passed an Act declaring that, in future, there should be no trial by jury, would it have been obligatory? No: it would have been void for want of jurisdiction, or constitutional extent of power. The right of trial by jury is a fundamental law, made sacred by the Constitution, and cannot be legislated away. The Constitution of a State is stable and permanent, not to be worked upon by the temper of the times, nor to rise and fall with the tide of events: notwithstanding the competition of opposing interests, and the violence of contending parties, it remains firm and immovable, as a mountain amidst the strife of storms, or a rock in the ocean amidst the raging of the waves. I take it to be a clear position, that if a legislative Act oppugns a constitutional principle, the former must give way, and be rejected on the score of repugnance. I hold it to be a position equally clear and sound, that, in such case, it will be the duty of the court to adhere to the Constitution, and to declare the Act null and void. The Constitution is the basis of legislative authority; it lies at the foundation f all law, and is a rule and commission by which both legislators and judges are to proceed. It is an important principle, which, in the discussion of questions of the present kind, ought never to be lost

sight of, that the judiciary in this country is not a subordinate, but co-ordinate, branch of the government.

Having made these preliminary observations, we shall proceed to contemplate the quieting and confirming Act, and to bring its validity to the test of the Constitution.

In the course of argument, the counsel on both sides relied upon certain parts of the late Bill of Rights and Constitution of Pennsylvania, which I shall now read, and then refer to them occasionally in the sequel of the charge.

(The judge then read the 1st, 8th, and 11th articles of the Declaration of Rights; and the 9th and 46th sections of the Constitution of Pennsylvania. See 1 Vol. Dall. Edit. Penn. Laws, pp. 55, 56, 60, in the Appendix.)

From these passages it is evident that the right of acquiring and possessing property, and having it protected, is one of the natural, inherent, and unalienable rights of man. Men have a sense of property: property is necessary to their subsistence, and correspondent to their natural wants and desires; its security was one of the objects that induced them to unite in society. No man would become a member of a community in which he could not enjoy the fruits of his honest labor and industry. The preservation of property, then, is a primary object of the social compact, and, by the late Constitution of Pennsylvania, was made a fundamental law. Every person ought to contribute his proportion for public purposes and public exigencies; but no one can be called upon to surrender or sacrifice his whole property, real and personal, for the good of the community, without receiving a recompense in value. This would be laying a burden upon an individual, which ought to be sustained by the society at large. The English history does not furnish an instance of the kind; the Parliament, with all their boasted omnipotence, never committed such an outrage on private property; and if they had, it would have served only to display the dangerous nature of unlimited authority; it would have been an exercise of power, and not of right. Such an Act would be a monster in legislation, and shock all mankind. The legislature, therefore, had no authority to make an Act divesting one citizen of his freehold, and vesting it in another, without a just compensation. It is inconsistent with the principles of reason, justice, and moral rectitude; it is incompatible with the comfort, peace, and happiness of mankind; it is contrary to the principles of social alliance in every free government; and lastly, it is contrary both to the letter and spirit of the Constitution. In short, it is what every one would think unreasonable and unjust in his own case. The next step in the line of progression is, whether the legislature had authority to make an Act, divesting one citizen of his freehold and vesting it in another, even with compensation. That the legislature, on certain emergencies, had authority to exercise this high power, has been urged from the nature of the social compact, and from the words of the Constitu-

tion, which says, that the House of Representatives shall have all other powers necessary for the legislature of a free State or commonwealth; but they shall have no power to add to, alter, abolish, or infringe any part of this Constitution. The course of reasoning, on the part of the defendant, may be comprised in a few words. The despotic power, as it is aptly called by some writers, of taking private property, when State necessity requires, exists in every government; the existence of such power is necessary; government could not subsist without it; and if this be the case, it cannot be lodged anywhere with so much safety as with the legislature. The presumption is, that they will not call it into exercise except in urgent cases, or cases of the first necessity. There is force in this reasoning. It is, however, difficult to form a case, in which the necessity of a State can be of such a nature as to authorize or excuse the seizing of landed property belonging to one citizen, and giving it to another citizen. It is immaterial to the State in which of its citizens the land is vested; but it is of primary importance that, when vested, it should be secured, and the proprietor protected in the enjoyment of it. The Constitution encircles and renders it an holy thing. We must, gentlemen, bear constantly in mind, that the present is a case of landed property, vested by law in one set of citizens, attempted to be divested, for the purpose of vesting the same property in another set of citizens. It cannot be assimilated to the case of personal property taken or used in time of war or famine, or other extreme necessity; it cannot be assimilated to the temporary possession of land itself, on a pressing public emergency, or the spur of the occasion. In the latter case there is no change of property, no divestment of right; the title remains, and the proprietor, though out of possession for a while, is still proprietor and lord of the soil. The possession grew out of the occasion and ceases with it: then the right of necessity is satisfied and at an end; it does not affect the title, is temporary in its nature, and cannot exist forever. The Constitution expressly declares, that the right of acquiring, possessing, and protecting property is natural, inherent, and unalienable. It is a right not *ex gratia* from the legislature, but *ex debito* from the Constitution. It is sacred; for, it is further declared, that the legislature shall have no power to add to, alter, abolish, or infringe any part of, the Constitution. The Constitution is the origin and measure of legislative authority; it says to legislators, thus far ye shall go and no further. Not a particle of it should be shaken; not a pebble of it should be removed. Innovation is dangerous. One encroachment leads to another; precedent gives birth to precedent; what has been done may be done again; thus radical principles are generally broken in upon, and the Constitution eventually destroyed. Where is the security, where the inviolability of property, if the legislature, by a private Act, affecting particular persons only, can take land from one citizen, who acquired it legally, and vest it in another? The rights of private property are regulated, protected, and governed by general, known, and established laws; and

decided upon by general, known, and established tribunals; laws and tribunals not made and created on an instant exigency, on an urgent emergency, to serve a present turn, or the interest of a moment. Their operation and influence are equal and universal; they press alike on all. Hence security and safety, tranquillity and peace. One man is not afraid of another, and no man afraid of the legislature. It is infinitely wiser and safer to risk some possible mischiefs, than to vest in the legislature so unnecessary, dangerous, and enormous a power as that which has been exercised on the present occasion; a power that, according to the full extent of the argument, is boundless and omnipotent: for the legislature judged of the necessity of the case, and also of the nature and value of the equivalent.

Such a case of necessity, and judging too of the compensation, can never occur in any nation. Singular, indeed, and untoward must be the state of things, that would induce the legislature, supposing they had the power, to divest one individual of his landed estate merely for the purpose of vesting it in another, even upon full indemnification; unless that indemnification be ascertained in the manner which I shall mention hereafter.

But admitting that the legislature can take the real estate of A. and give it to B. on making compensation, the principle and reasoning upon it go no further than to show, that the legislature are the sole and exclusive judges of the necessity of the case, in which this despotic power should be called into action. It cannot, on the principles of the social alliance, or of the Constitution, be extended beyond the point of judging upon every existing case of necessity. The legislature declare and enact, that such are the public exigencies, or necessities of the State, as to authorize them to take the land of A. and give it to B.; the dictates of reason and the eternal principles of justice, as well as the sacred principles of the social contract, and the Constitution, direct, and they accordingly declare and ordain, that A. shall receive compensation for the land. But here the legislature must stop; they have run the full length of their authority, and can go no further: they cannot constitutionally determine upon the amount of the compensation, or value of the land. Public exigencies do not require, necessity does not demand, that the legislature should, of themselves, without the participation of the proprietor, or intervention of a jury, assess the value of the thing, or ascertain the amount of the compensation to be paid for it. This can constitutionally be effected only in three ways.

1. By the parties; that is, by stipulation between the legislature and proprietor of the land.

2. By commissioners mutually elected by the parties.

3. By the intervention of a jury.

The compensatory part of the Act lies in the ninth section. . . . In this section two things are worthy of consideration.

1. The mode or manner in which compensation for the lands is to be ascertained.

2. The nature of the compensation itself.

The Pennsylvania claimants are directed to present their claims to the Board of Property — and what is the Board to do thereupon? Why, it is,

1. To judge of the validity of their claims.

2. To ascertain, by the aid and through the medium of commissioners, appointed by the legislature, the quality and value of the land.

3. To judge of the quantity of vacant land to be granted as an equivalent.

This is not the constitutional line of procedure. I have already observed, that there are but three modes, in which matters of this kind can be conducted consistently with the principles and spirit of the Constitution, and social alliance. The first of which is by the parties, that is to say, by the legislature and proprietor of the land. Of this the British history presents an illustrious example in the case of the Isle of Man.

"The distinct jurisdiction of this little subordinate royalty being found inconvenient for the purposes of public justice, and for the revenue (it affording a commodious asylum for debtors, outlaws, and smugglers) authority was given to the treasury, by statute 12 Geo. I. c. 28, to purchase the interest of the then proprietors for the use of the Crown; which purchase was at length completed in the year 1765, and confirmed by statutes 5 Geo. III. c. 26 and 38, whereby the whole island and all its dependencies, so granted, as aforesaid (except the landed property of the Atholl family, their manorial rights and emoluments, and the patronage of bishoprics, and other ecclesiastical benefices) are unalienably vested in the Crown, and subjected to the regulations of the British excise and customs." — 1 *Bl. Com.* 107.

Shame to American legislation! That in England, a limited monarchy, where there is no written constitution, where the Parliament is omnipotent, and can mould the Constitution at pleasure, a more sacred regard should have been paid to property, than in America, surrounded as we are with a blaze of political illumination; where the legislatures are limited; where we have republican governments, and written constitutions, by which the protection and enjoyment of property are rendered inviolable.

The case of the Isle of Man was a fair and honorable stipulation; it partook of the spirit and essence of a contract; it was free and mutual; and was treating with the proprietors on equal terms. But if the business cannot be effected in this way, then the value of the land, intended to be taken, should be ascertained by commissioners, or persons mutually elected by the parties, or by the intervention of the judiciary, of which a jury is a component part. In the first case, we approximate nearly to a contract; because the will of the party, whose property is to be affected, is in some degree exercised; he has a choice; his own act co-operates with that of the legislature. In the other case, there is the intervention of a court of law, or, in other words, a jury is to

pass between the public and the individual, who, after hearing the proofs and allegations of the parties, will, by their verdict, fix the value of the property, or the sum to be paid for it. The compensation, if not agreed upon by the parties or their agents, must be ascertained by a jury. The interposition of a jury is, in such case, a constitutional guard upon property, and a necessary check to legislative authority. It is a barrier between the individual and the legislature, and ought never to be removed; as long as it is preserved, the rights of private property will be in no danger of violation, except in cases of absolute necessity, or great public utility. By the confirming Act, the value of the land taken, and the value of the land to be paid in recompense, are to be ascertained by the Board of Property. And who are the persons that constitute this Board? Men appointed by one of the parties, by the legislature only. The person, whose property is to be divested and valued, had no volition, no choice, no co-operation in the appointment; and besides, the other constitutional guard upon property, that of a jury, is removed and done away. The Board of Property thus constituted, are authorized to decide upon the value of the land to be taken, and upon the value of the land to be given by way of equivalent, without the participation of the party, or the intervention of a jury.

2. The nature of the compensation.

By the Act the equivalent is to be in land. No just compensation can be made except in money. Money is a common standard, by comparison with which the value of anything may be ascertained. It is not only a sign which represents the respective values of commodities, but is an universal medium, easily portable, liable to little variation, and readily exchanged for any kind of property. Compensation is a recompense in value, a *quid pro quo*, and must be in money. True it is, that land or anything else may be a compensation, but then it must be at the election of the party; it cannot be forced upon him. His consent will legalize the Act, and make it valid; nothing short of it will have the effect. It is obvious, that if a jury pass upon the subject, or value of the property, their verdict must be in money.

To close this part of the discourse: It is contended that the legislature must judge of the necessity of interposing their despotic authority; it is a right of necessity upon which no other power in government can decide: that no civil institution is perfect; and that cases will occur, in which private property must yield to urgent calls of public utility or general danger. Be it so. But then it must be upon complete indemnification to the individual. Agreed: but who shall judge of this? Did there also exist a State necessity, that the legislature, or persons solely appointed by them, must admeasure the compensation, or value of the lands seized and taken, and the validity of the title thereto? Did a third State necessity exist, that the proprietor must take land by way of equivalent for his land? And did a fourth State necessity exist, that the value of this land equivalent must be adjusted

by the Board of Property, without the consent of the party, or the interference of a jury? Alas! how necessity begets necessity. They rise upon each other and become endless. The proprietor stands afar off, a solitary and unprotected member of the community, and is stripped of his property, without his consent, without a hearing, without notice, the value of that property judged upon without his participation, or the intervention of a jury, and the equivalent therefor in lands ascertained in the same way. If this be the legislation of a republican government, in which the preservation of property is made sacred by the Constitution, I ask, wherein it differs from the mandate of an Asiatic prince? Omnipotence in legislation is despotism. According to this doctrine, we have nothing that we can call our own, or are sure of for a moment; we are all tenants at will, and hold our landed property at the mere pleasure of the legislature. Wretched situation, precarious tenure! And yet we boast of property and its security, of laws, of courts, or constitutions, and call ourselves free! In short, gentlemen, the confirming Act is void; it never had constitutional existence; it is a dead letter, and of no more virtue or avail, than if it never had been made.

II. But, admitting the confirming Act to be constitutional and valid, the next subject of inquiry is, what is its operation, or, in other words, what construction ought to be put upon it? . . . [It is declared that the Act only purported to vest the estate in the Connecticut claimants on certain conditions, which have not been performed.]

III. The nature and operation of the suspending Act.

This Act was passed the 29th of March, 1788, and is as follows:

(Here the Judge read the Act at large.)

This Act was passed before the adoption of the Constitution of the United States, and therefore is not affected by it. If the legislature had authority to make the confirming Act, they had, also, authority to suspend it. Their constitutional power reached to both, or to neither. By the Act of the 28th of March, 1787, the commissioners were to ascertain and confirm the claims of the Connecticut settlers, upon the doing whereof the estate, if the law was constitutional, would become vested in them. This has not been done; the claim in the present instance has not been ascertained and confirmed: and as this Act suspends or revokes these ascertaining and confirming powers, it never can be done. Of course, there is an end of the business. The parties are placed on their original ground; they are restored to their pristine situation.

IV. After the opinion delivered on the preceding questions, it is not necessary to determine upon the validity of the repealing law. But it being my intention in this charge to decide upon all the material points in the cause, in order that the whole may, at once, be carried before the Supreme Judicature for revision, I shall detain you, gentlemen, a few minutes only, while I just touch upon the constitutionality

of the repealing Act. This Act was passed the 1st of April, 1790: the repealing part is as follows.

(Here the Judge read the 1st and 2d sections of the Act. See 2 Vol. Dall. Edit. Penn. Laws, p. 786.)

This Act was made after the adoption of the Constitution of the United States, and the argument is, that it is contrary to it.

1. Because it is an *ex post facto* law.

2. Because it is a law impairing the obligation of a contract.

1. That it is an *ex post facto* law. But what is the fact? If making a law be a fact within the words of the Constitution, then no law, when once made, can ever be repealed. Some of the Connecticut settlers presented their claims to the commissioners, who received and entered them. These are facts. But are they facts of any avail? Did they give any right or vest any estate? No — whether done or not done, they leave the parties just where they were. They create no interest, affect no title, change no property; when done they are useless and of no efficacy. Other Acts were necessary to be performed, but before the performance of them, the law was suspended and then repealed.

2. It impairs the obligation of a contract, and is therefore void. If the property to the lands in question had been vested in the State of Pennsylvania, then the legislature would have had the liberty and right of disposing or granting them to whom they pleased, at any time, and in any manner. Over public property they have a disposing and controlling power, over private property they have none, except, perhaps, in certain cases, and those under restrictions, and except also, what may arise from the enactment and operation of general laws respecting property, which will affect themselves as well as their constituents. But if the confirming Act be a contract between the Legislature of Pennsylvania and the Connecticut settlers, it must be regulated by the rules and principles which pervade and govern all cases of contracts; and if so, it is clearly void, because it tends, in its operation and consequences, to defraud the Pennsylvania claimants, who are third persons, of their just rights; rights ascertained, protected, and secured by the Constitution and known laws of the land. The plaintiff's title to the land in question is legally derived from Pennsylvania; how then, on the principles of contract, could Pennsylvania lawfully dispose of it to another? As a contract, it could convey no right, without the owner's consent; without that, it was fraudulent and void.

I shall close the discourse with a brief recapitulation of its leading points.

1. The confirming Act is unconstitutional and void. It was invalid from the beginning, had no life or operation, and is precisely in the same state, as if it had not been made. If so, the plaintiff's title remains in full force.

2. If the confirming Act is constitutional, the conditions of it have not been performed; and, therefore, the estate continues in the plaintiff.

3. The confirming Act has been suspended — and
4. Repealed.

The result is, that the plaintiff is, by law, entitled to recover the premises in question, and of course to your verdict.

Verdict for the plaintiff.[1]

COOPER v. TELFAIR.

SUPREME COURT OF THE UNITED STATES. 1800.

[4 *Dallas*, 14; 1 *Curtis's Decisions*, 314.]

THIS was a writ of error to the Circuit Court of the United States for the District of Georgia. The plaintiff in error brought an action of debt on a bond dated in 1774, against the defendant, as obligor. The defendant pleaded that by an Act of the Legislature of the State of Georgia, passed on the 4th day of May, 1782, the plaintiff and other persons named in the Act, were banished from the State, and their property, real and personal, including all debts due to each of them at the date thereof, was confiscated to the State, such persons being at the same time declared by the Act guilty of high treason. That by virtue of this Act, and another Act passed on the 10th day of February, 1787, giving certain powers to the auditors of the State, this debt became vested in the State of Georgia, and no cause of action hath accrued to the plaintiff. To this plea the plaintiff replied, in substance, that he had never been tried, convicted, or attainted of treason, and that the Acts relied on were repugnant to the Constitution of Georgia, adopted on the 5th day of February, 1777, and so were void. To this replication there was a demurrer, which was joined, and the Circuit Court held the plea good. The cause was argued by *E. Tilghman*, for the plaintiff, and by *Ingersoll* and *Dallas* for the defendant.

[1] For the early cases in the Federal Courts, see Meigs, 19 Am. Law Rev. 186. The case in the text appears to be the earliest Federal decision. The informal utterances of the Circuit Court Judges, in letters and memoranda, reported in the note to *Hayburn's Case*, 4 Dall. 409, in 1792, announce their opinions, that an Act of Congress of March 23, 1792 (1 St. at Large, 243), was unconstitutional; just as Chief Justice Jay and several of the judges of the Supreme Court, in 1790, in a letter intended for the President, had made a like declaration as to a part of the Judiciary Act of 1789. See 4 Am. Jurist, 293; 2 Story, Const. s. 1579, note. But in these there was no *judicial* utterance. In the case of Yale Todd (February, 1794), preserved in a note to *U. S.* v. *Ferreira*, 13 How. 52, it was decided that the theory of the legislation of March 23, 1792, adopted by some of the judges, *viz.*, that it gave them authority to act as commissioners, was untenable. It is inaccurate to say that this case holds the Act of 1792 to be unconstitutional, as appears to be said in the note in 13 How. 52, and as is expressly said in the Reporter's note in 131 U. S., Appendix, ccxxxv.

Marbury v. *Madison* is the earliest Federal decision in the Supreme Court. — ED.

The judges (except the Chief Justice, who had decided the cause in the Circuit Court) delivered their opinions, *seriatim*, in substance, as follows:

WASHINGTON, J. The Constitution of Georgia does not expressly interdict the passing of an Act of attainder and confiscation, by the authority of the legislature. Is such an Act, then, so repugnant to any constitutional regulation, as to be excepted from the legislative jurisdiction, by a necessary implication? Where an offence is not committed within some county of the State, the Constitution makes no provision for a trial, neither as to the place, nor as to the manner. Is such an offence (perhaps the most dangerous treason) to be considered as beyond the reach of the government, even to forfeit the property of the offender, within its territorial boundary? If the plaintiff in error had shown that the offence with which he was charged had been committed in any county of Georgia, he might have raised the question of conflict and collision, between the Constitution and the law; but as that fact does not appear, there is no ground on which I could be prepared to say that the law is void. The presumption, indeed, must always be in favor of the validity of laws, if the contrary is not clearly demonstrated.

CHASE, J. I agree, for the reason which has been assigned, to affirm the judgment. Before the plaintiff in error could claim the benefit of a trial by jury, under the Constitution, it was, at least, incumbent upon him to show, that the offence charged was committed in some county of Georgia, in which case alone the Constitution provides for the trial. But even if he had established that fact, I should not have thought the law a violation of the Constitution. The general principles contained in the Constitution are not to be regarded as rules to fetter and control, but as matter merely declaratory and directory; for, even in the Constitution itself, we may trace repeated departures from the theoretical doctrine, that the legislative, executive, and judicial powers should be kept separate and distinct.

There is, likewise, a material difference between laws passed by the individual States during the Revolution, and laws passed subsequent to the organization of the Federal Constitution. Few of the Revolutionary Acts would stand the rigorous test now applied; and although it is alleged that all Acts of the Legislature, in direct opposition to the prohibitions of the Constitution, would be void, yet it still remains a question, where the power resides to declare it void. It is, indeed, a general opinion, it is expressly admitted by all this Bar, and some of the judges have, individually, in the circuits, decided that the Supreme Court can declare an Act of Congress to be unconstitutional, and, therefore, invalid; but there is no adjudication of the Supreme Court itself upon the point. I concur, however, in the general sentiment, with reference to the period, when the existing Constitution came into operation; but whether the power, under the existing Constitution, can be employed to invalidate laws previously enacted, is a very different question, turn-

ing upon very different principles, and with respect to which I abstain from giving an opinion, since, on other ground, I am satisfied with the correctness of the judgment of the Circuit Court.

PATERSON, J. I consider it a sound political proposition, that wherever the legislative power of a government is undefined it includes the judicial and executive attributes. The legislative power of Georgia, though it is in some respects restricted and qualified, is not defined by the Constitution of the State. Had, then, the legislature power to punish its citizens, who had joined the enemy, and could not be punished by the ordinary course of law? It is denied, because it would be an exercise of judicial authority. But the power of confiscation and banishment does not belong to the judicial authority, whose process could not reach the offenders; and yet it is a power that grows out of the very nature of the social compact, which must reside somewhere, and which is so inherent in the legislature that it cannot be divested or transferred, without an express provision of the Constitution.

The constitutions of several of the other States of the Union contain the same general principles and restrictions; but it never was imagined that they applied to a case like the present, and to authorize this court to pronounce any law void, it must be a clear and unequivocal breach of the Constitution, not a doubtful and argumentative application.

CUSHING, J. Although I am of opinion that this court has the same power that a court of the State of Georgia would possess, to declare the law void, I do not think that the occasion would warrant an exercise of the power. The right to confiscate and banish, in the case of an offending citizen, must belong to every government. It is not within the judicial power, as created and regulated by the Constitution of Georgia, and it naturally, as well as tacitly, belongs to the legislature.

BY THE COURT. Let the judgment be affirmed, with costs.

MARBURY v. MADISON.

SUPREME COURT OF THE UNITED STATES. 1803.

[1 *Cranch*, 137; 1 *Curtis's Decisions*, 368.]

AT the last term, namely, December Term, 1801, William Marbury, Dennis Ramsay, Robert Townsend Hooe, and William Harper, by their counsel, *Charles Lee*, *Esq.*, late Attorney-General of the United States, severally moved the court for a rule to James Madison, Secretary of State of the United States, to show cause why a *mandamus* should not issue commanding him to cause to be delivered to them respectively their several commissions as justices of the peace in the

District of Columbia. This motion was supported by affidavits of the following facts; that notice of this motion had been given to Mr. Madison; that Mr. Adams, the late President of the United States, nominated the applicants to the Senate for their advice and consent to be appointed justices of the peace of the District of Columbia; that the Senate advised and consented to the appointments; that commissions in due form were signed by the said President appointing them justices, &c., and that the seal of the United States was in due form affixed to the said commissions by the Secretary of State; that the applicants have requested Mr. Madison to deliver them their said commissions, who has not complied with that request; and that their said commissions are withheld from them; that the applicants have made application to Mr. Madison, as Secretary of State of the United States, at his office, for information whether the commissions were signed and sealed as aforesaid; that explicit and satisfactory information has not been given in answer to that inquiry, either by the Secretary of State or any officer in the Department of State; that application has been made to the Secretary of the Senate for a certificate of the nomination of the applicants, and of the advice and consent of the Senate, who has declined giving such a certificate; whereupon a rule was laid to show cause on the fourth day of this term. This rule having been duly served,

Mr. Lee read the affidavit of Dennis Ramsay, and the printed journals of the Senate of 31st January, 1803, respecting the refusal of the Senate to suffer their secretary to give the information requested. He then called Jacob Wagner and Daniel Brent, who had been summoned to attend the court, and who had, as it is understood, declined giving a voluntary affidavit. They objected to being sworn, alleging that they were clerks in the Department of State, and not bound to disclose any facts relating to the business or transactions in the office.

The court ordered the witnesses to be sworn, and their answers taken in writing, but informed them that when the questions were asked they might state their objections to answering each particular question, if they had any.

Mr. Lincoln, Attorney-General, having been summoned, and now called, objected to answering. He requested that the questions might be put in writing, and that he might afterwards have time to determine whether he would answer. On the one hand he respected the jurisdiction of this court, and on the other he felt himself bound to maintain the rights of the executive. He was acting as Secretary of State at the time when this transaction happened. He was of opinion, and his opinion was supported by that of others whom he highly respected, that he was not bound, and ought not to answer, as to any facts which came officially to his knowledge while acting as Secretary of State.

The questions being written, were then read and handed to him.

He repeated the ideas he had before suggested, and said his objections were of two kinds.

1st. He did not think himself bound to disclose his official transactions while acting as Secretary of State; and,

2d. He ought not to be compelled to answer anything which might tend to criminate himself.

Mr. Lincoln thought it was going a great way to say that every Secretary of State should at all times be liable to be called upon to appear as a witness in a court of justice, and testify to facts which came to his knowledge officially. He felt himself delicately situated between his duty to this court, and the duty he conceived he owed to an executive department; and hoped the court would give him time to consider of the subject.

The court said that if Mr. Lincoln wished time to consider what answers he should make, they would give him time; but they had no doubt he ought to answer. There was nothing confidential required to be disclosed. If there had been he was not obliged to answer it; and if he thought that anything was communicated to him in confidence he was not bound to disclose it; nor was he obliged to state anything which would criminate himself; but that the fact whether such commissions had been in the office or not, could not be a confidential fact; it is a fact which all the world have a right to know. If he thought any of the questions improper, he might state his objections.

Mr. Lincoln then prayed time till the next day to consider of his answers under this opinion of the court.

The court granted it, and postponed further consideration of the cause till the next day.

At the opening of the court on the next morning, Mr. Lincoln said he had no objection to answering the questions proposed, excepting the last, which he did not think himself obliged to answer fully. The question was, what had been done with the commissions? He had no hesitation in saying that he did not know that they ever came to the possession of Mr. Madison, nor did he know that they were in the office when Mr. Madison took possession of it. He prayed the opinion of the court whether he was obliged to disclose what had been done with the commissions.

The court were of opinion that he was not bound to say what had become of them; if they never came to the possession of Mr. Madison it was immaterial to the present cause what had been done with them by others.

Afterwards, on the 24th February, the following opinion of the court was delivered by the CHIEF JUSTICE. At the last term on the affidavits then read and filed with the clerk, a rule was granted in this case, requiring the Secretary of State to show cause why a *mandamus* should not issue, directing him to deliver to William Marbury his commission

as a justice of the peace for the county of Washington, in the District of Columbia.

No cause has been shown, and the present motion is for a *mandamus*. The peculiar delicacy of this case, the novelty of some of its circumstances, and the real difficulty attending the points which occur in it, require a complete exposition of the principles on which the opinion to be given by the court is founded.

These principles have been, on the side of the applicant, very ably argued at the Bar. In rendering the opinion of the court, there will be some departure in form, though not in substance, from the points stated in that argument.

In the order in which the court has viewed this subject, the following questions have been considered and decided.

1st. Has the applicant a right to the commission he demands?

2dly. If he has a right, and that right has been violated, do the laws of his country afford him a remedy?

3dly. If they do afford him a remedy, is it a *mandamus* issuing from this court?

The first object of inquiry is,

1st. Has the applicant a right to the commission he demands? . . .

Mr. Marbury, then, since his commission was signed by the President and sealed by the Secretary of State, was appointed; and as the law creating the office, gave the officer a right to hold for five years, independent of the executive, the appointment was not revocable, but vested in the officer legal rights, which are protected by the laws of his country.

To withhold his commission, therefore, is an act deemed by the court not warranted by law, but violative of a vested legal right.

This brings us to the second inquiry, which is,

2dly. If he has a right, and that right has been violated, do the laws of his country afford him a remedy? . . .

It is then the opinion of the court,

1st. That by signing the commission of Mr. Marbury, the President of the United States appointed him a justice of peace for the county of Washington, in the District of Columbia; and that the seal of the United States, affixed thereto by the Secretary of State, is conclusive testimony of the verity of the signature, and of the completion of the appointment; and that the appointment conferred on him a legal right to the office for the space of five years.

2dly. That, having this legal title to the office, he has a consequent right to the commission; a refusal to deliver which is a plain violation of that right, for which the laws of his country afford him a remedy.

It remains to be inquired whether,

3dly. He is entitled to the remedy for which he applies. This depends on,

1st. The nature of the writ applied for; and,

This is not a bill brought by the State of Georgia to annul the contract, nor does it appear to the court, by this count, that the State of Georgia is dissatisfied with the sale that has been made. The case, as made out in the pleadings, is simply this. One individual who holds lands in the State of Georgia, under a deed covenanting that the title of Georgia was in the grantor, brings an action of covenant upon this deed, and assigns, as a breach, that some of the members of the legislature were induced to vote in favor of the law which constituted the contract, by being promised an interest in it, and that therefore the Act is a mere nullity.

This solemn question cannot be brought thus collaterally and incidentally before the court. It would be indecent in the extreme, upon a private contract between two individuals, to enter into an inquiry respecting the corruption of the sovereign power of a State. If the title be plainly deduced from a legislative Act, which the legislature might constitutionally pass, if the Act be clothed with all the requisite forms of a law, a court, sitting as a court of law, cannot sustain a suit brought by one individual against another founded on the allegation that the Act is a nullity, in consequence of the impure motives which influenced certain members of the legislature which passed the law.

The Circuit Court, therefore, did right in overruling this demurrer.

The fourth covenant in the deed is, that the title to the premises has been in no way constitutionally or legally impaired by virtue of any subsequent Act of any subsequent legislature of the State of Georgia.

The third count recites the undue means practised on certain members of the legislature, as stated in the second count, and then alleges that, in consequence of these practices and of other causes, a subsequent legislature passed an Act annulling and rescinding the law under which the conveyance to the original grantees was made, declaring that conveyance void, and asserting the title of the State to the lands it contained. The count proceeds to recite at large this rescinding Act, and concludes with averring that, by reason of this Act, the title of the said Peck in the premises was constitutionally and legally impaired, and rendered null and void.

After protesting as before that no such promises were made as stated in this count, the defendant again pleads that himself and the first purchaser under the original grantees, and all intermediate holders of the property, were purchasers without notice.

To this plea there is a demurrer and joinder.

The importance and the difficulty of the questions presented by these pleadings, are deeply felt by the court.

The lands in controversy vested absolutely in James Gunn and others, the original grantees, by the conveyance of the Governor, made in pursuance of an Act of Assembly to which the legislature was fully competent. Being thus in full possession of the legal estate, they, for a valuable consideration, conveyed portions of the land to those who were willing to purchase. If the original transaction was infected with

fraud, these purchasers did not participate in it, and had no notice of it. They were innocent. Yet the Legislature of Georgia has involved them in the fate of the first parties to the transaction, and, if the Act be valid, has annihilated their rights also.

The Legislature of Georgia was a party to this transaction; and for a party to pronounce its own deed invalid, whatever cause may be assigned for its invalidity, must be considered as a mere act of power which must find its vindication in a train of reasoning not often heard in courts of justice.

But the real party, it is said, are the people, and when their agents are unfaithful, the acts of those agents cease to be obligatory.

It is, however, to be recollected that the people can act only by these agents, and that, while within the powers conferred on them, their acts must be considered as the acts of the people. If the agents be corrupt, others may be chosen, and if their contracts be examinable, the common sentiment, as well as common usage of mankind, points out a mode by which this examination may be made, and their validity determined.

If the Legislature of Georgia was not bound to submit its pretensions to those tribunals which are established for the security of property, and to decide on human rights, if it might claim to itself the power of judging in its own case, yet there are certain great principles of justice, whose authority is universally acknowledged, that ought not to be entirely disregarded.

If the legislature be its own judge in its own case, it would seem equitable that its decisions should be regulated by those rules which would have regulated the decision of a judicial tribunal. The question was, in its nature, a question of title, and the tribunal which decided it was either acting in the character of a court of justice, and performing a duty usually assigned to a court, or it was exerting a mere act of power in which it was controlled only by its own will.

If a suit be brought to set aside a conveyance obtained by fraud, and the fraud be clearly proved, the conveyance will be set aside, as between the parties; but the rights of third persons, who are purchasers without notice, for a valuable consideration, cannot be disregarded. Titles, which, according to every legal test, are perfect, are acquired with that confidence which is inspired by the opinion that the purchaser is safe. If there be any concealed defect, arising from the conduct of those who had held the property long before he acquired it, of which he had no notice, that concealed defect cannot be set up against him. He has paid his money for a title good at law; he is innocent, whatever may be the guilt of others, and equity will not subject him to the penalties attached to that guilt. All titles would be insecure, and the intercourse between man and man would be very seriously obstructed, if this prinple be overturned.

A Court of Chancery, therefore, had a bill been brought to set aside the conveyance made to James Gunn and others, as being obtained by

improper practices with the legislature, whatever might have been its decision as respected the original grantees, would have been bound, by its own rules, and by the clearest principles of equity, to leave unmolested those who were purchasers, without notice, for a valuable consideration.

If the legislature felt itself absolved from those rules of property which are common to all the citizens of the United States, and from those principles of equity which are acknowledged in all our courts, its Act is to be supported by its power alone, and the same power may divest any other individual of his lands, if it shall be the will of the legislature so to exert it.

It is not intended to speak with disrespect of the Legislature of Georgia, or of its Acts. Far from it. The question is a general question, and is treated as one. For although such powerful objections to a legislative grant, as are alleged against this, may not again exist, yet the principle, on which alone this rescinding Act is to be supported, may be applied to every case to which it shall be the will of any legislature to apply it. The principle is this: that a legislature may, by its own Act, divest the vested estate of any man whatever, for reasons which shall, by itself, be deemed sufficient.

In this case the legislature may have had ample proof that the original grant was obtained by practices which can never be too much reprobated, and which would have justified its abrogation so far as respected those to whom crime was imputable. But the grant, when issued, conveyed an estate in fee-simple to the grantee, clothed with all the solemnities which law can bestow. This estate was transferable; and those who purchased parts of it were not stained by that guilt which infected the original transaction. Their case is not distinguishable from the ordinary case of purchasers of a legal estate without knowledge of any secret fraud which might have led to the emanation of the original grant. According to the well-known course of equity, their rights could not be affected by such fraud. Their situation was the same, their title was the same, with that of every other member of the community who holds land by regular conveyances from the original patentee.

Is the power of the legislature competent to the annihilation of such title, and to a resumption of the property thus held?

The principle asserted is, that one legislature is competent to repeal any Act which a former legislature was competent to pass; and that one legislature cannot abridge the powers of a succeeding legislature.

The correctness of this principle, so far as respects general legislation, can never be controverted. But if an Act be done under a law, a succeeding legislature cannot undo it. The past cannot be recalled by the most absolute power. Conveyances have been made, those conveyances have vested legal estates, and, if those estates may be seised by the sovereign authority, still, that they originally vested is a fact, and cannot cease to be a fact.

When, then, a law is in its nature a contract, when absolute rights

have vested under that contract, a repeal of the law cannot divest those rights; and the act of annulling them, if legitimate, is rendered so by a power applicable to the case of every individual in the community.

It may well be doubted whether the nature of society and of government does not prescribe some limits to the legislative power; and if any be prescribed, where are they to be found, if the property of an individual, fairly and honestly acquired, may be seised without compensation.

To the legislature all legislative power is granted; but the question, whether the act of transferring the property of an individual to the public, be in the nature of the legislative power, is well worthy of serious reflection.

It is the peculiar province of the legislature to prescribe general rules for the government of society; the application of those rules to individuals in society would seem to be the duty of other departments. How far the power of giving the law may involve every other power, in cases where the Constitution is silent, never has been, and perhaps never can be, definitely stated.

The validity of this rescinding Act, then, might well be doubted, were Georgia a single sovereign power. But Georgia cannot be viewed as a single, unconnected, sovereign power, on whose legislature no other restrictions are imposed than may be found in its own Constitution. She is a part of a large empire; she is a member of the American Union; and that union has a constitution the supremacy of which all acknowledge, and which imposes limits to the legislatures of the several States, which none claim a right to pass. The Constitution of the United States declares that no State shall pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts.

Does the case now under consideration come within this prohibitory section of the Constitution?

In considering this very interesting question, we immediately ask ourselves what is a contract? Is a grant a contract?

A contract is a compact between two or more parties, and is either executory or executed. An executory contract is one in which a party binds himself to do, or not to do, a particular thing; such was the law under which the conveyance was made by the Governor. A contract executed is one in which the object of contract is performed; and this, says Blackstone, differs in nothing from a grant. The contract between Georgia and the purchasers was executed by the grant. A contract executed, as well as one which is executory, contains obligations binding on the parties. A grant, in its own nature, amounts to an extinguishment of the right of the grantor, and implies a contract not to reassert that right. A party is, therefore, always estopped by his own grant.

Since, then, in fact, a grant is a contract executed, the obligation of which still continues, and since the Constitution uses the general term contract, without distinguishing between those which are executory and

those which are executed, it must be construed to comprehend the latter as well as the former. A law annulling conveyances between individuals, and declaring that the grantors should stand seised of their former estates, notwithstanding those grants, would be as repugnant to the Constitution as a law discharging the vendors of property from the obligation of executing their contracts by conveyances. It would be strange if a contract to convey was secured by the Constitution, while an absolute conveyance remained unprotected.

If, under a fair construction of the Constitution, grants are comprehended under the term contracts, is a grant from the State excluded from the operation of the provision? Is the clause to be considered as inhibiting the State from impairing the obligation of contracts between two individuals, but as excluding from that inhibition contracts made with itself?

The words themselves contain no such distinction. They are general, and are applicable to contracts of every description. If contracts made with the State are to be exempted from their operation, the exception must arise from the character of the contracting party, not from the words which are employed.

Whatever respect might have been felt for the State sovereignties, it is not to be disguised that the framers of the Constitution viewed, with some apprehension, the violent acts which might grow out of the feelings of the moment; and that the people of the United States, in adopting that instrument, have manifested a determination to shield themselves and their property from the effects of those sudden and strong passions to which men are exposed. The restrictions on the legislative power of the States are obviously founded in this sentiment; and the Constitution of the United States contains what may be deemed a bill of rights for the people of each State.

No State shall pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts.

A bill of attainder may affect the life of an individual, or may confiscate his property, or may do both.

In this form the power of the legislature over the lives and fortunes of individuals is expressly restrained. What motive, then, for implying, in words which import a general prohibition to impair the obligation of contracts, an exception in favor of the right to impair the obligation of those contracts into which the State may enter?

The State legislatures can pass no *ex post facto* law. An *ex post facto* law is one which renders an act punishable in a manner in which it was not punishable when it was committed. Such a law may inflict penalties on the person, or may inflict pecuniary penalties which swell the public treasury. The legislature is then prohibited from passing a law by which a man's estate, or any part of it, shall be seised for a crime which was not declared, by some previous law, to render him liable to that punishment. Why, then, should violence be done to the natural meaning of words for the purpose of leaving to the legislature the power

of seising, for public use, the estate of an individual in the form of a law annulling the title by which he holds that estate? The court can perceive no sufficient grounds for making that distinction. This rescinding Act would have the effect of an *ex post facto* law. It forfeits the estate of Fletcher for a crime not committed by himself, but by those from whom he purchased. This cannot be effected in the form of an *ex post facto* law, or bill of attainder; why, then, is it allowable in the form of a law annulling the original grant?

The argument in favor of presuming an intention to except a case, not excepted by the words of the Constitution, is susceptible of some illustration from a principle originally engrafted in that instrument, though no longer a part of it. The Constitution, as passed, gave the courts of the United States jurisdiction in suits brought against individual States. A State, then, which violated its own contract, was suable in the courts of the United States for that violation. Would it have been a defence in such a suit to say that the State had passed a law absolving itself from the contract? It is scarcely to be conceived that such a defence could be set up. And yet, if a State is neither restrained by the general principles of our political institutions, nor by the words of the Constitution, from impairing the obligation of its own contracts, such a defence would be a valid one. This feature is no longer found in the Constitution; but it aids in the construction of those clauses with which it was originally associated.

It is, then, the unanimous opinion of the court, that, in this case, the estate having passed into the hands of a purchaser for a valuable consideration, without notice, the State of Georgia was restrained, either by general principles which are common to our free institutions, or by the particular provisions of the Constitution of the United States, from passing a law whereby the estate of the plaintiff in the premises so purchased could be constitutionally and legally impaired and rendered null and void.

In overruling the demurrer to the third plea, therefore, there is no error. . . .

The question, whether the vacant lands within the United States became a joint property, or belonged to the separate States, was a momentous question, which, at one time, threatened to shake the American confederacy to its foundation. This important and dangerous contest has been compromised, and the compromise is not now to be disturbed.

It is the opinion of the court, that the particular land stated in the declaration appears, from this special verdict, to lie within the State of Georgia, and that the State of Georgia had power to grant it.

Some difficulty was produced by the language of the covenant, and of the pleadings. It was doubted whether a State can be seised in fee of lands subject to the Indian title, and whether a decision that they were seised in fee might not be construed to amount to a decision that their grantee might maintain an ejectment for them, notwithstanding that title.

The majority of the court is of opinion that the nature of the Indian title, which is certainly to be respected by all courts, until it be legitimately extinguished, is not such as to be absolutely repugnant to seisin in fee on the part of the State.

Judgment affirmed, with costs.

[The opinion of JOHNSON, J., is omitted.]

MARTIN, HEIR AT LAW AND DEVISEE OF FAIRFAX, *v.* HUNTER'S LESSEE.

SUPREME COURT OF THE UNITED STATES. 1816.

[1 *Wheaton*, 304; 3 *Curtis's Decisions*, 562.]

THIS case is fully stated in the opinion of the court.

Jones, for the plaintiff in error.

Tucker and *Dexter*, for the defendant.

STORY, J., delivered the opinion of the court.

This is a writ of error from the Court of Appeals of Virginia, founded upon the refusal of that court to obey the mandate of this court, requiring the judgment rendered in this very cause, at February Term, 1813, to be carried into due execution. The following is the judgment of the Court of Appeals rendered on the mandate: "The court is unanimously of opinion, that the appellate power of the Supreme Court of the United States does not extend to this court, under a sound construction of the Constitution of the United States; that so much of the 25th section of the Act of Congress to establish the Judicial Courts of the United States, as extends the appellate jurisdiction of the Supreme Court to this court, is not in pursuance of the Constitution of the United States; that the writ of error in this cause was improvidently allowed under the authority of that Act; that the proceedings thereon in the Supreme Court were *coram non judice*, in relation to this court, and that obedience to its mandate be declined by the court." . . .

Before proceeding to the principal questions, it may not be unfit to dispose of some preliminary considerations which have grown out of the arguments at the Bar.

The Constitution of the United States was ordained and established, not by the States in their sovereign capacities, but emphatically, as the preamble of the Constitution declares, by "the people of the United States." There can be no doubt that it was competent to the people to invest the general government with all the powers which they might deem proper and necessary; to extend or restrain these powers according to their own good pleasure, and to give them a paramount and supreme authority. As little doubt can there be, that the people had a right to prohibit to the States the exercise of any powers which were,

in their judgment, incompatible with the objects of the general compact; to make the powers of the State governments, in given cases, subordinate to those of the nation, or to reserve to themselves those sovereign authorities which they might not choose to delegate to either. The Constitution was not, therefore, necessarily carved out of existing State sovereignties, nor a surrender of powers already existing in State institutions, for the powers of the States depend upon their own constitutions; and the people of every State had the right to modify and restrain them, according to their own views of policy or principle. On the other hand, it is perfectly clear that the sovereign powers vested in the State governments, by their respective constitutions, remained unaltered and unimpaired, except so far as they were granted to the government of the United States.

These deductions do not rest upon general reasoning, plain and obvious as they seem to be. They have been positively recognized by one of the articles in amendment of the Constitution, which declares that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

The government, then, of the United States, can claim no powers which are not granted to it by the Constitution, and the powers actually granted must be such as are expressly given, or given by necessary implication. On the other hand, this instrument, like every other grant, is to have a reasonable construction, according to the import of its terms; and where a power is expressly given in general terms, it is not to be restrained to particular cases, unless that construction grows out of the context expressly, or by necessary implication. The words are to be taken in their natural and obvious sense, and not in a sense unreasonably restricted or enlarged.

The Constitution, unavoidably, deals in general language. It did not suit the purposes of the people, in framing this great charter of our liberties, to provide for minute specifications of its powers, or to declare the means by which those powers should be carried into execution. It was foreseen that this would be a perilous and difficult, if not an impracticable, task. The instrument was not intended to provide merely for the exigencies of a few years, but was to endure through a long lapse of ages, the events of which were locked up in the inscrutable purposes of Providence. It could not be foreseen what new changes and modifications of power might be indispensable to effectuate the general objects of the charter; and restrictions and specifications, which at the present might seem salutary, might, in the end, prove the overthrow of the system itself. Hence its powers are expressed in general terms, leaving to the legislature, from time to time, to adopt its own means to effectuate legitimate objects, and to mould and model the exercise of its powers, as its own wisdom and the public interests should require.

With these principles in view, principles in respect to which no difference of opinion ought to be indulged, let us now proceed to the inter-

pretation of the Constitution, so far as regards the great points in controversy.

The third article of the Constitution is that which must principally attract our attention. . . .

This leads us to the consideration of the great question as to the nature and extent of the appellate jurisdiction of the United States. We have already seen that appellate jurisdiction is given by the Constitution to the Supreme Court in all cases where it has not original jurisdiction, subject, however, to such exceptions and regulations as Congress may prescribe. It is, therefore, capable of embracing every case enumerated in the Constitution, which is not exclusively to be decided by way of original jurisdiction. But the exercise of appellate jurisdiction is far from being limited by the terms of the Constitution to the Supreme Court. There can be no doubt that Congress may create a succession of inferior tribunals, in each of which it may vest appellate as well as original jurisdiction. The judicial power is delegated by the Constitution in the most general terms, and may, therefore, be exercised by Congress under every variety of form, of appellate or original jurisdiction. And as there is nothing in the Constitution which restrains or limits this power, it must, therefore, in all other cases, subsist in the utmost latitude of which, in its own nature, it is susceptible.

As, then, by the terms of the Constitution, the appellate jurisdiction is not limited as to the Supreme Court, and as to this court it may be exercised in all other cases than those of which it has original cognizance, what is there to restrain its exercise over State tribunals in the enumerated cases? The appellate power is not limited by the terms of the third article to any particular courts. The words are, "the judicial power (which includes appellate power) shall extend to all cases," &c., and "in all other cases before mentioned the Supreme Court shall have appellate jurisdiction." It is the case, then, and not the court, that gives the jurisdiction. If the judicial power extends to the case, it will be in vain to search in the letter of the Constitution for any qualification as to the tribunal where it depends. It is incumbent, then, upon those who assert such a qualification to show its existence by necessary implication. If the text be clear and distinct, no restriction upon its plain and obvious import ought to be admitted, unless the inference be irresistible.

If the Constitution meant to limit the appellate jurisdiction to cases pending in the courts of the United States, it would necessarily follow that the jurisdiction of these courts would, in all the cases enumerated in the Constitution, be exclusive of State tribunals. How otherwise could the jurisdiction extend to all cases arising under the Constitution, laws, and treaties of the United States, or to all cases of admiralty and maritime jurisdiction? If some of these cases might be entertained by State tribunals, and no appellate jurisdiction as to them should exist, then the appellate power would not extend to all, but to some, cases. If State tribunals might exercise concurrent jurisdiction over all or

some of the other classes of cases in the Constitution without control, then the appellate jurisdiction of the United States, might, as to such cases, have no real existence, contrary to the manifest intent of the Constitution. Under such circumstances, to give effect to the judicial power, it must be construed to be exclusive; and this not only when the *casus fœderis* should arise directly, but when it should arise, incidentally, in cases pending in State courts. This construction would abridge the jurisdiction of such court far more than has been ever contemplated in any Act of Congress.

On the other hand, if, as has been contended, a discretion be vested in Congress to establish, or not to establish, inferior courts at their own pleasure, and Congress should not establish such courts, the appellate jurisdiction of the Supreme Court would have nothing to act upon, unless it could act upon cases pending in the State courts. Under such circumstances, it must be held that the appellate power would extend to State courts; for the Constitution is peremptory that it shall extend to certain enumerated cases, which cases could exist in no other courts. Any other construction, upon this supposition, would involve this strange contradiction, that a discretionary power vested in Congress, and which they might rightfully omit to exercise, would defeat the absolute injunctions of the Constitution in relation to the whole appellate power.

But it is plain that the framers of the Constitution did contemplate that cases within the judicial cognizance of the United States not only might but would arise in the State courts, in the exercise of their ordinary jurisdiction. With this view the sixth article declares, that "this Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land, and the judges in every State shall be bound thereby, anything in the Constitution, or laws of any State to the contrary notwithstanding." It is obvious that this obligation is imperative upon the State judges in their official, and not merely in their private, capacities. From the very nature of their judicial duties they would be called upon to pronounce the law applicable to the case in judgment. They were not to decide merely according to the laws or Constitution of the State, but according to the Constitution, laws, and treaties of the United States, "the supreme law of the land."

A moment's consideration will show us the necessity and propriety, of this provision in cases where the jurisdiction of the State courts is unquestionable. Suppose a contract for the payment of money is made between citizens of the same State, and performance thereof is sought in the courts of that State; no person can doubt that the jurisdiction completely and exclusively attaches, in the first instance, to such courts. Suppose, at the trial, the defendant sets up in his defence a tender under a State law, making paper money a good tender, or a State law, impairing the obligation of such contract, which law, if binding, would

defeat the suit. The Constitution of the United States has declared that no State shall make anything but gold or silver coin a tender in payment of debts, or pass a law impairing the obligation of contracts. If Congress shall not have passed a law providing for the removal of such a suit to the courts of the United States, must not the State court proceed to hear and determine it? Can a mere plea in defence be of itself a bar to further proceedings, so as to prohibit an inquiry into its truth or legal propriety, when no other tribunal exists to whom judicial cognizance of such cases is confided? Suppose an indictment for a crime in a State court, and the defendant should allege in his defence that the crime was created by an *ex post facto* Act of the State, must not the State court, in the exercise of a jurisdiction which has already rightfully attached, have a right to pronounce on the validity and sufficiency of the defence? It would be extremely difficult, upon any legal principles, to give a negative answer to these inquiries. Innumerable instances of the same sort might be stated in illustration of the position; and unless the State courts could sustain jurisdiction in such cases, this clause of the sixth article would be without meaning or effect, and public mischiefs, of a most enormous magnitude, would inevitably ensue.

It must, therefore, be conceded that the Constitution not only contemplated, but meant to provide for cases within the scope of the judicial power of the United States, which might yet depend before State tribunals. It was foreseen that in the exercise of their ordinary jurisdiction, State courts would incidentally take cognizance of cases arising under the Constitution, the laws, and treaties of the United States. Yet to all these cases the judicial power, by the very terms of the Constitution, is to extend. It cannot extend by original jurisdiction if that was already rightfully and exclusively attached in the State courts, which (as has been already shown) may occur; it must therefore extend by appellate jurisdiction, or not at all. It would seem to follow that the appellate power of the United States must, in such cases, extend to State tribunals; and if in such cases, there is no reason why it should not equally attach upon all others within the purview of the Constitution.

It has been argued that such an appellate jurisdiction over State courts is inconsistent with the genius of our governments, and the spirit of the Constitution. That the latter was never designed to act upon State sovereignties, but only upon the people, and that, if the power exists, it will materially impair the sovereignty of the States, and the independence of their courts. We cannot yield to the force of this reasoning; it assumes principles which we cannot admit, and draws conclusions to which we do not yield our assent.

It is a mistake that the Constitution was not designed to operate upon States, in their corporate capacities. It is crowded with provisions which restrain or annul the sovereignty of the States in some of the highest branches of their prerogatives. The tenth section of the first article contains a long list of disabilities and prohibitions imposed upon

the States. Surely, when such essential portions of State sovereignty are taken away, or prohibited to be exercised, it cannot be correctly asserted that the Constitution does not act upon the States. The language of the Constitution is also imperative upon the States, as to the performance of many duties. It is imperative upon the State legislatures to make laws prescribing the time, places, and manner of holding elections for Senators and representatives, and for electors of President and Vice-President. And in these, as well as some other cases, Congress have a right to revise, amend, or supersede the laws which may be passed by State legislatures. When, therefore, the States are stripped of some of the highest attributes of sovereignty, and the same are given to the United States; when the legislatures of the States are, in some respects, under the control of Congress, and in every case are, under the Constitution, bound by the paramount authority of the United States; it is certainly difficult to support the argument that the appellate power over the decisions of State courts is contrary to the genius of our institutions. The courts of the United States can, without question, revise the proceedings of the executive and legislative authorities of the States, and if they are found to be contrary to the Constitution, may declare them to be of no legal validity. Surely, the exercise of the same right over judicial tribunals is not a higher or more dangerous act of sovereign power.

Nor can such a right be deemed to impair the independence of State judges. It is assuming the very ground in controversy to assert that they possess an absolute independence of the United States. In respect to the powers granted to the United States, they are not independent; they are expressly bound to obedience by the letter of the Constitution; and if they should unintentionally transcend their authority, or misconstrue the Constitution, there is no more reason for giving their judgments an absolute and irresistible force, than for giving it to the acts of the other co-ordinate departments of State sovereignty.

The argument urged from the possibility of the abuse of the revising power, is equally unsatisfactory. It is always a doubtful course, to argue against the use or existence of a power, from the possibility of its abuse. It is still more difficult, by such an argument, to engraft upon a general power, a restriction which is not to be found in the terms in which it is given. From the very nature of things, the absolute right of decision, in the last resort, must rest somewhere — wherever it may be vested it is susceptible of abuse. In all questions of jurisdiction the inferior, or appellate court must pronounce the final judgment; and common-sense, as well as legal reasoning, has conferred it upon the latter.

It has been further argued against the existence of this appellate power, that it would form a novelty in our judicial institutions. This is certainly a mistake. In the articles of confederation, an instrument framed with infinitely more deference to State rights and State jeal-

ousies, a power was given to Congress, to establish "courts for revising and determining, finally, appeals in all cases of captures." It is remarkable, that no power was given to entertain original jurisdiction in such cases; and, consequently, the appellate power (although not so expressed in terms) was altogether to be exercised in revising the decisions of State tribunals. This was, undoubtedly, so far a surrender of State sovereignty; but it never was supposed to be a power fraught with public danger, or destructive of the independence of State judges. On the contrary, it was supposed to be a power indispensable to the public safety, inasmuch as our national rights might otherwise be compromitted, and our national peace be endangered. Under the present Constitution the prize jurisdiction is confined to the courts of the United States; and a power to revise the decisions of State courts, if they should assert jurisdiction over prize causes, cannot be less important, or less useful, than it was under the confederation.

In this connection, we are led again to the construction of the words of the Constitution, "the judicial power shall extend," &c. If, as has been contended at the Bar, the term "extend" have a relative signification, and mean to widen an existing power, it will then follow, that, as the confederation gave an appellate power over State tribunals, the Constitution enlarged or widened that appellate power to all the other cases in which jurisdiction is given to the courts of the United States. It is not presumed that the learned counsel would choose to adopt such a conclusion.

It is further argued, that no great public mischief can result from a construction which shall limit the appellate power of the United States to cases in their own courts: first, because State judges are bound by an oath to support the Constitution of the United States, and must be presumed to be men of learning and integrity; and, secondly, because Congress must have an unquestionable right to remove all cases within the scope of the judicial power, from the State courts to the courts of the United States, at any time before final judgment, though not after final judgment. As to the first reason — admitting that the judges of the State courts are, and always will be, of as much learning, integrity, and wisdom, as those of the courts of the United States (which we very cheerfully admit), it does not aid the argument. It is manifest that the Constitution has proceeded upon a theory of its own, and given or withheld powers according to the judgment of the American people, by whom it was adopted. We can only construe its powers, and cannot inquire into the policy or principles which induced the grant of them. The Constitution has presumed (whether rightly or wrongly we do not inquire) that State attachments, State prejudices, State jealousies, and State interests, might sometimes obstruct, or control, or be supposed to obstruct or control, the regular administration of justice. Hence, in controversies between States; between citizens of different States; between citizens claiming grants under different States; between a State and its citizens, or foreigners, and between citizens and foreigners,

it enables the parties, under the authority of Congress, to have the controversies heard, tried, and determined before the national tribunals. No other reason than that which has been stated can be assigned, why some, at least, of those cases should not have been left to the cognizance of the State courts. In respect to the other enumerated cases — the cases arising under the Constitution, laws, and treaties of the United States, cases affecting ambassadors and other public ministers, and cases of admiralty and maritime jurisdiction — reasons of a higher and more extensive nature, touching the safety, peace, and sovereignty of the nation, might well justify a grant of exclusive jurisdiction.

This is not all. A motive of another kind, perfectly compatible with the most sincere respect for State tribunals, might induce the grant of appellate power over their decisions. That motive is the importance, and even necessity of uniformity of decisions throughout the whole United States, upon all subjects within the purview of the Constitution. Judges of equal learning and integrity, in different States, might differently interpret a statute, or a treaty of the United States, or even the Constitution itself. If there were no revising authority to control these jarring and discordant judgments, and harmonize them into uniformity, the laws, the treaties, and the Constitution of the United States would be different in different States, and might perhaps never have precisely the same construction, obligation, or efficacy, in any two States. The public mischiefs that would attend such a state of things would be truly deplorable; and it cannot be believed that they could have escaped the enlightened convention which formed the Constitution. What, indeed, might then have been only prophecy has now become fact; and the appellate jurisdiction must continue to be the only adequate remedy for such evils.

There is an additional consideration, which is entitled to great weight. The Constitution of the United States was designed for the common and equal benefit of all the people of the United States. The judicial power was granted for the same benign and salutary purposes. It was not to be exercised exclusively for the benefit of parties who might be plaintiffs, and would elect the national forum, but also for the protection of defendants who might be entitled to try their rights, or assert their privileges, before the same forum. Yet, if the construction contended for be correct, it will follow, that as the plaintiff may always elect the State court, the defendant may be deprived of all the security which the Constitution intended in aid of his rights. Such a state of things can, in no respect, be considered as giving equal rights. To obviate this difficulty, we are referred to the power which it is admitted Congress possess to remove suits from State courts to the national courts; and this forms the second ground upon which the argument we are considering has been attempted to be sustained.

This power of removal is not to be found in express terms in any part of the Constitution; if it be given, it is only given by implication,

as a power necessary and proper to carry into effect some express power. The power of removal is certainly not, in strictness of language; it presupposes an exercise of original jurisdiction to have attached elsewhere. The existence of this power of removal is familiar in courts acting according to the course of the common law in criminal as well as civil cases, and it is exercised before as well as after judgment. But this is always deemed in both cases an exercise of appellate, and not of original jurisdiction, If, then, the right of removal be included in the appellate jurisdiction, it is only because it is one mode of exercising that power, and as Congress is not limited by the Constitution to any particular mode, or time of exercising it, it may authorize a removal either before or after judgment. The time, the process, and the manner, must be subject to its absolute legislative control. A writ of error is, indeed, but a process which removes the record of one court to the possession of another court, and enables the latter to inspect the proceedings, and give such judgment as its own opinion of the law and justice of the case may warrant. There is nothing in the nature of the process which forbids it from being applied, by the legislature, to interlocutory as well as final judgments. And if the right of removal from State courts exists before judgment, because it is included in the appellate power, it must, for the same reason, exist after judgment. And if the appellate power by the Constitution does not include cases pending in State courts, the right of removal, which is but a mode of exercising that power, cannot be applied to them. Precisely the same objections, therefore, exist as to the right of removal before judgment, as after, and both must stand or fall together. Nor, indeed, would the force of the arguments on either side materially vary, if the right of removal were an exercise of original jurisdiction. It would equally trench upon the jurisdiction and independence of State tribunals.

The remedy, too, of removal of suits would be utterly inadequate to the purposes of the Constitution, if it could act only on the parties, and not upon the State courts. In respect to criminal prosecutions, the difficulty seems admitted to be insurmountable; and, in respect to civil suits, there would, in many cases, be rights without corresponding remedies. If State courts should deny the constitutionality of the authority to remove suits from their cognizance, in what manner could they be compelled to relinquish the jurisdiction? In respect to criminal cases, there would at once be an end of all control, and the State decisions would be paramount to the Constitution; and though in civil suits the courts of the United States might act upon the parties, yet the State courts might act in the same way; and this conflict of jurisdictions would not only jeopardize private rights, but bring into imminent peril the public interests.

On the whole, the court are of opinion, that the appellate power of the United States does extend to cases pending in the State courts; and that the 25th section of the Judiciary Act, which authorizes the

exercise of this jurisdiction in the specified cases, by a writ of error, is supported by the letter and spirit of the Constitution. We find no clause in that instrument which limits this power; and we dare not interpose a limitation where the people have not been disposed to create one.

Strong as this conclusion stands upon the general language of the Constitution, it may still derive support from other sources. It is an historical fact, that this exposition of the Constitution, extending its appellate power to State courts, was, previous to its adoption, uniformly and publicly avowed by its friends, and admitted by its enemies, as the basis of their respective reasonings, both in and out of the State conventions. It is an historical fact, that at the time when the Judiciary Act was submitted to the deliberations of the first Congress, composed, as it was, not only of men of great learning and ability, but of men who had acted a principal part in framing, supporting, or opposing that Constitution, the same exposition was explicitly declared and admitted by the friends and by the opponents of that system. It is an historical fact, that the Supreme Court of the United States have, from time to time, sustained this appellate jurisdiction in a great variety of cases, brought from the tribunals of many of the most important States in the Union, and that no State tribunal has ever breathed a judicial doubt on the subject, or declined to obey the mandate of the Supreme Court, until the present occasion. This weight of contemporaneous exposition by all parties, this acquiescence of enlightened State courts, and these judicial decisions of the Supreme Court through so long a period, do, as we think, place the doctrine upon a foundation of authority which cannot be shaken, without delivering over the subject to perpetual and irremediable doubts. . . .

It is the opinion of the whole court, that the judgment of the Court of Appeals of Virginia, rendered on the mandate in this cause, be reversed, and the judgment of the District Court, held at Winchester, be, and the same is hereby affirmed. [The concurring opinion of JOHNSON, J., is omitted.][1]

[1] The same point was enforced in 1821, on a writ of error to a Virginia court in a criminal case. *Cohens* v. *Va.* 6 Wheat. 264 (1821). It was also elaborately considered and decided in *Ableman* v. *Booth*, 21 How. 506 (1858). — ED.

EAKIN *v.* RAUB.

SUPREME COURT OF PENNSYLVANIA. 1825.

[12 *S. & R.* 330.]

WRIT of error to the Court of Common Pleas of Northampton County, in an action of ejectment brought by James Eakin and James and Ann Simpson, against Daniel Raub, Edmund Porter, Samuel Sitgreaves, Hugh Ross, John Lippens, and John Ross, to recover a moiety of certain lots in the borough of Easton. . . . [The question was on the operation of two statutes of limitation. The judgment below was reversed by the majority of the court (TILGHMAN, C. J. and DUNCAN, J.) on the ground that, "The Act of the 11th of March, 1815, is not to be construed so as to form an immediate bar, by retrospection, to the claims of persons beyond sea, who had been out of possession twenty-one years prior to the passing of the Act; but such persons were allowed fifteen years from the 11th of March, 1815, for bringing their actions according to the provisions of the 3d section of the Act of Limitations of the 26th of March, 1785." MR. JUSTICE GIBSON, in a dissenting opinion, adopted a different construction of the statute.]

Barnes, for the plaintiffs in error. *Scott* and *Binney*, for the defendants in error.

GIBSON, J. . . . But it is said, that without it, the latter Act would be unconstitutional; and, instead of controverting this, I will avail myself of it to express an opinion which I have deliberately formed, on the abstract right of the judiciary to declare an unconstitutional Act of the Legislature void.

It seems to me there is a plain difference, hitherto unnoticed, between Acts that are repugnant to the Constitution of the particular State, and Acts that are repugnant to the Constitution of the United States; my opinion being, that the judiciary is bound to execute the former, but not the latter. I shall hereafter attempt to explain this difference, by pointing out the particular provisions in the Constitution of the United States on which it depends. I am aware, that a right to declare all unconstitutional Acts void, without distinction as to either Constitution, is generally held as a professional dogma; but, I apprehend, rather as a matter of faith than of reason. I admit that I once embraced the same doctrine, but without examination, and I shall therefore state the arguments that impelled me to abandon it, with great respect for those by whom it is still maintained. But I may premise, that it is not a little remarkable, that although the right in question has all along been claimed by the judiciary, no judge has ventured to discuss it, except Chief Justice Marshall (in *Marbury* v. *Madison*, 1 Cranch, 176), and if the argument of a jurist so distinguished for the strength of his ratiocinative powers be found inconclusive, it may fairly be set down to the weakness of the position which he attempts to defend. *Si Per-*

gama dextra defendi potuit, etiam hac defensa fuisset. In saying this, I do not overlook the opinion of Judge Patterson, in *Vanhorne* v. *Dorrance*, 2 Dall. 307, which abounds with beautiful figures in illustration of his doctrine; but, without intending disrespect, I submit that metaphorical illustration is one thing and argument another. Now, in questions of this sort, precedents ought to go for absolutely nothing. The Constitution is a collection of fundamental laws, not to be departed from in practice nor altered by judicial decision, and in the construction of it, nothing would be so alarming as the doctrine of *communis error*, which offers a ready justification for every usurpation that has not been resisted *in limine*. Instead, therefore, of resting on the fact, that the right in question has universally been assumed by the American courts, the judge who asserts it ought to be prepared to maintain it on the principles of the Constitution.

I begin, then, by observing that in this country, the powers of the judiciary are divisible into those that are political and those that are purely civil. Every power by which one organ of the government is enabled to control another, or to exert an influence over its Acts, is a political power. The political powers of the judiciary are extraordinary and adventitious; such, for instance, as are derived from certain peculiar provisions in the Constitution of the United States, of which hereafter: and they are derived, by direct grant, from the common fountain of all political power. On the other hand, its civil are its ordinary and appropriate powers; being part of its essence, and existing independently of any supposed grant in the Constitution. But where the government exists by virtue of a written constitution, the judiciary does not necessarily derive, from that circumstance, any other than its ordinary and appropriate powers. Our judiciary is constructed on the principles of the common law, which enters so essentially into the composition of our social institutions as to be inseparable from them, and to be, in fact, the basis of the whole scheme of our civil and political liberty. In adopting any organ or instrument of the common law, we take it with just such powers and capacities as were incident to it at the common law, except where these are expressly, or by necessary implication, abridged or enlarged in the Act of adoption; and, that such Act is a written instrument, cannot vary its consequences or construction. In the absence of special provision to the contrary, sheriffs, justices of the peace, and other officers whose offices are established in the Constitution, exercise no other powers here, than what similar officers do in England; and trial by jury would have been according to the course of the common law, without any declaration to that effect in the Constitution. Now, what are the powers of the judiciary at the common law? They are those that necessarily arise out of its immediate business; and they are therefore commensurate only with the judicial execution of the municipal law, or, in other words, with the administration of distributive justice, without extending to anything of a political cast whatever. Dr. Paley, as able a man as ever wrote

on those subjects on which he professed to treat, seems to have considered the judiciary as a part of the executive, and judging from its essence, subordinate to the legislature, which he viewed as the depository of the whole sovereignty of the State. With us, although the legislature be the depository of only so much of the sovereignty as the people have thought fit to impart, it is nevertheless sovereign within the limit of its powers, and may relatively claim the same pre-eminence here that it may claim elsewhere. It will be conceded, then, that the ordinary and essential powers of the judiciary do not extend to the annulling of an Act of the Legislature. Nor can the inference to be drawn from this, be evaded by saying that in England the Constitution, resting in principles consecrated by time, and not in an actual written compact, and being subject to alteration by the very Act of the Legislature, there is consequently no separate and distinct criterion by which the question of constitutionality may be determined; for it does not follow, that because we have such a criterion, the application of it belongs to the judiciary. I take it, therefore, that the power in question does not necessarily arise from the judiciary being established by a written constitution, but that this organ can claim, on account of that circumstance, no powers that do not belong to it at the common law; and that, whatever may have been the cause of the limitation of its jurisdiction originally, it can exercise no power of supervision over the legislature, without producing a direct authority for it in the Constitution, either in terms or by irresistible implication from the nature of the government: without which the power must be considered as reserved, along with the other ungranted portions of the sovereignty for the immediate use of the people.

The Constitution of Pennsylvania contains no express grant of political powers to the judiciary. But, to establish a grant by implication, the Constitution is said to be a law of superior obligation; and, consequently, that if it were to come into collision with an Act of the Legislature, the latter would have to give way. This is conceded. But it is a fallacy, to suppose that they can come into collision, before the judiciary. What is a constitution? It is an Act of extraordinary legislation, by which the people establish the structure and mechanism of their government; and in which they prescribe fundamental rules to regulate the motion of the several parts. What is a statute? It is an Act of ordinary legislation, by the appropriate organ of the government; the provisions of which are to be executed by the executive or judiciary, or by officers subordinate to them. The Constitution, then, contains no practical rules for the administration of distributive justice, with which alone the judiciary has to do; these being furnished in acts of ordinary legislation, by that organ of the government, which, in this respect, is exclusively the representative of the people; and it is generally true, that the provisions of a constitution are to be carried into effect immediately by the legislature, and only mediately, if at all, by the judiciary. In what respect is the Constitution of Pennsylvania

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inconsistent with this principle? Only, perhaps, in one particular provision, to regulate the style of process, and establish an appropriate form of conclusion in criminal prosecutions: in this alone the Constitution furnishes a rule for the judiciary, and this the legislature cannot alter, because it cannot alter the Constitution. In all other cases, if the Act of Assembly supposed to be unconstitutional, were laid out of the question, there would remain no rule to determine the point in controversy in the cause, but the statute or common law, as it existed before the Act of Assembly was passed; and the Constitution and Act of Assembly therefore do not furnish conflicting rules applicable to the point before the court; nor is it at all necessary, that the one or the other of them should give way.

The Constitution and the right of the legislature to pass the Act, may be in collision. But is that a legitimate subject for judicial determination? If it be, the judiciary must be a peculiar organ, to revise the proceedings of the legislature, and to correct its mistakes; and in what part of the Constitution are we to look for this proud pre-eminence? Viewing the matter in the opposite direction, what would be thought of an Act of Assembly in which it should be declared that the Supreme Court had, in a particular case, put a wrong construction on the Constitution of the United States, and that the judgment should therefore be reversed? It would doubtless be thought a usurpation of judicial power. But it is by no means clear, that to declare a law void which has been enacted according to the forms prescribed in the Constitution, is not a usurpation of legislative power. It is an act of sovereignty; and sovereignty an legislative power are said by Sir William Blackstone to be convertible terms. It is the business of the judiciary to interpret the laws, not scan the authority of the lawgiver; and without the latter, it cannot take cognizance of a collision between a law and the Constitution. So that to affirm that the judiciary has a right to judge of the existence of such collision, is to take for granted the very thing to be proved. And, that a very cogent argument may be made in this way, I am not disposed to deny; for no conclusions are so strong as those that are drawn from the *petitio principii*.

But it has been said to be emphatically the business of the judiciary, to ascertain and pronounce what the law is; and that this necessarily involves a consideration of the Constitution. It does so: but how far? If the judiciary will inquire into anything beside the form of enactment, where shall it stop? There must be some point of limitation to such an inquiry; for no one will pretend, that a judge would be justifiable in calling for the election returns, or scrutinizing the qualifications of those who composed the legislature.

It is next supposed, that as the members of the legislature have no inherent right of legislation, but derive their authority from the people, no law can be valid where authority to pass it, is either simply not given or positively withheld: thus treating the members as the agents of the people, and the Constitution as a letter of attorney containing

their authority and bounding their sphere of action, and the consequence deduced being, that acts not warranted by the Constitution are not the acts of the people, but of those that do them; and that they are therefore *ipso facto* void. The concluding inference is, in military phrase, the key of the position, and if it be tenable, it will decide the controversy; for a law *ipso facto* void, is absolutely a *non entity.* But it is putting the argument on bold ground to say, that a high public functionary shall challenge no more respect than is due to a private individual; and that its acts, although presenting themselves under sanctions derived from a strict observance of the form of enactment prescribed in the Constitution, are to be rejected as *ipso facto* void for excess of authority. The Constitution is not to be expounded like a deed, but by principles of interpretation much more liberal; as was declared by this court, in *The Farmers and Mechanics' Bank* v. *Smith,* 3 Serg. & Rawle, 63. But, in the case of a public functionary, even according to common-law maxims, *omnia presumi debent rite et solemniter esse acta.* The benefit of this maxim cannot be refused to the legislature by those who advocate the other side, inasmuch as it is the foundation of their own hypothesis; for all respect is demanded for the acts of the judiciary. For instance: let it be supposed that the power to declare a law unconstitutional has been exercised. What is to be done? The legislature must acquiesce, although it may think the construction of the judiciary wrong. But why must it acquiesce? Only because it is bound to pay that respect to every other organ of the government, which it has a right to exact from each of them in turn. This is the argument. But it will not be pretended, that the legislature has not at least an equal right with the judiciary to put a construction on the Constitution; nor that either of them is infallible; nor that either ought to be required to surrender its judgment to the other. Suppose, then, they differ in opinion as to the constitutionality of a particular law; if the organ whose business it first is to decide on the subject, is not to have its judgment treated with respect, what shall prevent it from securing the preponderance of its opinion by the strong arm of power? It is in vain to say, the legislature would be the aggressor in this; and that no argument in favor of its authority can be drawn from an abuse of its power. Granting this, yet it is fair to infer, that the framers of the Constitution never intended to force the judges either to become martyrs or to flinch from their duty; or to interpose a check that would produce no other effect than an intestine war. Such things have occurred in other States, and would necessarily occur in this, under circumstances of strong excitement in the popular branch. The judges would be legislated out of office, if the majority requisite to a direct removal by impeachment, or the legislative address, could not be had; and this check, instead of producing the salutary effect expected from it, would rend the government in pieces. But, suppose that a struggle would not produce consequences so disastrous, still the soundness of any construction which would bring one organ of the govern-

ment into collision with another, is to be more than suspected; for where collision occurs, it is evident the machine is working in a way the framers of it did not intend. But what I want more immediately to press on the attention, is the necessity of yielding to the acts of the legislature the same respect that is claimed for the acts of the judiciary. Repugnance to the Constitution is not always self-evident; for questions involving the consideration of its existence, require for their solution the most vigorous exertion of the higher faculties of the mind, and conflicts will be inevitable, if any branch is to apply the Constitution after its own fashion to the acts of all the others. I take it, then, the legislature is entitled to all the deference that is due to the judiciary; that its acts are in no case to be treated as *ipso facto* void, except where they would produce a revolution in the government; and that, to avoid them, requires the act of some tribunal competent under the Constitution (if any such there be), to pass on their validity. All that remains, therefore, is to inquire whether the judiciary or the people are that tribunal.

Now, as the judiciary is not expressly constituted for that purpose, it must derive whatever authority of the sort it may possess, from the reasonableness and fitness of the thing. But, in theory, all the organs of the government are of equal capacity; or, if not equal, each must be supposed to have superior capacity only for those things which peculiarly belong to it; and, as legislation peculiarly involves the consideration of those limitations which are put on the law-making power, and the interpretation of the laws when made, involves only the construction of the laws themselves, it follows that the construction of the Constitution in this particular belongs to the legislature, which ought therefore to be taken to have superior capacity to judge of the constitutionality of its own acts. But suppose all to be of equal capacity in every respect, why should one exercise a controlling power over the rest? That the judiciary is of superior rank, has never been pretended, although it has been said to be co-ordinate. It is not easy, however, to comprehend how the power which gives law to all the rest, can be of no more than equal rank with one which receives it, and is answerable to the former for the observance of its statutes. Legislation is essentially an act of sovereign power; but the execution of the laws by instruments that are governed by prescribed rules and exercise no power of volition, is essentially otherwise. The very definition of law, which is said to be "a rule of civil conduct prescribed by the supreme power in the State," shows the intrinsic superiority of the legislature. It may be said, the power of the legislature, also, is limited by prescribed rules. It is so. But it is, nevertheless, the power of the people, and sovereign as far as it extends. It cannot be said, that the judiciary is co-ordinate merely because it is established by the Constitution. If that were sufficient, sheriffs, registers of wills, and recorders of deeds, would be so too. Within the pale of their authority, the acts of these officers will have the power of the people for their support; but no one will pretend,

they are of equal dignity with the acts of the legislature. Inequality of rank arises not from the manner in which the organ has been constituted, but from its essence and the nature of its functions; and the legislative organ is superior to every other, inasmuch as the power to will and to command, is essentially superior to the power to act and to obey. It does not follow, then, that every organ created by special provision in the Constitution, is of equal rank. Both the executive, strictly as such, and the judiciary are subordinate; and an act of superior power exercised by an inferior ought, one would think, to rest on something more solid than implication.

It may be alleged, that no such power is claimed, and that the judiciary does no positive act, but merely refuses to be instrumental in giving effect to an unconstitutional law. This is nothing more than a repetition in a different form of the argument, — that an unconstitutional law is *ipso facto* void; for a refusal to act under the law, must be founded on a right in each branch to judge of the acts of all the others, before it is bound to exercise its functions to give those acts effect. No such right is recognized in the different branches of the national government, except the judiciary (and that, too, on account of the peculiar provisions of the Constitution), for it is now universally held, whatever doubts may have once existed, that Congress is bound to provide for carrying a treaty into effect, although it may disapprove of the exercise of the treaty-making power in the particular instance. A government constructed on any other principle, would be in perpetual danger of standing still; for the right to decide on the constitutionality of the laws, would not be peculiar to the judiciary, but would equally reside in the person of every officer whose agency might be necessary to carry them into execution.

Every one knows how seldom men think exactly alike on ordinary subjects; and a government constructed on the principle of assent by all its parts, would be inadequate to the most simple operations. The notion of a complication of counter checks has been carried to an extent in theory, of which the framers of the Constitution never dreamt. When the entire sovereignty was separated into its elementary parts, and distributed to the appropriate branches, all things incident to the exercise of its powers were committed to each branch exclusively. The negative which each part of the legislature may exercise, in regard to the acts of the other, was thought sufficient to prevent material infractions of the restraints which were put on the power of the whole; for, had it been intended to interpose the judiciary as an additional barrier, the matter would surely not have been left in doubt. The judges would not have been left to stand on the insecure and ever shifting ground of public opinion as to constructive powers: they would have been placed on the impregnable ground of an express grant. They would not have been compelled to resort to the debates in the convention, or the opinion that was generally entertained at the time. A constitution, or a statute, is supposed to contain the whole will of

the body from which it emanated; and I would just as soon resort to the debates in the legislature for the construction of an Act of Assembly, as to the debates in the convention for the construction of the Constitution.

The power is said to be restricted to cases that are free from doubt or difficulty. But the abstract existence of a power cannot depend on the clearness or obscurity of the case in which it is to be exercised; for that is a consideration that cannot present itself, before the question of the existence of the power shall have been determined; and, if its existence be conceded, no considerations of policy arising from the obscurity of the particular case, ought to influence the exercise of it. The judge would have no discretion; but the party submitting the question of constitutionality would have an interest in the decision of it, which could not be postponed to motives of deference for the opinion of the legislature. His rights would depend not on the greatness of the supposed discrepancy with the Constitution, but on the existence of any discrepancy at all; and the judge would therefore be bound to decide this question, like every other in respect to which he may be unable to arrive at a perfectly satisfactory conclusion. But he would evade the question instead of deciding it, were he to refuse to decide in accordance with the inclination of his mind. To say, therefore, that the power is to be exercised but in perfectly clear cases, is to betray a doubt of the propriety of exercising it at all. Were the same caution used in judging of the existence of the power that is inculcated as to the exercise of it, the profession would perhaps arrive at a different conclusion. The grant of a power so extraordinary ought to appear so plain, that he who should run might read. Now, put the Constitution into the hands of any man of plain sense, whose mind is free from an impression on the subject, and it will be impossible to persuade him, that the exercise of such a power was ever contemplated by the convention.

But the judges are sworn to support the Constitution, and are they not bound by it as the law of the land? In some respects they are. In the very few cases in which the judiciary, and not the legislature, is the immediate organ to execute its provisions, they are bound by it in preference to any Act of Assembly to the contrary. In such cases, the Constitution is a rule to the courts. But what I have in view in this inquiry, is the supposed right of the judiciary to interfere, in cases where the Constitution is to be carried into effect through the instrumentality of the legislature, and where that organ must necessarily first decide on the constitutionality of its own act. The oath to support the Constitution is not peculiar to the judges, but is taken indiscriminately by every officer of the government, and is designed rather as a test of the political principles of the man, than to bind the officer in the discharge of his duty: otherwise it were difficult to determine what operation it is to have in the case of a recorder of deeds, for instance, who, in the execution of his office, has nothing to do with the

Constitution. But granting it to relate to the official conduct of the judge, as well as every other officer, and not to his political principles, still it must be understood in reference to supporting the Constitution, only as far as that may be involved in his official duty; and, consequently, if his official duty does not comprehend an inquiry into the authority of the legislature, neither does his oath. It is worthy of remark here, that the foundation of every argument in favor of the right of the judiciary, is found at last to be an assumption of the whole ground in dispute. Granting that the object of the oath is to secure a support of the Constitution in the discharge of official duty, its terms may be satisfied by restraining it to official duty in the exercise of the ordinary judicial powers. Thus, the Constitution may furnish a rule of construction, where a particular interpretation of a law would conflict with some constitutional principle; and such interpretation, where it may, is always to be avoided. But the oath was more probably designed to secure the powers of each of the different branches from being usurped by any of the rest: for instance, to prevent the House of Representatives from erecting itself into a court of judicature, or the Supreme Court from attempting to control the legislature; and, in this view, the oath furnishes an argument equally plausible against the right of the judiciary. But if it require a support of the Constitution in anything beside official duty, it is in fact an oath of allegiance to a particular form of government; and, considered as such, it is not easy to see why it should not be taken by the citizens at large, as well as by the officers of the government. It has never been thought that an officer is under greater restraint as to measures which have for their avowed end a total change of the Constitution, than a citizen who has taken no oath at all. The official oath, then, relates only to the official conduct of the officer, and does not prove that he ought to stray from the path of his ordinary business to search for violations of duty in the business of others; nor does it, as supposed, define the powers of the officer.

But do not the judges do a positive act in violation of the Constitution, when they give effect to an unconstitutional law? Not if the law has been passed according to the forms established in the Constitution. The fallacy of the question is, in supposing that the judiciary adopts the Acts of the Legislature as its own; whereas the enactment of a law and the interpretation of it are not concurrent acts, and as the judiciary is not required to concur in the enactment, neither is it in the breach of the Constitution which may be the consequence of the enactment. The fault is imputable to the legislature, and on it the responsibility exclusively rests. In this respect, the judges are in the predicament of jurors who are bound to serve in capital cases, although unable, under any circumstances, to reconcile it to their duty to deprive a human being of life. To one of these, who applied to be discharged from the panel, I once heard it remarked, by an eminent and humane judge, "You do not deprive a prisoner of life by finding him guilty of a cap-

ital crime: you but pronounce his case to be within the law, and it is therefore those who declare the law, and not you, who deprive him of life."

That everything addressed to the legislature by way of positive command, is purely directory, will hardly be disputed: it is only to enforce prohibitions that the interposition of judicial authority is thought to be warrantable. But I can see no room for a distinction between the injunctions that are positive and those that are negative: the same authority must enforce both.

But it has been said, that this construction would deprive the citizen of the advantages which are peculiar to a written constitution, by at once declaring the power of the legislature, in practice, to be illimitable. I ask, what are those advantages? The principles of a written constitution are more fixed and certain, and more apparent to the apprehension of the people, than principles which depend on tradition and the vague comprehension of the individuals who compose the nation, and who cannot all be expected to receive the same impressions or entertain the same notions on any given subject. But there is no magic or inherent power in parchment and ink, to command respect and protect principles from violation. In the business of government, a recurrence to first principles answers the end of an observation at sea with a view to correct the dead reckoning; and, for this purpose, a written constitution is an instrument of inestimable value. It is of inestimable value, also, in rendering its principles familiar to the mass of the people; for, after all, there is no effectual guard against legislative usurpation but public opinion, the force of which, in this country, is inconceivably great. Happily this is proved, by experience, to be a sufficient guard against palpable infractions. The Constitution of this State has withstood the shocks of strong party excitement for thirty years, during which no Act of the Legislature has been declared unconstitutional, although the judiciary has constantly asserted a right to do so in clear cases. But it would be absurd to say, that this remarkable observance of the Constitution has been produced, not by the responsibility of the legislature to the people, but by an apprehension of control by the judiciary. Once let public opinion be so corrupt as to sanction every misconstruction of the Constitution and abuse of power which the temptation of the moment may dictate, and the party which may happen to be predominant, will laugh at the puny efforts of a dependent power to arrest it in its course.

For these reasons, I am of opinion that it rests with the people, in whom full and absolute sovereign power resides, to correct abuses in legislation, by instructing their representatives to repeal the obnoxious Act. What is wanting to plenary power in the government, is reserved by the people for their own immediate use; and to redress an infringement of their rights in this respect, would seem to be an accessory of the power thus reserved. It might, perhaps, have been better to vest the power in the judiciary; as it might be expected that its habits of

deliberation, and the aid derived from the arguments of counsel, would more frequently lead to accurate conclusions. On the other hand, the judiciary is not infallible; and an error by it would admit of no remedy but a more distinct expression of the public will, through the extraordinary medium of a convention; whereas, an error by the legislature admits of a remedy by an exertion of the same will, in the ordinary exercise of the right of suffrage, — a mode better calculated to attain the end, without popular excitement. It may be said, the people would probably not notice an error of their representatives. But they would as probably do so, as notice an error of the judiciary; and, beside, it is a postulate in the theory of our government, and the very basis of the superstructure, that the people are wise, virtuous, and competent to manage their own affairs: and if they are not so, in fact, still every question of this sort must be determined according to the principles of the Constitution, as it came from the hands of its framers, and the existence of a defect which was not foreseen, would not justify those who administer the government, in applying a corrective in practice, which can be provided only by a convention. Long and uninterrupted usage is entitled to respect; and, although it cannot change an admitted principle of the Constitution, it will go far to settle a question of doubtful right. But, although this power has all along been claimed by the State judiciary, it has never been exercised. *Austin* v. *The University of Pennsylvania*, 1 Yeates, 260, is the only case even apparently to the contrary; but there the Act of Assembly had been previously repealed. In *Vanhorne* v. *Dorrance*, decided by the Circuit Court of the United States under similar circumstances, the right is peremptorily asserted and examples of monstrous violations of the Constitution are put in a strong light by way of example; such as taking away the trial by jury, the elective franchise, or subverting religious liberty. But any of these would be such a usurpation of the political rights of the citizens, as would work a change in the very structure of the government; or, to speak more properly, it would itself be a revolution, which, to counteract, would justify even insurrection; consequently, a judge might lawfully employ every instrument of official resistance within his reach. By this I mean, that while the citizen should resist with pike and gun, the judge might co-operate with *habeas corpus* and *mandamus*. It would be his duty, as a citizen, to throw himself into the breach, and, if it should be necessary, perish there; but this is far from proving the judiciary to be a peculiar organ under the Constitution, to prevent legislative encroachment on the powers reserved by the people; and this is all that I contend it is not. Indeed, its absolute inadequacy to the object, is conclusive that it never was intended as such by the framers of the Constitution, who must have had in view the probable operation of the government in practice.

But in regard to an Act of Assembly, which is found to be in collision with the Constitution, laws, or treaties of the United States, I take the

duty of the judiciary to be exactly the reverse. By becoming parties to the Federal Constitution, the States have agreed to several limitations of their individual sovereignty, to enforce which, it was thought to be absolutely necessary to prevent them from giving effect to laws in violation of those limitations, through the instrumentality of their own judges. Accordingly, it is declared in the sixth article and second section of the Federal Constitution, that "This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby: anything in the laws or Constitution of any State to the contrary notwithstanding."

This is an express grant of a political power, and it is conclusive to show that no law of inferior obligation, as every State law must necessarily be, can be executed at the expense of the Constitution, laws, or treaties of the United States. It may be said, these are to furnish a rule only when there is no State provision on the subject. But, in that view, they could with no propriety be called supreme; for supremacy is a relative term, and cannot be predicated of a thing which exists separately and alone: and this law, which is called supreme, would change its character and become subordinate as soon as it should be found in conflict with a State law. But the judges are to be bound by the Federal Constitution and laws, notwithstanding anything in the Constitution or laws of the particular State to the contrary. If, then, a State were to declare the laws of the United States not to be obligatory on her judges, such an Act would unquestionably be void; for it will not be pretended, that any member of the Union can dispense with the obligation of the Federal Constitution: and, if it cannot be done directly, and by a general declaratory law, neither can it indirectly, and by by-laws dispensing with it in particular cases. This, therefore, is an express grant of the power, and would be sufficient for the purposes of the argument; but it is not all.

By the third article and second section, appellate jurisdiction of all cases arising under the Constitution and laws of the United States, is reserved to the Federal judiciary, under such regulations as Congress may prescribe; and, in execution of this provision, Congress has prescribed regulations for removing into the Supreme Court of the United States all causes decided by the highest court of judicature of any State, which involve the construction of the Constitution, or of any law or treaty of the United States. This is another guard against infraction of the limitations imposed on State sovereignty, and one which is extremely efficient in practice; for reversals of decisions in favor of the constitutionality of Acts of Assembly have been frequent on writs of error to the Supreme Court of the United States.

Now, a reversal implies that it was not only the right, but the duty of the inferior court to decide otherwise; for where there is but one

way of deciding, there can be no error. But what beneficial result would there be produced by the decision of a State court in favor of a State law palpably unconstitutional? The injured party would have the judgment reversed by the court in the last resort, and the cause would come back with a mandate to decide differently, which the State court dare not disobey: so that nothing would eventually be gained by the party claiming under the law of the State, but, on the contrary, he would be burdened with additional costs. I grant, however, that the State judiciary ought not to exercise the power except in cases free from all doubt, because, as a writ of error to the Supreme Court of the United States lies to correct an error only in favor of the constitutionality of the State law, an error in deciding against it would be irremediable. Anticipating those who think they perceive in this, exactly what I have censured in those who assume the existence of the same power in respect to laws that are repugnant to the Constitution of the State, but restrict the exercise of it to clear cases, I briefly remark that the instances are not parallel; an error in deciding against the validity of the law being irreparable in the one, and not so in the other.

Unless, then, the respective States are not bound by the engagement, which they have contracted by becoming parties to the Constitution of the United States, they are precluded from denying either the right or the duty of their judges, to declare their laws void when they are repugnant to that Constitution.

The preceding inquiry may perhaps appear foreign to the point immediately before the court; but, as the Act of 1815 may be thought repugnant to the Constitution of the State, an examination of the powers of the judiciary became not only proper but necessary.

Then, laying the Constitution of the State out of the case, what restriction on State sovereignty is violated by at once repealing any of the saving clauses in the Statute of Limitations? Those restrictions are contained in the first article and tenth section of the Constitution of the United States; and, as there is no pretence that a contract has been impaired, none of them can, even by the most strained construction, be supposed to be violated, except that which relates to *ex post facto* laws. But that was held, in *Calder* v. *Bull*, 3 Dall. 386, to be applicable only to penal laws. The law in question not only relates to civil rights, but is not even retrospective. . . . I am therefore of opinion that the judgment be affirmed.[1]

[1] When this opinion was cited, in argument, in 1845, Chief Justice Gibson remarked to counsel: "I have changed that opinion, for two reasons. The late convention [for framing the Pennsylvania Constitution of 1838], by their silence, sanctioned the pretensions of the courts to deal freely with the Acts of the Legislature; and from experience of the necessity of the case." *Norris v. Clymer*, 2 Penn. St. 281. — ED.

NOTE.[1]

THE quotation from Bluntschli's Public Law, previously given,[2] is authority for the proposition that, in 1863, in Germany, no judicial court could declare a law of its State to be void because conflicting with the written constitution of the State. That proposition was in 1883, and is since, equally true of the judiciaries of the several States of the German Empire. Between those two dates, however, two most interesting cases have been decided, in the first of which the truth of the proposition was denied with great ability by the Hanseatic Court of Upper Appeal at Lubeck. In the second case, the doctrine of the first was overruled by the Imperial Tribunal or Supreme Court of the German Empire. Thus, with the exception of a temporary recognition within the limited territories of the Hanseatic republics, the proposition in question has always been law in the different States of Germany possessing written constitutions, that is to say, in nearly every German State.

The first case was decided in 1875. It is that of *Garbade* v. *The State of Bremen*, and is reported in Seuffert's Archives for the Decisions of the Highest Courts of the German States, vol. 32, no. 101. The following is a translation of the decision of the Hanseatic Court of Upper Appeal, there given in the original:

"Positive directions like that of Article 106 of the Prussian constitutional charter sometimes prohibit an official testing of the legal validity of ordinances [of the sovereign] which have been authenticated in due form. When such directions do not exist, the judge has, according to general legal principles, both the authority and the duty of refusing to apply an ordinance of the sovereign (*Landesherr*), which, while its provisions are those of a law, has not been enacted according to the forms prescribed for making laws by the Constitution of the land. For this purpose, the judge must, of course, first of all examine whether, when the law in question was published it was then explicitly stated that the constitutionally prescribed forms were observed. (See case in Kierulff's Collection, vol. 5, p. 331.) The proper decision in such a case, however, depends only upon the question as to what evidence is sufficient to put the judge in a position of ascertaining with certainty that the constitutional forms for making laws were complied with. The decision itself, therefore, takes for granted that the judge must have no doubt as to the observance of the constitutionally prescribed forms in making the law in question, and when the decision has shown a condition of things, which prevents any such doubt, it goes no farther.

"It is thus true that, in cases of laws which are not organic ones altering the Constitution, the judge must be sure that the law, which he is to apply, has been made according to constitutional forms. Such being so, it must be equally true that the same requirement must be met in the case of organic laws altering the Constitution, for, either a part or the whole of their provisions may enlarge or diminish existing rights as hitherto constituted. For the judge is as much bound by the organic constitutional law of the land as by any other law. If therefore the observance of certain forms is constitutionally prescribed for changing a constitutional charter, it can only be altered or abolished by observing those forms. An ordinary law exists until it is abolished by way of legislation according to the forms prescribed for the enacting of laws. So too, a constitution exists until it is abolished by way of organic legislation according to the forms prescribed for changing the Constitution. These points do not include a further and a different question as to what are the conditions under which the judge must feel convinced that the requisite forms for altering the Constitu-

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[1] The first part of this note is taken from Coxe's Jud. Power and Unconst. Legis. 95–102. I am indebted to William M. Meigs, Esq., the editor of this valuable work of the late Brinton Coxe, of Philadelphia, for obtaining permission from the owners of the copyright, and from the publishers (Messrs. Kay and Bro.), to quote these pages. — ED.

[2] Bluntschli, Gen. Pub. Law (ed. 1863), i. 550, 551.

tion have been observed. An answer to this question is not, however, necessary in the case before us.

"That case is as follows:

"A constitution has been made in Bremen, the 19th article of which reads:

"'Property and other private rights are inviolable. Cession, surrender, or limitation of the same for the general good can only be required in the cases and forms prescribed by law and upon proper indemnification.'

"A law has been enacted in Bremen which is an ordinance relating to rural communities dated 28 December, 1870. It conflicts with the said Constitution and is not an organic constitutional law. Its 15th section reads thus:

"'All hitherto existing exemptions from communal taxes, so far as not based on Federal laws or State treaties, are abolished without indemnification.'

"The last-named law has been enacted according to the forms prescribed for ordinary legislation and therefore ought to be binding upon the judge. Nevertheless, if the forms prescribed for ordinary legislation are not sufficient for legislation altering the Constitution, such an Act of ordinary legislation leaves the Constitution intact. The latter continues to exist and, as long as it does so, the judge must hold it to be an existing law. Hereby arises a conflict of legal provisions. On account of the inequality of the conflicting laws, this conflict cannot be settled upon the principle of *lex posterior derogat legi priori*. It can only be settled by an application of the doctrine that ordinary laws conflicting with organic constitutional laws cannot be enacted.

"The judge is to be considered competent to make this decision, even without any authority having been explicitly given him by any special law; because he is obliged to apply the laws and because the application of two existing laws, conflicting with each other, is an impossibility. The recognition of the legal principle, that the judge is not to apply a law conflicting with the Constitution, includes therefore no assertion of a superiority of the judge over the lawgiver. So doing is merely an acknowledgment of his authority, in an actual case of conflict, to apply that law, which general legal principles require to be applied. In cases of conflict between laws of the Empire and laws of the land, there exists a written legal provision for the settlement thereof. In the case of a conflict between laws, which are of different import but emanate from the legislative power of the same State, there enters the legal principle that ordinary laws must not conflict with the provisions of the organic constitutional law. It may, perhaps, be objected that, when the legislative authorities have under forms of ordinary legislation, enacted a law, which the judge deems to be in contradiction to the provisions of the Constitution, those authorities have themselves previously considered the question whether such a contradiction exists. Granting this, however, the resulting obligation of the judge, in such a case, does not extend beyond weighing carefully the reasons on both sides of the question in a way like that which he must follow in another and similar case. This other case is that in which he is compelled to declare, in opposition to the legislative authorities of a particular State, that a law made by them contradicts the laws of the Empire."

"Now the constitutional charter of Bremen, dated February 21, 1854, in its Article 67, establishes certain formalities, by observing which, alterations of the Constitution can alone be made. The observance of these formalities in enacting the law of December 28, 1870, would have been considered sufficient for the adoption of any law altering the Constitution. According to the documents before us, it can, however, by no means be admitted that this was done; there being no indication that, in the case of the law of December 28, 1870, anything other than an Act of ordinary legislation was in question. This being so, the result arrived at in the reasons given for the previous part of this judgment, including likewise the consequences deduced therefrom, directly follow as a matter of course."

In concluding this account of the judgment of the Hanseatic Court of Upper Appeal, it ought to be added that it seems probable that that tribunal was greatly influenced by the whole of Von Mohl's treatise on "Unconstitutional Laws" and especially by its pages 79 and 80. See his *Monographie ueber die rechtliche Bedeutung verfassungswidriger Gesetze* in his work entitled, *Staatsrecht, Voelkerrecht und Politik*

(Tuebingen. 1860), vol. 1, pp. 66–95. Von Mohl was undoubtedly influenced by American ideas and writings, as pages 69 and 71 of the above work prove. He expressly mentions the authors of the Federalist, Story and Kent. He does not name Marshall, but must have been influenced by his views. Elsewhere he expresses great admiration for the Chief Justice.

THE case of *Garbade* v. *The State of Bremen* was expressly overruled, some eight years later, by the Imperial Tribunal. This was done in the case of *K.* v. *The Dyke Board of Niedervieland*, which was also a Bremen case. It is reported in the Decisions of the *Reichsgericht* in Civil Causes, vol. 9, p. 233. From the original report the following is partially abstracted and partially translated.

The suit was originally brought in the Land Court of Bremen by K. and other interested parties against the Dyke Board of Niedervieland in the State of Bremen. Thence an appeal was taken to the Superior Land Court of Hamburg in second instance. Recourse in third and final instance was then had to the *Reichsgericht* or Supreme Court of the German Empire. The original plaintiffs, who were finally defendants, claimed that their well-acquired rights, as commoners of a swine pasture, had been violated by the Dyke Board proceeding under section 29 of the dyke ordinance of Bremen, a State of the German Empire. That ordinance was an Act of ordinary legislation and its section 29 was alleged to be in conflict with the provisions of the written Constitution of Bremen, which prohibited legislation impairing well-acquired rights of property.

On behalf of K. and the other commoners it was contended, *inter alia*, that the said section of the dyke ordinance was an invalid law because it conflicted with the Constitution as aforesaid. All the questions raised in the case were decided in favor of the Dyke Board. The constitutional questions are, however, the only ones requiring mention here. The following extracts are translated from the portion of the decision, which relates to the constitutional branch of the case. This final judgment in third instance was given on February 17, 1883. In it the Court of Second Instance is alluded to as the Court of Appeal:

"The principle is maintained by the Court of Appeal that, when two interpretations of a law appear possible to a judge, one conflicting and the other not conflicting with the Constitution, the former is simply to be rejected: and this is laid down universally and without limitation (as is indicated by the court's use of the words *schon deshalb*). So laid down, this principle cannot be recognized as correct.

"When both the form of a law and the procedure of its enactment are not those prescribed for an alteration of the [written] Constitution, it may happen that a particular interpretation thereof may according to the judge's view be in conflict with a principle of the Constitution. Properly, this circumstance must be considered only one of the reasons determining the interpretation of the law. It can only be a decisive one when, exclusive of it, the grounds for one or other of the two contradicting interpretations are equally balanced. The Court of Appeal contented itself with mentioning that the interpretation given in first instance by the Land Court to section 29 of the dyke ordinance was not one of actual necessity, although its view of the constitutional repugnancy of the section was based upon that interpretation. The Court of Appeal, therefore, attributed too great weight and significance to the interpretation made by the Land Court, while not holding the same merely in itself to be fully satisfactory. In so doing, the Court of Appeal overlooked weighty considerations, proper in seeking to ascertain the legislative will. Among these was, especially, that of the question as to what was the purpose of the law, and what value according thereto one interpretation had when compared with the other. The omission to consider that question further involved the loss of an available means of assistance which would otherwise have been obtainable.

". . . There remains to be considered only the question left undecided by the Appellate Court, namely, whether section 29 of the dyke ordinance shall be denied the force of binding law, because it is only an Act of ordinary legislation, while the Constitution is a law of a higher order. In a similar case, such denial was made by

the formerly existing Court of Upper Appeal at Lubeck. (See Seuffert's Archives, vol. 32, no. 101.[1]) This view, however, cannot be acceded to. On the contrary, the correct view on this head is that which was taken by the same court in another case only a few years before. (See Kierulff's Collection, vol. 7, p. 234.) This correct view is as follows: the constitutional provision that well-acquired rights must not be injured, is to be understood only as a rule for the legislative power itself to interpret, and does not signify that a command given by the legislative power should be left disregarded by the judge because it injures well-acquired rights. This is said without affecting the question whether the State may or may not be bound to grant damages; a matter not here brought into consideration. There is, therefore, no occasion to investigate whether well-acquired rights have been violated or not. The question is not whether a particular principle of the Constitution has been altered or not; but whether the law could have been enacted without an alteration of the Constitution itself, and therefore without applying the forms prescribed for such alteration. This last question, however, is one which cannot be examined by the judiciary." . . .

The case above mentioned in Kierulff's Collection, vol. 7, p. 234, is, that of *Krieger* v. *The State of Bremen*, decided by the Hanseatic Court of Upper Appeal on June 15, 1872. On the page cited, the court declares it to be law that the constitutional principle, which prohibits the injury of well-acquired rights by legislation, is to be understood only as a rule for the legislative power itself: that it does not signify that a command, which is given by the legislative power, is to be disregarded by the judiciary because it injures well-acquired rights. This is said with a saving as to whether the State may or may not be bound to grant remuneration for the injury. — COXE, *Jud. Power and Unconst. Legis.* 95–102.

So far as the grounds for this remarkable power are found in the mere fact of a constitution being in writing, or in judges being sworn to support it, they are quite inadequate. Neither the written form nor the oath of the judges necessarily involves the right of reversing, displacing, or disregarding any action of the legislature or the executive which those departments are constitutionally authorized to take, or the determination of those departments that they are so authorized. It is enough, in confirmation of this, to refer to the fact that other countries, as France, Germany, and Switzerland, have written constitutions, and that such a power is not recognized there. "The restrictions," says Dicey, in his admirable Law of the Constitution, "placed on the action of the legislature under the French Constitution are not in reality laws, since they are not rules which in the last resort will be enforced by the courts. Their true character is that of maxims of political morality, which derive whatever strength they possess from being formally inscribed in the Constitution, and from the resulting support of public opinion."[2]

How came we then to adopt this remarkable practice? Mainly as a natural result of our political experience before the War of Independence, — as being colonists, governed under written charters of government proceeding from the English Crown. The terms and limitations of these charters, so many written constitutions, were enforced by various means, — by forfeiture of the charters, by Act of Parliament, by the direct annulling of legislation by the Crown, by judicial proceedings and an ultimate appeal to the Privy Council. Our practice was a natural result of this; but it was by no means a necessary one. All this colonial restraint was only the usual and normal

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[1] The case of *Garbade* v. *The State of Bremen*, previously given.

[2] Ch. ii. p. 127, 3d ed. President Rogers, in the Preface to a valuable collection of papers on the "Constitutional History of the United States, as seen in the Development of American Law," 11, remarks that "there is not in Europe to this day a court with authority to pass on the constitutionality of national laws. But in Germany and Switzerland, while the Federal courts cannot annul a Federal law, they may, in either country, declare a cantonal or State law invalid when it conflicts with the Federal law." Compare Dicey, *ubi supra*, and Bryce, Am. Com., i. 430, note (1st ed.), as to possible qualifications of this statement.

exercise of power. An external authority had imposed the terms of the charters, the authority of a paramount government, fully organized and equipped for every exigency of disobedience, with a king and legislature and courts of its own. The superior right and authority of this government were fundamental here, and fully recognized; and it was only a usual, orderly, necessary procedure when our own courts enforced the same rights that were enforced here by the Appellate Court in England. These charters were in the strict sense written *law:* as their restraints upon the colonial legislatures were enforced by the English court of last resort, so might they be enforced through the colonial courts, by disregarding as null what went counter to them.[1]

The Revolution came, and what happened then? Simply this: we cut the cord that tied us to Great Britain, and there was no longer an external sovereign. Our conception now was that "the people" took his place; that is to say, our own home population in the several States were now their own sovereign. So far as existing institutions were left untouched, they were construed by translating the name and style of the English sovereign into that of our new ruler, — ourselves, the People. After this the charters, and still more obviously the new constitutions, were not so many orders from without, backed by an organized outside government, which simply performed an ordinary function in enforcing them; they were precepts from the people themselves who were to be governed, addressed to each of their own number, and especially to those who were charged with the duty of conducting the government. No higher power existed to support these orders by compulsion of the ordinary sort. The sovereign himself, having written these expressions of his will, had retired into the clouds; in any regular course of events he had no organ to enforce his will, except those to whom his orders were addressed in these documents. How then should his written constitution be enforced if these agencies did not obey him, if they failed, or worked amiss?

Here was really a different problem from that which had been presented under the old state of things. And yet it happened that no new provisions were made to meet it. The old methods and the old conceptions were followed. In Connecticut, in 1776, by a mere legislative Act, the charter of 1662 was declared to continue "the civil Constitution of the State, under the sole authority of the people thereof, independent of any king or prince whatsoever;" and then two or three familiar fundamental rules of liberty and good government were added as a part of it. Under this the people of Connecticut lived till 1818. In Rhode Island the charter, unaltered, served their turn until 1842; and, as is well known, it was upon this that one of the early cases of judicial action arose for enforcing constitutional provisions under the new order of things, as against a legislative Act; namely, the case of *Trevett* v. *Weeden*, in the Rhode Island Supreme Court in 1786.[2]

But it is instructive to see that this new application of judicial power was not universally assented to. It was denied by several members of the Federal Convention, and was referred to as unsettled by various judges in the last two decades of the last century. The surprise of the Rhode Island Legislature at the action of the court in *Trevett* v. *Weeden* seems to indicate an impression in their minds that the change from colonial dependence to independence had made the legislature the substitute for Parliament, with a like omnipotence.[3] In Vermont it seems to have been the established doctrine of the period that the judiciary could not disregard a legislative Act; and the same view was held in Connecticut, as expressed in 1795 by Swift, afterwards Chief Justice of that State. In the preface to 1 D. Chipman's (Vermont) Reports, 22 *et seq.*, the learned reporter, writing (in 1824) of the period of the Vermont Constitution of 1777, says that "No idea was entertained that the judiciary had any power to inquire into the constitutionality of Acts of the Legislature, or to pronounce them void for any

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[1] For the famous cases of *Lechmere* v. *Winthrop* (1727–28), *Phillips* v. *Savage* (1734), and *Clark* v. *Tousey* (1745), see the Talcott Papers, Conn. Hist. Soc. Coll. iv. 94, note.

[2] Varnum's Report (Providence, 1787); s. c. 2 Chandler's Crim. Trials, 269.

[3] And so of the excitement aroused by the alleged setting aside of a legislative Act in New York in 1784, in the case of *Rutgers* v. *Waddington*.

cause, or even to question their validity." And at page 25, speaking of the year 1785, he adds: "Long after the period to which we have alluded, the doctrine that the Constitution is the supreme law of the land, and that the judiciary have authority to set aside . . . Acts repugnant thereto, was considered anti-republican." In 1814,[1] for the first time, I believe, we find this court announcing an Act of the State Legislature to be "void as against the Constitution of the State and the United States, and even the laws of nature." It may be remarked here that the doctrine of declaring legislative Acts void as being contrary to the Constitution, was probably helped into existence by a theory which found some favor among our ancestors at the time of the Revolution, that courts might disregard such Acts if they were contrary to the fundamental maxims of morality, or, as it was phrased, to the laws of nature. Such a doctrine was thought to have been asserted by English writers, and even by judges at times, but was never acted on. It has been repeated here, as matter of speculation, by our earlier judges, and occasionally by later ones; but in no case within my knowledge has it ever been enforced where it was the single and necessary ground of the decision, nor can it be, unless as a revolutionary measure.[2]

In Swift's System of the Laws of Connecticut, published in 1795,[3] the author argues strongly and elaborately against the power of the judiciary to disregard a legislative enactment, while mentioning that the contrary opinion "is very popular and prevalent." "It will be agreed," he says, "it is as probable that the judiciary will declare laws unconstitutional which are not so, as it is that the legislature will exceed their constitutional authority." But he makes the very noticeable admission that there may be cases so monstrous, — *e. g.*, an Act authorizing conviction for crime without evidence, or securing to the legislature their own seats for life, — "so manifestly unconstitutional that it would seem wrong to require the judges to regard it in their decisions." As late as 1807 and 1808, judges were impeached by the Legislature of Ohio for holding Acts of that body to be void.[4]

When at last this power of the judiciary was everywhere established, and added to the other bulwarks of our written constitutions, how was the power to be conceived of? Strictly as a judicial one. . . . Therefore, since the power now in question was a purely judicial one, in the first place, there were many cases where it had no operation. In the case of purely political acts and of the exercise of mere discretion, it mattered not that other departments were violating the Constitution, the judiciary could not interfere; on the contrary, they must accept and enforce their Acts. Judge Cooley has lately said:[5] "The common impression undoubtedly is that in the case of any legislation where the bounds of constitutional authority are disregarded, . . . the judiciary is perfectly competent to afford the adequate remedy; that the Act indeed must be void, and that any citizen, as well as the judiciary itself, may treat it as void, and refuse obedience. This, however, is far from being the fact."

Again, where the power of the judiciary did have place, its whole scope was this; namely, to determine, for the mere purpose of deciding a litigated question properly submitted to the court, whether a particular disputed exercise of power was forbidden by the Constitution. In doing this the court was so to discharge its office as not to deprive another department of any of its proper power, or to limit it in the proper

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[1] *Dupuy* v. *Wickwire*, 1 D. Chipman, 237.

[2] This subject is well considered in a learned note to *Paxton's Case* (1761), Quincy's Rep. 51, 520, relating to Writs of Assistance. The American cases sometimes referred to as deciding that a legislative Act was void, as being contrary to the first principles of morals or of government, — *e. g.*, in Quincy, 529, citing *Bowman* v. *Middleton*, 1 Bay, 252, and in 1 Bryce, Am. Com. 431, *n.*, 1st ed., citing *Gardner* v. *Newburgh*, 2 Johns. Ch. Rep. 162, — will be found, on a careful examination, to require no such explanation.

[3] Vol. i. 50 *et seq.*

[4] Cooley, Const. Lim., 6th ed., 193, *n.*; 1 Chase's Statutes of Ohio, preface, 38-40. For the last reference I am indebted to my colleague, Professor Wambaugh.

[5] Journal of the Michigan Pol. Sc. Association, i. 47.

range of its discretion. Not merely, then, do these questions, when presenting themselves in the courts for judicial action, call for a peculiarly large method in the treatment of them, but especially they require an allowance to be made by the judges for the vast and not definable range of legislative power and choice, for that wide margin of considerations which address themselves only to the practical judgment of a legislative body. Within that margin, as among all these legislative considerations, the constitutional law-makers must be allowed a free foot. In so far as legislative choice, ranging here unfettered, may select one form of action or another, the judges must not interfere, since *their* question is a naked judicial one.

Moreover, such is the nature of this particular judicial question that the preliminary determination by the legislature is a fact of very great importance, since the constitutions expressly intrust to the legislature this determination; they cannot act without making it. Furthermore, the constitutions not merely intrust to the legislatures a preliminary determination of the question, but they contemplate that this determination may be the final one; for they secure no revision of it. It is only as litigation may spring up, and as the course of it may happen to raise the point of constitutionality, that any question for the courts can regularly emerge. It may be, then, that the mere legislative decision will accomplish results throughout the country of the profoundest importance before any judicial question can arise or be decided, — as in the case of the first and second charters of the United States Bank, and of the legal tender laws of thirty years ago and later. The constitutionality of a bank charter divided the cabinet of Washington, as it divided political parties for more than a generation. Yet when the first charter was given, in 1791, to last for twenty years, it ran through its whole life unchallenged in the courts, and was renewed in 1816. Only after three years from that did the question of its constitutionality come to decision in the Supreme Court of the United States. It is peculiarly important to observe that such a result is not an exceptional or unforeseen one; it is a result anticipated and clearly foreseen. Now, it is the legislature to whom this power is given, — this power, not merely of enacting laws, but of putting an interpretation on the Constitution which shall deeply affect the whole country, enter into, vitally change, even revolutionize the most serious affairs, except as some individual may find it for his private interest to carry the matter into court. So of the legal tender legislation of 1863 and later. More important action, more intimately and more seriously touching the interests of every member of our population, it would be hard to think of. The constitutionality of it, although now upheld, was at first denied by the Supreme Court of the United States. The local courts were divided on it, and professional opinion has always been divided. Yet it was the legislature that determined this question, not merely primarily, but once for all, except as some individual, among the innumerable chances of his private affairs, found it for his interest to raise a judicial question about it.

It is plain that where a power so momentous as this primary authority to interpret is given, the actual determinations of the body to whom it is intrusted are entitled to a corresponding respect; and this not on mere grounds of courtesy or conventional respect, but on very solid and significant grounds of policy and law. The judiciary may well reflect that if they had been regarded by the people as the chief protection against legislative violation of the Constitution, they would not have been allowed merely this incidental and postponed control. They would have been let in, as it was sometimes endeavored in the conventions to let them in, to a revision of the laws before they began to operate.[1] As the opportunity of the judges to check and correct

[1] The Constitution of Colombia, of 1886, art. 84, provides that the judges of the Supreme Court may take part in the legislative debates over "bills relating to civil matters and judicial procedure." And in the case of legislative bills which are objected to by "the government" as unconstitutional, if the legislature insist on the bill, as against a veto by the government, it shall be submitted to the Supreme Court, which is to decide upon this question finally. Arts. 90 and 150. See a translation of this Constitution by Professor Moses, of the University of California, in the supplement to the Annals of the American Academy of Political and Social Science, for January,

unconstitutional Acts is so limited, it may help us to understand why the extent of their control, when they do have the opportunity, should also be narrow.

It was, then, all along true, and it was foreseen, that much which is harmful and unconstitutional may take effect without any capacity in the courts to prevent it, since their whole power is a judicial one. Their interference was but one of many safeguards, and its scope was narrow.

The rigor of this limitation upon judicial action is sometimes freely recognized, yet in a perverted way which really operates to extend the judicial function beyond its just bounds. The court's duty, we are told, is the mere and simple office of construing two writings and comparing one with another, as two contracts or two statutes are construed and compared when they are said to conflict; of declaring the true meaning of each, and, if they are opposed to each other, of carrying into effect the Constitution as being of superior obligation, — an ordinary and humble judicial duty, as the courts sometimes describe it. This way of putting it easily results in the wrong kind of disregard of legislative considerations; not merely in refusing to let them directly operate as grounds of judgment, but in refusing to consider them at all. Instead of taking them into account and allowing for them as furnishing possible grounds of legislative action, there takes place a pedantic and academic treatment of the texts of the Constitution and the laws. And so we miss that combination of a lawyer's rigor with a statesman's breadth of view which should be found in dealing with this class of ques-

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1893. We are much too apt to think of the judicial power of disregarding the acts of the other departments as our only protection against oppression and ruin. But it is remarkable how small a part this played in any of the debates. The chief protections were a wide suffrage, short terms of office, a double legislative chamber, and the so-called executive veto. There was, in general, the greatest unwillingness to give the judiciary any share in the law-making power. In New York, however, the Constitution of 1777 provided a Council of Revision, of which several of the judges were members, to whom all legislative Acts should be submitted before they took effect. That existed for more than forty years, giving way in the Constitution of 1821 to the common expedient of merely requiring the approval of the executive, or in the alternative, if he refused it, the repassing of the Act, perhaps by an increased vote, by both branches of the legislature. In Pennsylvania (Const. of 1776, § 47) and Vermont (Const. of 1777, § 44) a Council of Censors was provided for, to be chosen every seven years, who were to investigate the conduct of affairs, and point out, among other things, all violations of the Constitution by any of the departments. In Pennsylvania this arrangement lasted only from 1776 to 1790; in Vermont from 1777 to 1870. In framing the Constitution of the United States, several of these expedients, and others, were urged, and at times adopted; *e. g.*, that of New York. It was proposed at various times that the general government should have a negative on all the legislation of the States; that the governors of the States should be appointed by the United States, and should have a negative on State legislation; that a Privy Council to the President should be appointed, composed in part of the judges; and that the President and the two Houses of Congress might obtain opinions from the Supreme Court. But at last the convention, rejecting all these, settled down upon the common expedients of two legislative Houses, to be a check upon each other, and of an executive revision and veto, qualified by the legislative power of reconsideration and enactment by a majority of two-thirds; — upon these expedients, and upon the declaration that the Constitution, and constitutional laws and treaties, shall be the supreme law of the land, and shall bind the judges of the several States. This provision, as the phrasing of it indicates, was inserted with an eye to secure the authority of the general government as against the States, *i. e.*, as an essential feature of any efficient Federal system, and not with direct reference to the other departments of the government of the United States itself. The first form of it was that "legislative Acts of the United States, and treaties, are the supreme law of the respective States, and bind the judges there as against their own laws."

tions in constitutional law. Of this petty method we have many specimens; they are found only too easily to-day in the volumes of our current reports.

In order, however, to avoid falling into these narrow and literal methods, in order to prevent the courts from forgetting, as Marshall said, that "it is a constitution we are expounding," these literal precepts about the nature of the judicial task have been accompanied by a rule of administration which has tended, in competent hands, to give matters a very different complexion. — THAYER'S *Origin and Scope of the American Doctrine of Constitutional Law*, 4–12. — ED.

ADM'RS OF BYRNE *v.* ADM'RS OF STEWART.

COURT OF EQUITY OF SOUTH CAROLINA. 1812.

[3 *Des.* 466.]

. . . *Mr. Pringle*, *Mr. Ford*, and *Mr. Simons* argued against the rule. *Mr. Smith*, in support of the rule.

CHANCELLOR WATIES, after taking time to deliberate, delivered the following judgment:

A rule was taken out in this case against C. Lining, Esq., to show cause why another solicitor should not be substituted in his place for the defendants, on account of his being the ordinary for Charleston district, and disqualified as such from practising as a solicitor by an Act passed in December, 1811.

The defendant showed for cause that the Act of the Legislature which restrains him as aforesaid, is void, because it is an *ex post facto* law; and that it is also void because it deprives him of a right of freehold, without the judgment of his peers, or any law authorized by the Constitution.

It has been correctly said in the argument that the question for the court in this case is not whether the Act complained of is a just and proper one, but whether the legislature had a right to make it? The power and the duty of the court to declare an act void, which violates any right of the citizen secured to him by the Constitution, have been admitted on both sides, and I feel so strong a sense of this duty, that if the violation complained of was manifest, I should not only declare the Act void, but in doing so I should think that I rendered a more important service to my country than I could by discharging the ordinary duties of a judge for many years.

It is the peculiar and characteristic excellence of the free governments of America, that the legislative power is not supreme; but that it is limited and controlled by written constitutions, to which the judges, who are sworn to defend them, are authorized to give a transcendent operation over all laws that may be made in derogation of them.

This judicial check affords a security here for civil liberty, which belongs to no other governments in the world; and if the judges will everywhere faithfully exercise it, the liberties of the American nation

may be rendered perpetual. But while I assert this power in the court, and insist on the great value of it to the community, I am not insensible of the high deference which is due to the legislative authority. It is supreme in all cases in which it is not restrained by the Constitution; and as it is the duty of the legislators as well as of the judges to consult this and conform their acts to it, so it ought to be presumed that all their acts are conformable to it, unless the contrary is manifest. This confidence in the wisdom and integrity of the legislature, is necessary to ensure a due obedience to its authority; for if this is frequently questioned, it must tend to diminish that reverence for the laws which is essential to the public safety and happiness. I am not, therefore, disposed to examine with scrupulous exactness the validity of a law. It would be unwise to do so on another account. The interference of the judicial power with legislative acts, if frequent or on dubious grounds, might occasion so great a jealousy of this power, and so general a prejudice against it, as to lead to measures, which might end in the total overthrow of the independence of the judiciary, and with it this best preservative of the Constitution. The validity of a law ought not then to be questioned, unless it is so obviously repugnant to the Constitution, that when pointed out by the judges, all men of sense and reflection in the community may perceive the repugnancy. By such a cautious exercise of this judicial check, no jealousy of it will be excited, the public confidence in it may be promoted, and its salutary effects be justly and fully appreciated. . . . [The court negatived both grounds of defence. *Rule absolute.*][1]

[1] In 1811,[1] Chief Justice Tilghman, of Pennsylvania, while asserting the power of the court to hold laws unconstitutional, but declining to exercise it in a particular case, stated the rule of administration as follows: "For weighty reasons, it has been assumed as a principle in constitutional construction by the Supreme Court of the United States, by this court, and every other court of reputation in the United States, that an Act of the Legislature is not to be declared void unless the violation of the Constitution is so manifest as to leave no room for reasonable doubt." In *Ogden* v. *Saunders*, 12 Wheat. 213 (1827), Mr. Justice Washington, after remarking that the question was a doubtful one, said: "If I could rest my opinion in favor of the constitutionality of the law . . . on no other ground than this doubt, so felt and acknowledged, that alone would, in my estimation, be a satisfactory vindication of it. It is but a decent respect due to the . . . legislative body by which any law is passed, to presume in favor of its validity, until its violation of the Constitution is proved beyond all reasonable doubt. This has always been the language of this court when that subject has called for its decision; and I know it expresses the honest sentiments of each and every member of this bench." In the Sinking Fund Cases, 99 U. S. 700 (1878), Chief Justice Waite, for the court, said: "This declaration [that an Act of Congress is unconstitutional] should never be made except in a clear case. Every possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt. One branch of the government cannot encroach on the domain of another without danger. The safety of our institutions depends in no small degree on a strict observance of this salutary rule." In Wellington *et al.*, Petitioners, 16 Pick. 87 (1834), Chief Justice Shaw, for the court, remarked that it was proper "to repeat what has been so often suggested by courts of justice, that when called upon to pronounce the invalidity of an Act of legislation [they

[1] *Commonwealth* v. *Smith*, 4 Bin. 117.

will] never declare a statute void unless the nullity and invalidity of the Act are placed, in their judgment, beyond reasonable doubt."

On this subject see Cooley, Const. Lim., 6th ed. 216, and Thayer's Origin and Scope of the American Doct. of Const. Law, 12–30. In the last-named pamphlet, the following passage is found at page 27: —

"Finally, let me briefly mention one or two discriminations which are often overlooked, and which are important in order to a clear understanding of the matter. Judges sometimes have occasion to express an opinion upon the constitutionality of a statute, when the rule which we have been considering has no application, or a different application from the common one. There are at least three situations which should be distinguished: (1) where judges pass upon the validity of the acts of a co-ordinate department; (2) where they act as advisers of the other departments; (3) where, as representing a government of paramount authority, they deal with acts of a department which is not co-ordinate.

"(1) The case of a court passing upon the validity of the act of a co-ordinate department is the normal situation, to which the previous observations mainly apply. I need say no more about that.

"(2) As regards the second case, the giving of advisory opinions, this, in reality, is not the exercise of the judicial function at all, and the opinions thus given have not the quality of judicial authority.[1] A single exceptional and unsupported opinion upon this subject, in the State of Maine, made at a time of great political excitement,[2] and a doctrine in the State of Colorado, founded upon considerations peculiar to the Constitution of that State,[3] do not call for any qualification of the general remark, that such opinions, given by our judges, — like that well-known class of opinions given by the judges in England when advising the House of Lords, which suggested our own practice, — are merely advisory, and in no sense authoritative judgments.[4] Under our constitutions such opinions are not generally given. In the six or seven States where the constitutions provide for them, it is the practice to report these opinions among the regular decisions, much as the responses of the judges in *Queen Caroline's Case*, and in *MacNaghten's Case*, in England, are reported, and sometimes cited, as if they held equal rank with true adjudications. As regards such opinions, the scruples, cautions, and warnings of which I have been speaking, and the rule about a reasonable doubt, which we have seen emphasized by the courts as regards judicial decisions upon the constitutionality of legislative Acts, have no application. What is asked for is the judge's own opinion.

"(3) Under the third head come the questions arising out of the existence of our double system, with two written constitutions, and two governments, one of which, within its sphere, is of higher authority than the other. The relation to the States

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[1] *Commonwealth* v. *Green*, 12 Allen, 163; *Taylor* v. *Place*, 4 R. I. 362. See Thayer's Memorandum on Advisory Opinions (Boston, 1885), Jameson, Const. Conv., 4th ed., Appendix, note *e*, 667, and a valuable article by H. A. Dubuque, in 24 Am. Law Rev. 369, on "The Duty of Judges as Constitutional Advisers."

[2] Opinion of Justices, 70 Me. 583 (1880). *Contra*, Kent, J., in 58 Me. 573 (1870): "It is true, unquestionably, that the opinions given under a requisition like this have no judicial force, and cannot bind or control the action of any officer of any department. They have never been regarded as binding on the body asking for them." And so Tapley, J., *Ib.* 615: "Never regarding the opinions thus formed as conclusive, but open to review upon every proper occasion;" and Libby, J., in 72 Me. 562–563 (1881): "Inasmuch as any opinion now given can have no effect if the matter should be judicially brought before the court by the proper process, and lest, in declining to answer, I may omit the performance of a constitutional duty, I will very briefly express my opinion upon the question submitted." Walton, J., concurred; the other judges said nothing on this point.

[3] *In re* Senate Bill, 12 Colo. 466, — an opinion which seems to me, in some respects, ill considered.

[4] Macqueen's Pract. Ho. of Lords, 49, 50.

IN *Thorpe* v. *Rutland & Burlington R. R. Co.*, 27 Vt. 140 (1854), there was an action on the case to recover damages for sheep of the plaintiff killed by one of the defendants' locomotives, upon their railroad track, where said sheep had escaped in consequence of there being no cattle-guard at a farm-crossing across the defendants' railroad on the plaintiff's land in Charlotte. The only question reserved at the trial in the County Court was, whether the defendants were bound by the provision in the general railroad Act of 1849, requiring railroad companies to construct and maintain cattle-guards; there being no such obligation imposed upon the defendants by their charter, which was granted in 1843. In holding that they were so bound, the court (REDFIELD, C. J.) said: "The present case involves the question of the right of the legislature to require existing railways to respond in damages for all cattle killed or injured by their trains until they erect suitable cattle-guards

of the paramount government as a whole, and its duty in all questions involving the powers of the general government to maintain that power as against the States in its fulness, seem to fix also the duty of each of its departments; namely, that of maintaining this paramount authority in its true and just proportions, to be determined by itself. If a State legislature passes a law which is impeached in the due course of litigation before the national courts, as being in conflict with the supreme law of the land, those courts may have to ask themselves a question different from that which would be applicable if the enactments were those of a co-ordinate department. When the question relates to what is admitted not to belong to the national power, then whoever construes a State constitution, whether the State or national judiciary, must allow to that legislature the full range of rational construction. But when the question is whether State action be or be not conformable to the paramount constitution, the supreme law of the land, we have a different matter in hand. Fundamentally, it involves the allotment of power between the two governments, — where the line is to be drawn. True, the judiciary is still debating whether a legislature has transgressed its limit; but the departments are not co-ordinate, and the limit is at a different point. The judiciary now speaks as representing a paramount constitution and government, whose duty it is, in all its departments, to allow to that constitution nothing less than its just and true interpretation to be fixed by itself; and having fixed this, to guard it against any inroads from without.

"I have been speaking of the national judiciary. As to how the State judiciary should treat a question of the conformity of an Act of their own Legislature to the paramount constitution, it has been plausibly said that they should be governed by the same rule that the Federal courts would apply. Since an appeal lies to the Federal courts, these two tribunals, it has been said, should proceed on the same rule, as being parts of one system. But under the Judiciary Act an appeal does not lie from every decision; it only lies when the State law is *sustained* below. It would perhaps be sound on general principles, even if an appeal were allowed in all cases, here also to adhere to the general rule that judges should follow any permissible view which the co-ordinate legislature has adopted. At any rate, under existing legislation it seems proper in the State court to do this, for the practical reason that this is necessary in order to preserve the right of appeal."[1] — ED.

[1] Gibson, J., in *Eakin* v. *Raub*, 12 S. & R. 357. Compare *Ib.* 352. The same result is reached by the court, on general principles, in *The Tonnage Tax Cases*, 62 Pa. St. 286: "A case of simple doubt should be resolved favorably to the State law, leaving the correction of the error, if it be one, to the Federal judiciary. The presumption in favor of a co-ordinate branch of the State government, the relation of her courts to the State, and, above all, the necessity of preserving a financial system so vital to her welfare, demand this at our hands." — AGNEW, J., for the court.

at farm-crossings. No question could be made where such a requisition was contained in the charter of the corporation, or in the general laws of the State at the date of the charter. But where neither is the case, it is claimed that it is incompetent for the legislature to impose such an obligation by statute, subsequent to the date of the charter. It has never been questioned, so far as I know, that the American legislatures have the same unlimited power in regard to legislation which resides in the British Parliament, except where they are restrained by written constitutions. That must be conceded, I think, to be a fundamental principle in the political organizations of the American States. We cannot well comprehend how, upon principle, it should be otherwise. The people must of course possess all legislative power originally. They have committed this in the most general and unlimited manner to the several State legislatures, saving only such restrictions as are imposed by the Constitution of the United States, or of the particular State in question. I am not aware that the Constitution of this State contains any restriction upon the legislature in regard to corporations, unless it be that where 'any person's property is taken for the use of the public, the owner ought to receive an equivalent in money;' or that there is any such restriction in the United States Constitution, except that prohibiting the States from 'passing any law impairing the obligation of contracts.' It is a conceded point, upon all hands, that the Parliament of Great Britain is competent to make any law binding upon corporations, however much it may increase their burdens or restrict their powers, whether general or organic, even to the repeal of their charters. This extent of power is recognized in the case of *Dartmouth College* v. *Woodward*, 4 Wheaton, 518, and the leading authorities are there referred to. Any requisite amount of authority, giving this unlimited power over corporations to the British Parliament, may readily be found. And if, as we have shown, the several State legislatures have the same extent of legislative power, with the limitations named, the inviolability of these artificial bodies rests upon the same basis in the American States with that of natural persons, and there are, no doubt, many of the rights, powers, and functions of natural persons which do not come within legislative control. Such, for instance, as are purely and exclusively of private concern, and in which the body politic, as such, have no special interest."[1]

[1] "The legislative power of a State extends to everything within the sphere of such power, except as it is restricted by the Federal Constitution or that of the State." — SWAYNE, J. (for the court), in *Township* v. *Talcott*, 19 Wall. p. 576 (1873). "The State does not act by its people in their collective capacity, but through such political agencies as are duly constituted and established. The legislative power is the supreme authority except as limited by the Constitution of the State, and the sovereignty of the people is exercised through their representatives in the legislature, unless by the fundamental law power is elsewhere reposed." — FULLER, C. J. (for the court), in *McPherson* v. *Blacker*, 146 U. S. p. 25. "Irrespective of the operation of the Federal Constitution and restrictions asserted to be inherent in the nature of American institutions, the general rule is that there are no limitations upon the legislative power of the legislature of a State, except those imposed by its written Constitution." — FULLER, C. J. (for the court), in *Giozza* v. *Tiernan*, 148 U. S. p. 661. — ED.

TAYLOR *v.* PLACE.

SUPREME COURT OF RHODE ISLAND. 1856.

[4 *R. I.* 324.] [1]

James Tillinghast and *Bradley*, for the plaintiffs; *Currey*, for the defendants.

AMES, C. J. . . . In some cases, it is difficult to draw and apply the precise line separating the different powers of government which, under our political systems, Federal and State, are, without exception, carefully distributed between the legislative, the executive, and the judicial departments. To some extent, and in some sense, each of the powers appropriated to different departments in the above distribution must be exercised by every other department of the government, in order to the proper performance of its duty. As illustrated by Mr. Justice McLean, in giving the judgment of the Supreme Court of the United States, in the case of *Watkins* v. *Holman et al.*, 16 Pet. 60, 61. "The executive, in acting upon claims for services rendered, may be said to exercise, if not in form, in substance, judicial power. And so a court, in the use of a discretion essential to its existence, by the adoption of rules or otherwise, may be said to legislate. A legislature, too, in providing for the payment of a claim, exercises a power in its nature judicial; but this is coupled with the paramount and remedial power." In an early case, which we shall have occasion hereafter to use for another purpose, the question came before the courts of the United States, under the clause of the Constitution of the United States distributing the different powers of the Federal government amongst its different departments, whether a power lodged by an Act of Congress, in the Circuit Courts of the United States, to inquire into and to take evidence of the claims of invalid pensioners, and to transmit the result of their inquiries to the Secretary of War, for his action and that of Congress thereon, was judicial power, and so the exercise of it imperative upon the Circuit judges. The unanimous opinion of the Circuit Court for the district of New York, then consisting of Jay, Chief Justice, Cushing, Justice, and Duane, District Judge; of the Circuit Court for the district of Pennsylvania, then consisting of Wilson and Blair, Justices, and of Peters, District Judge; and of the Circuit Court for the district of North Carolina, then consisting of Iredell, Justice, and of Sitgreaves, District Justice, — was, that the power thus vested was not judicial, and that consequently they were not bound to exercise it.[2] The reasons given by them were, in substance, that the Act of Congress did not contemplate this power as judicial, inasmuch as it subjected the decisions of the courts, in the matter to which it related, to the consideration and suspension of the Secretary of War, and again to the revision

[1] The statement of facts and a part of the case are omitted.

[2] These were not judicial utterances. See *ante*, p. 105, *n.* — ED.

of Congress; whereas, by the Constitution, neither the Secretary of War, nor any other executive officer, nor even the legislature, were authorized to sit, as a court of errors, on the judicial acts or opinions of the courts of the United States. The judges composing the Circuit Court of New York, however, consented, on account of the benevolence which had dictated the passage of the pension Act in question, personally to execute the duties imposed upon them in the character of commissioners appointed by official instead of personal descriptions; deeming themselves at liberty, as individuals, to accept or decline the office thus tendered to them. See the opinions in the note illustrating *Hayburn's Case*, 2 Dallas, 410, 411, 412, and in 1 Curtis's Decis. Sup. Ct. U. S. 9, 10, and 11. In *Watkins* v. *Holman et al.*, before quoted, the question arose before the Supreme Court of the United States, under the Constitution of Alabama, containing a like distribution of powers with our own, whether an Act of the Legislature of that State, authorizing an administratrix residing in another State, to sell and convey, by certain attorneys named in the Act, the real estate of her intestate husband in Alabama, for the payment of his debts, her attorneys giving bond with sureties for the faithful payment of the proceeds of sale to the administratrix, "to be appropriated to the payment of the debts of the deceased," was a judicial Act, and so within the inhibition of the Constitution of Alabama. The court held the Act to be valid, as the exercise, not of judicial, but of legislative power; the Act providing a special remedy, merely, for a case which, on account of its circumstances, though within the spirit, was not within the letter of the General Statute of Alabama, which directed the mode in which the real estate of a deceased debtor should be sold and applied to the payment of his debts. Again, in the late case of *United States* v. *Ferreira*, 13 Howard, 40, 48, the same court held that an Act of Congress, empowering the district judge of Florida, under the treaty with Spain of 1819, commonly called the Florida treaty, to examine and adjudge claims for injuries made by the Spanish inhabitants of Florida, provided for by a clause in that treaty, and to report his decisions, if favorable to the claimants, with the evidence, to the Secretary of the Treasury, for his discretionary action thereon, did not confer upon the District Court of Florida judicial power, in the sense of the Constitution of the United States, in that matter; and hence, that no appeal from the award of the judge, thus acting merely as a commissioner, could be brought to the Supreme Court of the United States. The court followed precisely the line of reasoning which must have been adopted by the judges in *Hayburn's Case*, in 1792, as illustrated by the opinions given in the note to that case, which the court recite at large. In the opinion of the court, delivered by the present venerable Chief Justice, he says: "The powers conferred by these Acts of Congress upon the judge, as well as the secretary, are, it is true, judicial in their nature; for judgment and discretion must be exercised by both of them. But it is nothing more than the power ordinarily given by law to a commissioner

appointed to adjust claims to lands or money, under a treaty; or special powers to inquire into or decide any other particular class of controversies in which the public or individuals may be concerned. A power of this description may constitutionally be conferred on a secretary as well as a commissioner, but is not judicial in either case, in the sense in which judicial power is granted by the Constitution, to the courts of the United States;" and see *American Ins Co.* v. *Carter*, 1 Peters, 511; *Benner* v. *Porter*, 9 Howard, 235; *United States* v. *Ritchie*, 17 Howard, 533, 534. Upon the same principle, the decisions of the various State auditors of this and other States, or even of the Court of Claims, recently established at Washington, though this latter sits as a court, takes and receives evidence, and hears counsel as a court, subject, as they all are, to the revision and control of their respective legislatures or of Congress, are not judicial decisions, in the sense of the Constitution of the States, or of the United States. They may, and the latter does, task high judicial capacity, learning, and experience, and is called a court; but after all, these officers, and the members of this tribunal, sit as auditors only, and not as judges, in any constitutional sense. "That the auditing of the accounts of a receiver of public moneys," says Mr. Justice Curtis, in recently delivering the opinion of the Supreme Court in *Murray's lessee et al.* v. *Hoboken Land and Improvement Company*, 18 Howard, 280, "may be, in an enlarged sense, a judicial act, must be admitted. So are those administrative duties, the performance of which involves an inquiry into the existence of facts, and the application to them of rules of law. In this sense, the act of the President in calling out the militia, under the Act of 1795, or of a commissioner, who makes a certificate for the extradition of a criminal, under a treaty, is judicial. But it is not sufficient to bring such matters under the judicial power, that they involve the exercise of judgment upon law and fact." One of the points decided in this case was, that the auditing of an account, and ascertaining a balance, by the first Auditor of the Treasury of the United States, and the issue of a distress warrant by the Solicitor of the Treasury, under an Act of Congress, by virtue of and under which the lands of a defaulting collector of the customs were seized and held to satisfy the balance ascertained by the auditor to be due to the treasury, were not acts of judicial power, in the sense of the Constitution; that they might, therefore, under the law, be constitutionally, and with effect, done by those officers, although neither of them constituted a court, nor were so connected with a court as to perform any, even of the ministerial duties, which arise out of judicial proceedings. *Murray's lessee et al.* v. *Hoboken Land and Improvement Company*, 18 Howard, 275.

On the other hand, it may safely be said, that to hear and decide adversary suits at law and in equity, with the power of rendering judgments and entering up decrees according to the decision, to be executed by the process and power of the tribunal deciding, or of another tribunal acting under its orders and according to its direction, is the exercise of

judicial power, in the constitutional sense; and that it is so, whether the decision be final, or subject to reversal on error or appeal. It is precisely thus, that the great exemplar of constitutional law, the Constitution of the United States, defines this power; for, after vesting, by the first section of its third article, "the judicial power of the United States," in "one supreme court, and in such inferior courts as Congress may, from time to time, order and establish;" and after, in the same section, fixing the tenure and mode of compensating the judges of the courts of the United States; it proceeds, in the second section of the same article, to define this power, by stating the cases and controversies in law and equity, and of admiralty and maritime jurisdiction, to which, from the nature of the questions involved in them, or of the principles of decision to be applied to them, or from the character or citizenship of the parties to them, or to be affected by them, this power, whether original or appellate, shall extend. In *Osborn* v. *The Bank of the United States*, 9 Wheaton, 319, Chief Justice Marshall, in delivering the opinion of the court, after saying that the second article of the Constitution vests the whole executive power in the President, and that the third article, among other things, declares, "that the judicial power shall extend to all cases in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made under their authority," thus speaks of the effect and extent of the latter: "This clause enables the judicial department to receive jurisdiction to the full extent of the Constitution, laws, and treaties of the United States, when any question respecting them shall assume such a form that the judicial power is capable of acting upon it. That power is capable of acting only when the subject is submitted to it by a party who asserts his rights in the form prescribed by law. It then becomes a case; and the Constitution declares that the judicial power shall extend to all cases arising under the Constitution, laws, and treaties of the United States." The judicial power is exercised in the decision of cases; the legislative, in making general regulations, by the enactment of laws. The latter acts from considerations of public policy; the former is guided by the pleadings and evidence in the case. Per Mr. Justice McLean. *State of Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 18 Howard, 440. Indeed, laws and courts have their origin in the necessity of rules and means to enforce them, to be applied to cases and controversies within their jurisdiction; and our whole idea of judicial power is, the power of the latter to apply the former to the decision of those cases and controversies. . . .

THE STATE *v.* WHEELER.

SUPREME COURT OF ERRORS OF CONNECTICUT. 1856.

[25 *Conn.* 290.]

THIS was a complaint preferred by a grand juror of the town of New Haven, to a justice of the peace, against Stephen Wheeler, for keeping spirituous liquors with intent to sell the same in violation of the statute of 1854, entitled "An Act for the Suppression of Intemperance."

A trial was had before the justice, and the defendant found guilty. From this decision he appealed to the Superior Court, and the cause was tried at the term of said court holden at New Haven, in September, 1855.

Upon the trial the defendant's counsel requested the court to instruct the jury that the statute upon which the information was founded was unconstitutional and void. The court did not comply with this request, but did instruct them that the section of the Act upon which the information was founded, prohibiting the keeping of spirituous liquors with intent to sell the same contrary to the provisions of said Act, was constitutional and valid. The court did not express any opinion upon other sections of the Act. The jury having returned a verdict against the defendant, he filed a motion for a new trial, which motion was reserved for the advice of this court.

Flagg, in support of the motion.

Foster (State Attorney) and *Candee*, against the motion.

STORRS, J. The information in this case is founded on the ninth section of the Act for the suppression of intemperance. (Rev. Stat., 821.) That section provides that no person under the penalties therein prescribed, shall own or keep any spirituous or intoxicating liquor, or any mixed liquor of which a part is spirituous or intoxicating, with intent to sell the same in violation of that Act. The only question before us is, whether that provision is constitutional. . . .

Such being the extent of the general legislative power of a State, we come to the inquiry, whether the legislature of this State, in enacting the provisions which we are now considering, have violated any of the provisions of our State Constitution. This point is briefly disposed of by the remark, that we find nothing whatever in that instrument, which either expressly or impliedly restricts, or even touches upon, the exercise of the power of the legislature, in relation to the subject we are examining. . . .

The defendant insists that we should pronounce the law now in question to be void, on the ground that it is opposed to natural right, and the fundamental principles of civil liberty. We are by no means prepared to accede to the doctrine involved in this claim, that, under a written constitution like ours, in which the three great departments of government, the executive, legislative, and judicial, are confided to dis-

tinct bodies of magistracy, the powers of each of which are expressly confined to its own proper department, and in which the powers of each are unlimited in its appropriate sphere, except so far as they are abridged by the Constitution itself, it is competent for the judicial department to deprive the legislature of powers which they are not restricted from exercising by that instrument. It would seem to be sufficient to prevent us from thus interposing, that the power exercised by the legislature is properly legislative in its character, which is unquestionably the case with respect to the law we have been considering, and that the Constitution contains no restriction upon its exercise in regard to the subject of it. There is, however, no occasion to pursue this topic. The law in question is, in our opinion, obnoxious to no objection which could be derived from the establishment of the doctrine advanced by the defendant. It is not different in its character, although it may be more stringent in some of its provisions, from those numerous laws which have been passed in almost all civilized communities, and in ours from the earliest settlement of our State, regulating the traffic in spirituous liquors, and which are based on the power possessed by every sovereign State, to provide by law, as it shall deem fit, for the health, morals, peace, and general welfare of the State; and which, whatever may have been thought of their expediency, have been invariably sustained as being within the competency of the legislature to enact. . . .

In this opinion, the other judges, WAITE and HINMAN, concurred.

A new trial not granted.

IT is a principle in the English law, that an Act of Parliament, delivered in clear and intelligible terms, cannot be questioned, or its authority controlled, in any court of justice. "It is," says Sir William Blackstone, "the exercise of the highest authority that the kingdom acknowledges upon earth." When it is said in the books, that a statute contrary to natural equity and reason, or repugnant, or impossible to be performed, is void, the cases are understood to mean that the courts are to give the statute a reasonable construction. They will not readily presume, out of respect and duty to the lawgiver, that any very unjust or absurd consequence was within the contemplation of the law. But if it should happen to be too palpable in its direction to admit of but one construction, there is no doubt in the English law as to the binding efficacy of the statute. The will of the legislature is the supreme law of the land, and demands perfect obedience. . . .

The principle in the English government, that the Parliament is omnipotent, does not prevail in the United States; though, if there be no constitutional objection to a statute, it is with us as absolute and uncontrollable as laws flowing from the sovereign power, under any other form of government. But in this, and all other countries where there is a written constitution, designating the powers and duties of the

legislative, as well as of the other departments of the government, an Act of the Legislature may be void as being against the Constitution. The law with us must conform, in the first place, to the Constitution of the United States, and then to the subordinate Constitution of its particular State, and if it infringes the provisions of either, it is so far void. The courts of justice have a right, and are in duty bound, to bring every law to the test of the Constitution, and to regard the Constitution, first of the United States, and then of their own State, as the paramount or supreme law, to which every inferior or derivative power and regulation must conform. The Constitution is the act of the people, speaking in their original character, and defining the permanent conditions of the social alliance; and there can be no doubt on the point with us, that every act of the legislative power, contrary to the true intent and meaning of the Constitution, is absolutely null and void. — 1 *Kent's Com.* (12th ed.), *447.[1]

PEOPLE *v.* SIMEON DRAPER.

NEW YORK COURT OF APPEALS. 1857.

[15 *N. Y.* 532.]

Charles O'Conor and *J. W. Edmonds*, for the appellants.

W. M. Evarts and *F. B. Cutting*, for the respondents.

BY THE COURT (DENIO, C. J.). This is an appeal from a judgment of the Supreme Court, sitting in the first district. The complaint is in substance an information in the nature of a *quo warranto*. Its general object is to obtain a judgment upon the right of the defendants to execute the offices of "commissioners of police," to which they have been appointed pursuant to a statute passed at the last session of the legislature. The relator, Fernando Wood, claims that he, as mayor (together with the recorder and city judge of the city of New York), is by law chargeable with and entitled to perform the duties of commissioners of police; and he alleges that the defendants have intruded into and usurped these offices. The special purpose of the action is to obtain a judicial determination as to the constitutional validity of the statute referred to. The defendants have put in an answer, in which they set up their appointment under the Act, and the plaintiffs have demurred. The Supreme Court, holding the Act constitutional, has overruled the demurrer and given judgment for the defendants; and the plaintiffs thereupon prosecute this appeal. . . .

[1] This passage has stood in substantially the same form in all the editions of Kent's Commentaries. The book was published in 1826. A single significant change was made in the second edition, in 1832, by introducing that part of the first sentence in the second paragraph above quoted which begins with the words "though if there be," &c. — ED.

Before proceeding to the other ground of objection, it will be useful to state certain principles which, though not controverted, have sometimes been overlooked in this argument. In the first place, the people, in framing the Constitution, committed to the legislature the whole law-making power of the State, which they did not expressly or impliedly withhold. Plenary power in the legislature for all purposes of civil government is the rule. A prohibition to exercise a particular power is an exception. In inquiring, therefore, whether a given statute is constitutional, it is for those who question its validity to show that it is forbidden. I do not mean that the power must be expressly inhibited, for there are but few positive restraints upon the legislative power contained in the instrument. The first article lays down the ancient limitations which have always been considered essential in a constitutional government, whether monarchical or popular; and there are scattered through the instrument a few other provisions in restraint of legislative authority. But the affirmative prescriptions, and the general arrangements of the Constitution, are far more fruitful of restraints upon the legislature. Every positive direction contains an implication against anything contrary to it, or which would frustrate or disappoint the purpose of that provision. The frame of the government; the grant of legislative power itself; the organization of the executive authority; the erection of the principal courts of justice, create implied limitations upon the law-making authority as strong as though a negative was expressed in each instance; but independently of these restraints, express or implied, every subject within the scope of civil government is liable to be dealt with by the legislature. As it may act upon the State at large, by laws affecting at once the whole country, and all the people, so it may in its discretion, and independently of any prohibition, expressly made or necessarily implied, make special laws relating to any separate district or section of the State. As a political society, the State has an interest in the repression of disorder, and the maintenance of peace and security in every locality within its limits; and if from exceptional causes, the public good requires that legislation, either permanent or temporary, be directed toward any particular locality, whether consisting of one county or of several counties, it is within the discretion of the legislature to apply such legislation, as in its judgment, the exigency of the case may require; and it is the sole judge of the existence of such causes. The representatives of the whole people, convened in the two branches of the legislature, are, subject to the exceptions which have been mentioned, the organs of the public will in every district or locality of the State. It follows that it belongs to the legislature to arrange and distribute the administrative functions, committing such portions as it may deem suitable to local jurisdictions, and retaining other portions to be exercised by officers appointed by the central power, and changing the arrangement from time to time. as convenience, the efficiency of administration and the public good may seem to require. If a particular Act of Legislation

does not conflict with any of the limitations or restraints which have been referred to, it is not in the power of the courts to arrest its execution, however unwise its provisions may be, or whatever the motives may have been which led to its enactment. There is room for much bad legislation and misgovernment within the pale of the Constitution; but whenever this happens, the remedy which the Constitution provides, by the opportunity for frequent renewals of the legislative bodies, is far more efficacious than any which can be afforded by the judiciary. The courts cannot impute to the legislature any other than public motives for their acts. If a given Act of Legislation is not forbidden by express words, or by necessary implication, the judges cannot listen to a suggestion that the professed motives for passing it are not the real ones. If the Act can be upheld upon any views of necessity or public expediency, which the legislature may have entertained, the law cannot be challenged in the courts. It may be proper to make one other remark of a general character. It has been said that a tendency may be discovered in the Constitution, toward local administration, and in favor of decentralizing, as it is not inaptly called, the powers of government; and that a policy in that direction, more marked than in any of our former systems, is plainly to be traced in several constitutional provisions. This I believe to be true. So far as the convention has proceeded in that direction, it is for the courts to follow; and it may be that, in the construction of doubtful provisions, regard should be had to this political tendency. But we cannot, in furtherance of such a supposed policy, however plainly it may be perceived, create exceptions or restraints on the legislature, which are not fairly contained in the Constitution as it is written. It may be the duty of the legislature to follow out or advance such a line of policy, but the business of the courts is with the text of the fundamental law as they find it. They have no political maxims and no line of policy to further or to advance. Their duty is the humble one of construing the Constitution by the language it contains. . . .

We are of the opinion that the judgment of the Supreme Court should be affirmed, and it is accordingly affirmed.

SHANKLAND, J. The Act of the Legislature, entitled "An Act to establish a Metropolitan Police District and to provide for the Government thereof," is, by these proceedings, alleged to be unconstitutional. That Act, having received the sanction of the legislature and of the executive department of the government, is clothed with all the forms of law. Nevertheless, if its provisions are, directly, or by necessary implication, repugnant to the Constitution, it is the province and duty of the courts so to declare it. But if the law should be found to be within the competency of the legislature, however much we may doubt the policy or wisdom of the enactment, it is our duty to uphold it and vindicate the legislative power. It is needless to say the judicial records of this court show that we have never shrunk from the performance of this duty on just occasions.

The Constitution vests all legislative power in the Senate and Assembly, with certain restrictions and limitations imposed on that body by the Constitution itself. Independent of those limitations, the legislative power is omnipotent within its proper sphere. The legislature, in this respect, is the direct representative of the people, and the delegate and depositary of their power. Hence, the limitations of the Constitution are not so much limitations of the legislature as of the power of the people themselves, self-imposed by the constitutional compact. When the court declares a law unconstitutional, it in effect declares that the sovereign power of the people has so far been abdicated by themselves. This consideration has led the courts, in all governments which are based on the theory that all power resides in the people, to give a strict construction to compacts which deprive the people of this sovereign power. It will not be presumed that they intended to abdicate their power, unless they have so declared in express terms or by necessary implication. These principles are fundamental, conservative, and cannot be disregarded without infringement upon the reserved rights and power of the people. Hence, the courts have frequently and uniformly declared that they will not adjudicate a law unconstitutional when it is to be made so by inferences or presumptions only, or when the question rests in doubt. Any other rule of construction would bring the legislative and judicial branches of government into collision, to the ruin of one or both.

The wisdom of the conservative maxims of the courts is further exhibited by the consideration that the legislatures are chosen at frequently occurring elections and for short terms. Hence, if they err in expressing the wants of the people, or exceed their powers, the error or excess may be quietly and quickly corrected by the people themselves, through subsequently elected representatives. But if this court wanders from its judicial orbit, and in its progress collides with a co-ordinate power, when moving in its legitimate sphere, who shall restore the system to harmony and regulate its dynamical forces? Such collision must terminate either in judicial revolution or new constitutional compacts. . . .

All the judges, except BROWN and COMSTOCK, concurring.

Judgment affirmed.[1]

[1] In *Bertholf* v. *O'Reilly*, 74 N. Y. 509 (1878), ANDREWS, J. (for the court), said: "The question whether the Act under consideration is a valid exercise of legislative power is to be determined solely by reference to constitutional restraints and prohibitions. The legislative power has no other limitation. If an Act can stand when brought to the test of the Constitution the question of its validity is at an end, and neither the executive or judicial department of the government can refuse to recognize or enforce it. The theory that laws may be declared void when deemed to be opposed to natural justice and equity, although they do not violate any constitutional provision, has some support in the *dicta* of learned judges, but has not been approved, so far as we know, by any authoritative adjudication, and is repudiated by numerous authorities. Indeed, under the broad and liberal interpretation now given to constitutional guaranties, there can be no violation of fundamental rights by legislation which will not fall within the express or implied prohibition and restraints of the Constitution,

and it is unnecessary to seek for principles outside of the Constitution, under which such legislation may be condemned. . . .

"Admitting, as we do, the soundness of this view, and fully approving it, we come back to the proposition that no law can be pronounced invalid, for the reason simply that it violates our notions of justice, is oppressive and unfair in its operation, or because, in the opinion of some or all of the citizens of the State, it is not justified by public necessity, or designed to promote the public welfare. We repeat, if it violates no constitutional provision, it is valid and must be obeyed. The remedy for unjust or unwise legislation, not obnoxious to constitutional objections, is to be found in a change by the people of their representatives, according to the methods provided by the Constitution." The same principle is affirmed in *People* v. *Gillson*, 109 N. Y. 398.

"The rule of law upon this subject appears to be, that, except where the Constitution has imposed limits upon the legislative power, it must be considered as practically absolute, whether it operate according to natural justice or not in any particular case. The courts are not the guardians of the rights of the people of the State, except as those rights are secured by some constitutional provision which comes within the judicial cognizance. The protection against unwise or oppressive legislation, within constitutional bounds, is by an appeal to the justice and patriotism of the representatives of the people. If this fail, the people in their sovereign capacity can correct the evil; but courts cannot assume their rights. The judiciary can only arrest the execution of a statute when it conflicts with the Constitution. It cannot run a race of opinions upon points of right, reason, and expediency with the law-making power. Any legislative Act which does not encroach upon the powers apportioned to the other departments of the government, being *prima facie* valid, must be enforced, unless restrictions upon the legislative authority can be pointed out in the Constitution, and the case shown to come within them. . . .

"The accepted theory upon this subject appears to be this: In every sovereign State there resides an absolute and uncontrolled power of legislation. In Great Britain this complete power rests in the Parliament; in the American States it resides in the people themselves as an organized body politic. But the people, by creating the Constitution of the United States, have delegated this power as to certain subjects, and under certain restrictions, to the Congress of the Union; and that portion they cannot resume, except as it may be done through amendment of the national Constitution. For the exercise of the legislative power, subject to this limitation, they create, by their State Constitution, a legislative department upon which they confer it; and granting it in general terms, they must be understood to grant the whole legislative power which they possessed, except so far as at the same time they saw fit to impose restrictions. While, therefore, the Parliament of Britain possesses completely the absolute and uncontrolled power of legislation, the legislative bodies of the American States possess the same power, except, first, as it may have been limited by the Constitution of the United States; and, second, as it may have been limited by the Constitution of the State. A legislative Act, cannot, therefore, be declared void, unless its conflict with one of these two instruments can be pointed out." *Cooley, Const. Lim.* (6th ed.) 200.

In *Loan Association* v. *Topeka*, 20 Wall. 655, 662 (1874) MILLER, J. (for the court), on error to the United States Circuit Court for the District of Kansas, in holding a State statute invalid as imposing taxation for a merely private purpose, said: "We have referred to this history of the contest over aid to railroads by taxation, to show that the strongest advocates for the validity of these laws never placed it on the ground of the unlimited power in the State legislature to tax the people, but conceded that where the purpose for which the tax was to be issued could no longer be justly claimed to have this public character, but was purely in aid of private or personal objects, the law authorizing it was beyond the legislative power, and was an unauthorized invasion of private right. *Olcott* v. *Supervisors*, 16 Wallace, 689; *People* v. *Salem*, 20 Mich. 452; *Jenkins* v. *Andover*, 103 Mass. 94; Dillon on Municipal Corporations, § 587; 2 Redfield's Laws of Railways, 398, rule 2. It must be conceded that there are such rights in every free government beyond the control of the State. A government

which recognized no such rights, which held the lives, the liberty, and the property of its citizens subject at all times to the absolute disposition and unlimited control of even the most democratic depository of power, is after all but a despotism. It is true it is a despotism of the many, of the majority, if you choose to call it so, but it is none the less a despotism. It may well be doubted if a man is to hold all that he is accustomed to call his own, all in which he has placed his happiness, and the security of which is essential to that happiness, under the unlimited dominion of others, whether it is not wiser that this power should be exercised by one man than by many. The theory of our governments, State and National, is opposed to the deposit of unlimited power anywhere. The executive, the legislative, and the judicial branches of these governments, are all of limited and defined powers. There are limitations on such power which grow out of the essential nature of all free governments. Implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name. No court, for instance, would hesitate to declare void a statute which enacted that A. and B. who were husband and wife to each other should be so no longer, but that A. should thereafter be the husband of C., and B. the wife of D. Or which should enact that the homestead now owned by A. should no longer be his, but should henceforth be the property of B. *Whiting* v. *Fond du Lac*, 25 Wis. 188; Cooley on Constitutional Limitations, 129, 175, 487; Dillon on Municipal Corporations, § 587."

In *Munn* v. *Illinois*, 94 U. S. 113, 124 (1876), WAITE, C. J. (for the court) said: "When the people of the United Colonies separated from Great Britain, they changed the form, but not the substance, of their government. They retained for the purposes of government all the powers of the British Parliament, and through their State constitutions, or other forms of social compact, undertook to give practical effect to such as they deemed necessary for the common good and the security of life and property. All the powers which they retained they committed to their respective States, unless in express terms or by implication reserved to themselves. Subsequently, when it was found necessary to establish a national government for national purposes, a part of the powers of the States and of the people of the States was granted to the United States and the people of the United States. This grant operated as a further limitation upon the powers of the States, so that now the governments of the States possess all the powers of the Parliament of England, except such as have been delegated to the United States or reserved by the people. The reservations by the people are shown in the prohibitions of the constitutions."

In *Chic. & Grand Tr. Ry. Co.* v. *Wellman*, 143 U. S. 339 (1891), on error to the Supreme Court of Michigan, a question involving the validity, under the Constitution of the United States, of a State law regulating the charges of a railroad corporation, had been raised on an agreed statement of facts, supplemented by the evidence of two witnesses. In sustaining the decision of the State court, which had refused to hold the law unconstitutional, the Supreme Court of the United States (BREWER, J.) said: "The Supreme Court of Michigan in passing upon the present case, felt constrained to make this observation: 'It being evident from the record that this was a friendly suit between the plaintiff and the defendant to test the constitutionality of this legislation, the Attorney-General, when it was brought into this court upon writ of error, very properly interposed and secured counsel to represent the public interest. In the stipulation of facts or in the taking of testimony in the court below, neither the Attorney-General nor any other person interested for or employed in behalf of the people of the State took any part. What difference there might have been in the record had the people been represented in the court below, however, under our view of the case, is not of material inquiry.'

"Counsel for plaintiff in error, referring to this, does not question or deny, but says: 'The Attorney-General speaks of the case as evidently a friendly case, and Justice Morse, in his opinion, also so speaks of it. This may be conceded; but what of it? There is no ground for the claim that any fraud or trickery has been practised in presenting the testimony.'

"We think there is much in the suggestion. The theory upon which, apparently, this suit was brought is that parties have an appeal from the legislature to the courts;

NOTE.

I. Administrative Rules in Constitutional Law.

"The following general propositions," it is remarked by Cooley (Principles of Constitutional Law, 2d ed. 152),[1] "will be found to state the obligations of duty and of forbearance for such cases which are generally recognized.

"1. The duty to pass upon a question of constitutional law may devolve upon a court of any grade, and of either the Federal or the State jurisdiction. Wherever the question can arise in court of the conformity of a statute to the Constitution, the court to whom the question is addressed must in some manner dispose of it, and the power of the court to apply the law to the case necessarily embraces the power to determine what law controls. In the absence of authoritative precedents, there can be no other test of this than the judgment of the court. The validity of a Federal statute may therefore be a necessary question for consideration in a State court, and that of a State statute in a Federal court. Nevertheless, when the court to whom the question is addressed is not the court of last resort in respect thereto, it may well be expected to proceed with more than ordinary caution and hesitation, and to abstain altogether from declaring a statute invalid unless in the clearest cases, especially if, without serious detriment to justice, the decision can be delayed until the Superior Court can have opportunity to pass upon it. There may be cases where, by inadvertence or accident, a bill which has gone through all the forms required for valid legislation is, nevertheless, clearly and without question invalid; but except in such cases the spectacle of an

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and that the latter are given an immediate and general supervision of the constitutionality of the Acts of the former. Such is not true. Whenever, in pursuance of an honest and actual antagonistic assertion of rights by one individual against another, there is presented a question involving the validity of any Act of any Legislature, State or Federal, and the decision necessarily rests on the competency of the legislature to so enact, the court must, in the exercise of its solemn duties, determine whether the Act be constitutional or not; but such an exercise of power is the ultimate and supreme function of courts. It is legitimate only in the last resort, and as a necessity, in the determination of real, earnest, and vital controversy between individuals. It never was the thought that, by means of a friendly suit, a party beaten in the legislature could transfer to the courts an inquiry as to the constitutionality of the legislative Act.

"These observations are pertinent here. On the very day the Act went into force the application for a ticket is made, a suit commenced, and within two months a judgment obtained in the trial court; a judgment rendered not upon the presentation of all the facts from the lips of witnesses, and a full inquiry into them, but upon an agreed statement which precludes inquiry into many things which necessarily largely enter into the determination of the matter in controversy. A single suggestion in this direction: It is agreed that the defendant's operating expenses for 1888 were $2,404,516.54. Of what do these operating expenses consist? Are they made up partially of extravagant salaries; fifty to one hundred thousand dollars to the president, and in like proportion to subordinate officers? Surely, before the courts are called upon to adjudge an Act of the Legislature fixing the maximum passenger rates for railroad companies to be unconstitutional, on the ground that its enforcement would prevent the stockholders from receiving any dividends on their investments, or the bondholders any interest on their loans, they should be fully advised as to what is done with the receipts and earnings of the company; for if so advised, it might clearly appear that a prudent and honest management would, within the rates prescribed, secure to the bondholders their interest, and to the stockholders reasonable dividends." — Ed.

[1] Quoted by permission of the author, and of the publishers, Messrs. Little, Brown, and Co., of Boston. — Ed.

inferior magistrate, having merely police or other limited jurisdiction, assuming to pass judgment upon the legislation of his State or country, and declare it invalid, can only be ludicrous.[1]

"2. The judicial sense of propriety and of the importance of the occasion will generally incline the court to refuse a consideration of a constitutional question without the presence of a full bench of judges. With many courts this is a rule to which few exceptions are admitted, and those only which seem to be imperative.

"3. Neither, as a rule, will a court express an opinion adverse to the validity of a statute, unless it becomes absolutely necessary to the determination of a cause before it. Therefore, in any case where a constitutional question is raised, if the record presents some other and clear ground upon which the court may rest its judgment, and thereby render the constitutional question immaterial to the case, the court will adopt that course, and the question of constitutional power will be left for consideration until a case arises which cannot be disposed of without considering it, and when, consequently, a decision upon such question will be unavoidable. This course has not always been followed; but it has seldom occurred that a constitutional question has been considered settled, or been allowed to remain without further dispute and question where the opinion given upon it was rendered in a case not necessarily requiring it. Want of jurisdiction of the particular case is always reason why the court should abstain from expressing opinions on other questions which parties may attempt to raise.

"4. The court will not listen to an objection made to the constitutionality of an Act by one whose rights are not affected by it, and who consequently can have no interest in defeating it. For example, one who has received compensation for property appropriated by statute to a public use will not be suffered afterwards to dispute the constitutional validity of the statute. The statute is assumed to be valid until some one complains of it whose rights it invades. The power of the court can be invoked only when it is found necessary to secure and protect a party before it against an unwarranted exercise of legislative power to his prejudice.

"5. Nor can a court declare a statute unconstitutional and void when the objection to it is merely that it is unjust and oppressive, and violates rights and privileges of the citizen, unless it can be shown that such injustice is prohibited, or such rights and privileges guaranteed, by the Constitution. The propriety or justice or policy of legislation, within the limits of the Constitution, is exclusively for the legislative department to determine; and the moment a court ventures to substitute its own judgment for that of the legislature, it passes beyond its legitimate authority, and enters a field where it would be impossible to set limits to its interference, except as should be prescribed in its own discretion. The protection against unwise or oppressive legislation, within constitutional bounds, is by an appeal to the justice and patriotism of the representatives of the people. If this fail, the people in their sovereign capacity can correct the evil, but courts cannot assume their rights. The judiciary can only arrest the execution of a statute when it conflicts with the Constitution. It cannot run a race of opinions upon points of right, reason, and expediency, with the law-making power. The question of the validity of a statute must always be one of legislative competency to enact it; not one of policy, propriety, or strict justice.

"6. Nor can a statute be declared unconstitutional merely because in the opinion of the court it violates one or more of the fundamental principles of republican liberty,

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[1] Some courts have intimated that only the superior courts should assume to deny validity to a statute. *Ortman* v. *Greenman*, 4 Mich. 291. Compare *Mayberry* v. *Kelly*, 1 Kans. 116. [It is a rule of practice in some States, that a single judge shall never hold a statute invalid. In Rhode Island (Pub. St. R. I., 1882, c. 220), it is provided that in cases before a magistrate or court other than the Supreme Court, on an objection to the constitutionality of a legislative Act, the court or magistrate shall hold the Act valid, and if judgment goes against the party raising this objection, the case shall be certified to the Supreme Court for its decision. An instance of this procedure is found in *Com.* v. *Amery*, 12 R. I. 64. — Ed.]

unless it shall be found that those principles are placed beyond legislative encroachment by the provisions of the Constitution itself. The principles of republican government are not a set of inflexible rules, vital and active in the Constitution even when unexpressed; but they are subject to variation and modification from motives of policy and public necessity, and it is only in those particulars in which experience has demonstrated that any departure from the settled course must work injustice and confusion, that it is customary to incorporate them in the Constitution in such a way as to make them definite rules of action and decision. The following are illustrations. The principle that taxation and representation go together is important and valuable, and should never be lost sight of in legislation; but, as commonly understood, it can never be applied universally without admitting every person to the elective franchise; for taxes in some form fall upon all, — the rich and the poor, the infant and the adult, the male and the female, and Federal taxes reach the unrepresented Territories as well as the represented States. So the principle that local affairs shall be managed in local districts, and that these shall choose their own local officers, constitutes one of the chief excellencies of our system of government; but in applying it the difficulty is at once encountered of determining what are local concerns and what general; and it may perhaps be found in a given case that the concerns that are set apart as local, if neglected or imperfectly performed, subject the whole State to embarrassment, so that State intervention becomes necessary. And it is obvious that, wherever a recognized principle of free government requires legislation for its practical application and enforcement, the body that passes laws for the purpose must determine, in its discretion, what are the needs of legislation and what its proper limits. The courts cannot take such principles as abstract rules of law, and give them practical force.

"7. When a question of Federal constitutional law is involved, the purpose of the Constitution, and the object to be accomplished by any particular grant of power, are often most important guides in reaching the real intent; and the debates in the Constitutional Convention, the discussions in the Federalist and in the conventions of the States, are often referred to as throwing important light on clauses in the Constitution which seem blind or of ambiguous import. We may discover from these what the general drift of opinion was as to the division line between Federal and State power on many subjects, and we can sometimes judge from that whether a particular authority lies on one side of the line or on the other. But we shall be misled if we attempt in this manner to judge of State legislative power when the limitations of the Federal Constitution are not in question. We cannot test the validity of any State statute by a general spirit which is supposed to pervade the State Constitution, but is not expressed in words. Presumptively, when the people of the State, by their Constitution, call into existence a legislative department, and endow it with the function of making laws, they confer upon it the full and complete legislative power, — as full and complete as the people, in the exercise of sovereignty, could themselves have wielded it, — subject only to such restrictions as were by the same instrument imposed. 'The law-making power of the State recognizes no restraints, and is bound by none except such as are imposed by the Constitution. That instrument has been aptly termed a legislative Act by the people themselves, in their sovereign capacity, and is therefore the paramount law. Its object is, not to grant legislative power, but confine and restrain it. Without the constitutional limitations, the power to make laws would be absolute. These limitations are created and imposed by express words, or arise by necessary implication. The leading feature of the Constitution is the separation and distribution of the powers of the government. It takes care to separate the executive, legislative, and judicial powers, and to define their limits. The executive can do no legislative act, nor the legislature any executive act, and neither can exercise judicial authority.' Presumptively, therefore, if an Act of the legislative department is not an encroachment upon executive or judicial power, it is valid. To show its invalidity, it is necessary to point out some particular in which, either in form or substance, it is inconsistent with the Constitution. The inconsistency may consist, either, (1) in the failure to observe some constitutional form which is made essential to a valid enactment, such as the taking of the final vote thereon by yeas and nays when the Constitution requires it; or (2) in the disregard of

an express prohibition, as where it consists in a special charter of incorporation when the Constitution forbids incorporation except under general laws; or (3) in the disregard of some fundamental right declared in the bill of rights, as would be a statute compelling support of sectarian worship or schools when the Constitution proclaims religious liberty. And in all these cases it is not the spirit of the Constitution that must be the test of validity, but the written requirements, prohibitions, and guaranties of the Constitution itself.

"8. A statute may sometimes be valid in part and invalid in other particulars. This often happens under State constitutions that require an Act to contain but one object which shall be expressed in the title. If in such a case the Act embraces two objects while the title expresses but one, the Act will be unconstitutional and void as to the one not so expressed. So in the absence of such a requirement the Act might be void as to one object because the legislation attempted was expressly forbidden by the Constitution, while in other particulars it was plainly within the legislative competency. The general rule therefore is, that the fact that part of a statute is unconstitutional does not justify the remainder being declared invalid also, unless all the provisions are connected in subject-matter, depending on each other, operating together for the same purpose, or otherwise so connected together in meaning that it cannot be presumed the legislature would have passed the Act otherwise than as a whole. It is immaterial how closely the valid and invalid provisions are associated in the Act; they may even be contained in the same section, and yet be perfectly distinct and separable, so that the one may stand though the other fall. If, when the unconstitutional portion is stricken out, that which remains is complete in itself, and capable of being executed in accordance with the apparent legislative intent, wholly independent of that which was rejected, it must be sustained. But if the intent of the Act is to accomplish a single purpose only, and some provisions are void, the whole must fail unless sufficient remains to effect the object without the invalid portion. And if they are so mutually connected with and dependent on each other as conditions, considerations, or compensations, as to warrant the belief that the legislature intended them as a whole, and that, if all could not be carried into effect, the legislature would not pass the residue independently, then, if some parts are unconstitutional, all the provisions that are thus dependent, conditional, or connected must fall with them.

"9. A doubt of the constitutional validity of a statute is never sufficient to warrant its being set aside. 'It is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers, and its acts to be considered as void. The opposition between the Constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other.' 'It is but a decent respect due to the wisdom, the integrity, and the patriotism of the legislative body by which any law is passed, to presume in favor of its validity, until its violation of the Constitution is proved beyond all reasonable doubt.' To be in doubt, therefore, is to be resolved, and the resolution must support the law.

"This course is the opposite to that which is required of the legislature in considering the question of passing a proposed law. Legislators have their authority measured by the Constitution; they are chosen to do what it permits, and nothing more, and they take solemn oath to obey and support it. When they disregard its provisions, they usurp authority, abuse their trust, and violate the promise they have confirmed by an oath. To pass an Act when they are in doubt whether it does not violate the Constitution, is to treat as of no force the most imperative obligations any person can assume. A business agent who would deal in that manner with his principal's business would be treated as untrustworthy; a witness in court who would treat his oath thus lightly, and affirm things concerning which he was in doubt, would be held a criminal. Indeed, it is because the legislature has applied the judgment of its members to the question of its authority to pass the proposed law, and has only passed it after being satisfied of the authority, that the judiciary waive their own doubts, and give it their support.[1]

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[1] Perhaps more exactly, because it is the duty of the legislature to do this, and

"10. The validity of legislation can never be made to depend on the motives which have secured its adoption, whether these be public or personal, honest or corrupt. There is ample reason for this in the fact that the people have set no authority over the legislators with jurisdiction to inquire into their conduct, and to judge what have been their purposes in the pretended discharge of the legislative trust. This is a jurisdiction which they have reserved to themselves exclusively, and they have appointed frequent elections as the occasions and the means for bringing these agents to account. A further reason is, that to make legislation depend upon motives would render all statute law uncertain, and the rule which should allow it could not logically stop short of permitting a similar inquiry into the motives of those who passed judgment. Therefore the courts do not permit a question of improper legislative motives to be raised, but they will in every instance assume that the motives were public and befitting the station. They will also assume that the legislature had before it any evidence necessary to enable it to take the action it did take.

"11. When a legislative enactment proves to be invalid, it is for all legal purposes as if it had never been. It can support no contract, it can create no right, it can give protection to no one who has acted under it, it can make no one an offender who has refused obedience to it. And this is true of any particular provision of a statute which proves invalid, while the remainder is sustained. It is true that one who assumes to disobey a statute as invalid does so at the risk of being punished for his disobedience if the law is sustained; but this is a risk which every one takes when he acts in any matter in respect to which the law is in doubt."

II. Advisory Opinions.

The giving of such opinions by judges is not an exercise of the judicial function. The relation of the English judges to the king, in former days, and their ancient place as assistants to the House of Lords, led to a practice, on the part of that House, as well as the king, of calling on them for advisory or "consultative" opinions. This may be traced very far back in our records, *e. g.*, in 1387 (2 Stat. Realm, 102–104), King Richard II. puts to his judges a long string of questions.

In this country the constitutions of seven States have provided for obtaining opinions from the judges of the highest court upon application by the executive or the legislature, *viz.*, of Massachusetts, New Hampshire, Maine, Rhode Island, Florida, Colorado, and South Dakota. In one other State, Missouri, a similar clause was introduced in the Constitution of 1865, just after the war; but it continued only ten years, and was left out of the Constitution of 1875. It dates in Massachusetts from 1780, — Part II., c. iii. s. 2; in New Hampshire from 1784, — Part II., title, *Judiciary Power*; in Maine (formerly a part of Massachusetts) from 1820, — Art. VI., s. 3; in Rhode Island, from 1842, — Art. X., s. 3; in Florida, from 1868, — Art. V., s. 16, amended in 1875, — Amendment XI.; in Colorado, from 1886, — Amendment to Art. VI., s. 3; in South Dakota, from 1889, — Art. V., s. 13. In the first three States, the judges are to give their opinions "upon important questions of law and upon solemn occasions." In Rhode Island, "upon any question of law, whenever requested," &c. In Florida, at any time, upon the Governor's request "as to the interpretation of any portion of this Constitution, or upon any point of law;" this was amended by limiting the last alternative to "any question affecting his executive powers and duties." In Colorado, the provision reads: "The Supreme Court shall give its opinion upon important questions upon solemn occasions, when required by the Governor, the Senate, or the House of Repre-

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because a failure on the part of the legislature to do its duty will not justify the judiciary in trying to mend matters by a breach of its own duty.

Cooley, in another place (Const. Lim., 6th ed., 68), says: "Cases must sometimes occur when a court should refrain from declaring a statute unconstitutional because not clearly satisfied that it is so, though, if the judges were to act as legislators upon the question of its enactment, they ought, with the same views, to withhold their assent, from grave doubts upon that subject." — Ed.]

sentatives: and all such opinions shall be published in connection with the reported decisions of the court." This has been *held* (In the Matter of Senate Bill No. 65, 12 Colo. 466, in 1889) to be limited to questions of law and such as are questions *publici juris*, and to call not merely, as elsewhere generally held, for the opinions of the justices, but for authoritative judgments of the court. The resort to this power in Colorado was prompt and troublesome. See a group of opinions in 9 Col. 620–642. In South Dakota, the Governor may "require the opinions of the judges of the Supreme Court upon important questions of law involved in the exercise of his executive powers, and upon solemn occasions." In Missouri, the provision only varied from that in Massachusetts, by the insertion of a word, — "upon important questions of *constitutional* law," &c.

In the Federal Convention of 1787, it was proposed that "each branch of the legislature, as well as the supreme executive, shall have authority to require the opinions of the Supreme Judicial Court upon important questions of law, and upon solemn occasions." 5 Ell. Deb. 445. But nothing came of it. It is, however, interesting to see that the first President, who had also presided over the Convention, asked for an opinion from the justices. "Washington, in 1793, sought to take the opinion of the judges of the Supreme Court of the United States as to various questions arising under our treaties with France. They declined to respond. The President and Cabinet came to the conclusion to ask this opinion from the judges on July 12, 1793. Those who were at hand appear to have suggested delay until they could communicate with their absent associates. A letter of July 23, from the President to Chief Justice Jay and his brethren, is preserved, in which he assents to this delay, but expresses the pleasure that he shall have in receiving the opinion at a convenient time. (Sparks's Washington, x. 359.) The date was but a little later, — not far from Aug. 1, as it would seem, — of which Marshall speaks when he says (Life of Washington, v. 441, Philadelphia, 1807): 'About this time it is probable that the difficulties felt by the judges of the Supreme Court in expressing their sentiments on the points referred to them were communicated to the Executive. Considering themselves merely as constituting a legal tribunal for the decision of controversies brought before them in legal form, these gentlemen deemed it improper to enter the field of politics by declaring their opinion on questions not growing out of the case before them.' It was, perhaps, fortunate for the judges and their successors that the questions then proposed came in so formidable a shape as they did. There were twenty-nine of them, and they fill three large octavo pages in the Appendix to the tenth volume of Sparks's Washington. Had they been brief and easily answered the court might, not improbably, have slipped into the adoption of a precedent that would have engrafted the English usage upon our national system. As it is, we may now read in 2 Story, Const. sec. 1571, that while the President may require the written opinion of his Cabinet, 'he does not possess a like authority in regard to the judicial department.'" — THAYER'S *Mem. on Advisory Opinions*, 13.

It may be added that the Constitution of the Hawaiian Islands of 1887, Art. 70 (5 Haw. Rep. 716), gives "the King, His Cabinet, and the Legislature . . . authority to require the opinions of the justices of the Supreme Court upon important questions of law, and upon solemn occasions." This provision is said to run back through the Constitution of 1864 (art. 70) to that of 1852 (art. 88), where it seems to have been first introduced, in a slightly different form. A number of such opinions are preserved in the Hawaiian Reports, beginning with one entitled *The Segregation of Lepers*, 5 Haw. Rep. 162 (May, 1884). — ED.

GREEN v. THE COMMONWEALTH.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1866.

[12 *Allen*, 155.]

Reed, Attorney-General, for the Commonwealth.

H. W. Paine, and *N. St. J. Green*, for the petitioner.

BIGELOW, C. J. The petitioner in this case stands convicted upon his own confession in open court of the crime of murder in the first degree, and is now awaiting the execution of sentence of death awarded against him on such conviction at a term of this court for the county of Middlesex, held at the city of Lowell, on the third Monday of April, 1864. Under the provisions of Gen. St. c. 146, § 13, he made application by petition to a "justice of this court on the 21st day of March last, for a writ of error on said judgment." His petition is accompanied by an assignment of certain errors, which he alleges to exist in the record. With the assent of counsel, who appear in his behalf, and in conformity to the precedent established in *Webster* v. *The Commonwealth*, 5 Cush. 386, the hearing of this petition was adjourned into the full court. The grounds upon which the alleged errors are supposed to rest have been presented to our consideration with great fulness and ability by learned counsel, and the case now stands for our final adjudication on the causes of error assigned in support of the petition. It is hardly necessary for us to say that we have considered the questions thus brought before us with the most anxious solicitude, and that we have examined and deliberated upon them under a deep sense of the responsibility which rests upon us, in view of the solemn and momentous consequences to the petitioner involved in our decision.

But it is not for this reason only that we have been earnest in our desire to weigh with the utmost candor and impartiality the causes of error assigned by him. Some of the points now relied on as affording sufficient ground for a reversal of the judgment against him have been heretofore called to our attention. By an order of the Governor and Council passed on the 31st day of October, 1864, in pursuance of the provision of the Constitution, c. 3, § 2, the inquiry was propounded to us "whether it was competent for this court, especially when held by a single justice, to enter up a final judgment against a prisoner, and award the sentence of death, upon his own plea of guilty of murder in the first degree; or whether, on the contrary, it is not necessary to record the plea as a general plea of guilty, and either enter judgment as of murder in the second degree, or else submit the question of the degree of murder to be found by a jury." To this inquiry, in compliance with the duty imposed by the Constitution, an answer, signed by all the justices of this court, covering, as we then supposed, the entire subject-matter concerning which information was sought, was returned to the Governor and Council, which stated in substance that the convic-

tion was not irregular or informal on the grounds which were understood to be suggested by the inquiry; and that the judgment and sentence were duly entered up and recorded. 9 Allen, 585. The opinion thus given, like all others of a similar character, was formed without the aid of counsel learned in the law, or any statement of the reasons on which the regularity or validity of the proceedings had been called in question. Although it is well understood and has often been declared by this court that an opinion formed and expressed under such circumstances cannot be considered in any sense as conclusive or binding on the rights of parties, but is regarded as being open to reconsideration and revision, yet it necessarily presupposes that the subject to which it relates has been judicially examined and considered, and an opinion formed thereon. We have therefore felt it to be our duty most sedulously to guard against any influence which might flow from our previous consideration of some of the causes of error now assigned as the ground for a reversal of the judgment. . . .

The result is, that the prayer of the petitioner is denied.

The prisoner was accordingly hung.

OPINION OF THE JUSTICES.

THE JUSTICES OF THE SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1878.

[126 *Mass.* 557.]

. . . THE Justices of the Supreme Judicial Court, having now fully considered the questions upon which their opinions have been required by the Honorable Senate and the Honorable House of Representatives respectively, and the precedents communicated to them by the joint order of the two Houses, and other precedents and authorities on the subject, respectfully submit the following opinion:

The Constitution of the Commonwealth provides as follows: "All money bills shall originate in the House of Representatives; but the Senate may propose or concur with amendments, as on other bills." Chap. 1, sect. 3, art. 7.

The questions proposed by the two Houses, although differing in form, appear to us to present substantially one and the same question; namely, whether a bill which appropriates money from the treasury of the Commonwealth, and does not provide for levying such money upon the people, by tax or otherwise, is a money bill, which must, by this provision of the Constitution, originate in the House of Representatives.

Upon first taking up this question, some of us had doubts whether it was one upon which we could properly express an opinion. Although a consideration of the precedents dispelled those doubts, it has seemed

to us proper, in order to show that, in undertaking to define the constitutional authority of a branch of the legislature, we have been cautious not to exceed our own, that we should state the reasons on which it has appeared to us to be our duty to answer the question to the best of our information and abilities.

The question is indeed, in one aspect, a question of parliamentary privilege and of parliamentary procedure; but it is also a question of the construction of the Constitution of the Commonwealth, which is on this subject the supreme law.

The Constitution declares that "each branch of the legislature, as well as the Governor and Council, shall have authority to require the opinions of the Justices of the Supreme Judicial Court upon important questions of law and upon solemn occasions." Chap. 3, art. 2. This article, as reported in the Convention that framed the Constitution, limited the authority to the Governor and Council and the Senate, and was extended by the Convention so as to include the House of Representatives; Journal of Convention of 1779–80 (ed. 1832), 211, 242; and, as may be inferred from the form in which it was originally presented, evidently had in view the usage of the English Constitution, by which the king, as well as the House of Lords, whether acting in their judicial or in their legislative capacity, had the right to demand the opinions of the twelve judges of England.

The practice of the Stuart kings, in taking extrajudicial opinions of the judges upon questions about to come before them judicially, was an unconstitutional abuse of the royal authority in this respect. *Stafford's Case*, Year-Book, 1 H. VII. fol. 26, pl. 1; Lord Coke, in *Peacham's Case*, 2 Howell's State Trials, 871; 3 Inst. 29; Foster's Crown Law, 200; Co. Lit. 110, Hargrave's note. But, since the Revolution of 1688, so sturdy an assertor of the independence of the judges as Lord Holt joined with the other judges of the time in opinions to King William III. upon the extent of the power of pardon; *Fenwick's Case*, Fortescue, 385; and to Queen Anne upon the question whether a writ of error should be granted as of right; *Paty's Case*; 14 East, 92, note; 14 Howell's State Trials, 861, note. And, as late as 1760, Lord Mansfield, Chief Justice Willes, and other judges, gave an opinion to King George II. upon the jurisdiction of a court-martial to try an officer, after his dismissal from the army, for a military offence committed while in actual service. *Lord George Sackville's Case*, 2 Eden, 371. So, under the Constitution of the Commonwealth, opinions have been given by the justices of the Supreme Judicial Court to the Governor and Council upon questions of the exercise of the power of pardon, 13 Gray, 618, the issue of death-warrants, 11 Cush. 604, the validity of the proceedings of a court-martial, 3 Cush. 586, and the authority of the Governor, as commander-in-chief, over the militia. 1 Allen, 197, note.

We are not aware of any instance since 1760 in which the Crown has exercised the power of asking the opinion of the judges. But the

right of the House of Lords to put abstract questions of law to the judges, the answer to which might be necessary to the House in its legislative capacity, has been often acted on in modern times. *M'Naghten's Case* (1843), 10 Cl. & Fin. 200, 212–214. . . .

In this Commonwealth, the privileges of the two Houses do not, as in England, rest merely upon legislative resolves and usages; but they are defined by the written Constitution. *Burnham's Case*, 14 Gray, 226, 238; *Whitcomb's Case*, 120 Mass. 118, 122. The same Constitution which defines these privileges declares that each branch of the legislature, as well as the Governor and Council, shall have authority to require the opinions of the justices of the Supreme Judicial Court upon important questions of law and upon solemn occasions. The opinions of the justices can be required only "upon important questions of law," not upon questions of fact; *Opinion of Justices*, 120 Mass. 600; "and upon solemn occasions," that is to say, when such questions of law are necessary to be determined by the body making the inquiry, in the exercise of the legislative or executive power intrusted to it by the Constitution and laws of the Commonwealth. *Answer of Justices*, 122 Mass. 600. No other limit of the authority to require the opinions of the justices is expressed in the Constitution. In giving such opinions, the justices do not act as a court, but as the constitutional advisers of the other departments of the government, and it has never been considered essential that the questions proposed should be such as might come before them in their judicial capacity.[1] . . .

The interesting character of the precedents to which we have referred, and the want of any published collection in which they may be readily found, may, we trust, excuse the fulness with which we have stated the considerations which have satisfied us that the orders of the Senate and of the House of Representatives present an important question of law, arising upon a solemn occasion, and upon which the two Houses are empowered by the Constitution to require our opinion. Any embarrassment that we might have felt in giving an opinion to one House upon a question affecting the constitutional powers of both has been removed by the facts that each House has proposed a similar

[1] It has been sometimes asked, whether the opinions of the judges ought not to govern the decision of the House. They have never had that effect even when unanimous; and it is not easy to see how they could so operate when conflicting and opposed. The House pays great regard to the opinions of the judges, especially when concurrent; but the House cannot transfer to others the constitutional responsibility which attaches to the adjudication of causes in the court of last resort. — MACQUEEN, *Appellate Jurisd. of the House of Lords*, 49–50.

This is the first time, since the adoption of the Constitution, that this question has been brought *judicially* to the attention of the court. The advice, or opinion, given by the judges of this court, when requested, to the Governor, or to either House of the General Assembly, under the 3d section of the 10th article of the Constitution, is not a *decision* of this court; and given, as it must be, without the aid which the court derives, in adversary cases, from able and experienced counsel, though it may afford much light, from the reasonings or research displayed in it, can have no weight as a precedent. — AMES, C. J. (for the court), in *Taylor* v. *Place*, 4 R. I. 362 (1856). — ED.

question and that the two Houses have joined in an order transmitting to us all the precedents that either House deemed of sufficient importance to be considered. . . .

The result is, that, having regard to the history of the subject, to the settled meaning of the words "money bills" at the time of the adoption of the Constitution of the Commonwealth, and to the contemporaneous construction of that Constitution by the justices of the Supreme Judicial Court and by both Houses of the Legislature, affirmed by a continuous and uniform practice of eighty-five years, we are of opinion that the exclusive constitutional privilege of the House of Representatives to originate money bills is limited to bills that transfer money or property from the people to the State, and does not include bills that appropriate money from the treasury of the Commonwealth to particular uses of the government, or bestow it upon individuals or corporations. . . .

HORACE GRAY, MARCUS MORTON,
JAMES D. COLT, WILLIAM C. ENDICOTT,
SETH AMES, OTIS P. LORD,
AUGUSTUS L. SOULE.

BOSTON, December 31, 1878.

IN THE MATTER OF THE APPLICATION OF THE SENATE.

SUPREME COURT OF MINNESOTA. 1865.

[10 *Minn.* 78.]

AT a session of the Legislature of this State in 1865, the following resolution was adopted by the Senate, to wit:

Resolved, That the Supreme Court be and they are hereby respectfully requested to furnish the Senate their opinion upon the following questions. . . .

Whereupon the court, in answer to such resolution, returned to the Senate the following opinion.

BY THE COURT (MCMILLAN, J.). A copy of the resolution of the Senate requesting the Supreme Court to furnish the Senate with their opinion upon certain questions stated in the resolution was communicated to the court yesterday.

We have had the matter under advisement, and given it that consideration which a communication from so high a source is entitled to receive.

The resolution, we presume, was passed in view of sec. 15, ch. 4, Comp. Stat., which provides that "either House may, by resolution, request the opinion of the Supreme Court, or any one or more of the judges thereof, upon a given subject, and it shall be the duty of such court or judges when so requested, respectively, to give such opinion in writing."

We are aware of but two instances under our State organization, in which similar resolutions have been passed, and in both cases replies were made declining to express any opinion upon the points submitted. Journal of the Senate, 1858, 718; *Ib.* 1863, 75.

We might be justified in resting on these precedents. But we perceive that in neither case was the resolution considered by all the members of the court; nor does either of the opinions given by the judges cover the whole ground of the power of the legislature and the court under resolutions of this kind. We, therefore, deem it proper out of respect to the Senate, and in view of the important principles involved, to state briefly the reasons for the conclusions at which we have arrived.

By the Constitution the power of the State government is divided into three distinct departments, legislative, executive, and judicial. The powers and duties of each department are distinctly defined. The departments are independent of each other to the extent, at least, that neither can exercise any of the powers of the others, not expressly provided for. Constitution, art. 3, sec. 1.

This not only prevents an assumption by either department of power not properly belonging to it, but also prohibits the imposition, by one, of any duty upon either of the others not within the scope of its jurisdiction; and "it is the duty of each to abstain from and to oppose encroachments on either." Any departure from these important principles must be attended with evil.

This question is well considered in a note to *Hayburn's Case*, 2 Dall. 409 *et seq.*, in which the Circuit Court for the District of New York,[1] Jay, Chief Justice, says: "That neither the legislative nor the executive branches can constitutionally assign to the judicial, any duties but such as are properly judicial and to be performed in a judicial manner."

The duty sought to be imposed by the section of the Act referred to, is clearly neither a judicial act nor is it to be performed in a judicial manner. It constitutes the Supreme Court the advisers of the legislature, nothing more. This does not come within the provisions of the Constitution, and, as the Constitution now stands, would be, in our opinion, not only inconsistent with judicial duties, but a dangerous precedent. The impropriety of an unauthorized expression of opinion by a judge or court, especially one of last resort, upon a matter which may subsequently come before the court for adjudication, will immediately suggest itself. If the statute under consideration is in conflict with the Constitution it imposes no duty, and any opinion expressed in pursuance of action under it is extra-judicial, and no official responsibility attaches to the judge or court voluntarily giving it. The evils which might result to the people from such a source will suggest themselves on a moment's reflection.

In all the instances to which we have had an opportunity of referring, where courts have responded to resolutions of this character in other

[1] See *ante*, p. 105, *n.* — ED.

States, provision has been made therefor in the State Constitution. Const. of Mass. ch. 3, sec. 2; Const. of New Hampshire, sec. 74; and of course in such case official responsibility attaches to the discharge of the duty, and thus one serious objection is removed. Although we confess that, for other reasons, such a constitutional provision does not address itself to our minds with any favor.

Whether under the territorial organization the statute referred to could have been sustained, we need not consider, since only such territorial laws as are not inconsistent with the Constitution, are preserved by the schedule to that instrument.

We are, therefore, unanimously of opinion that the section referred to authorizing the action of the Senate is unconstitutional and void, and therefore imposes no duty on the court. And we are prevented from voluntarily complying with the request, by the views we entertain of our judicial duty and the injurious tendency of such a precedent.

We must, therefore, respectfully decline to comply with the request contained in the resolution.[1]

[1] A statute similar to that declared unconstitutional in Minnesota, is found in Vermont (Rev. St. Vt. (1880) § 795): "The Governor, when the interests of the State demand it, may require the opinion of the judges of the Supreme Court or a majority of them upon questions of law connected with the discharge of his duties." So in New York, by a provision first introduced in 1829 (2 Rev. St., ed. 1829, 658; Part iv. tit. 1, §§ 13, 14), when a person was convicted and sentenced to death, the presiding judge was required to inform the Governor and to send to him the judge's notes of the testimony; whereupon the Governor might "require the opinion of the Chancellor, the justices of the Supreme Court, and of the Attorney-General, or of any of them, upon any statement so furnished." A case in which an opinion was given under this statute is *People* v. *Green*, 1 Denio, 614 (1845). By a statute of 1847, the judges of the Court of Appeals were substituted for the Chancellor; and the law so stands now. (N. Y. Code Crim. Proc. §§ 493, 494.)

Without any such statute, and without any constitutional requirement, the judges have sometimes been called on for such extra-judicial advice and aid, and have given it. There are indications that this was done, more or less, during the colonial period, — as in the expressions of Mr. Justice Howell (*ante*, p. 76) in the Rhode Island case of *Trevett* v. *Weeden* in 1786. On February 25, 1780, the Constitutional Convention of Massachusetts voted "to signify to the judges of the Superior Court in writing the request of this Convention that they would give their attendance this evening, as matters of importance are to be acted on." (Journal of Conv. of 1779–80, 142.) In Pennsylvania (Archives, vols. 8, 11, and 12) there are various instances of opinions given by the justices to the executive department between 1780 and 1790. An account of such an opinion is found in *Respublica* v. *De Longchamps*, 1 Dall. 111, 115–116 (1784); and an opinion or "report" is found in 3 Binney, Appendix, 598 (1808). For other like opinions, given upon request, without any legal requirement, see Jameson, Const. Conv., 4th ed. 663 (in New York), *In re* Power of the Governor, 79 Ky. 621 (1881), and 55 N. W. Rep. 1092 (Nebraska, 1893). In this last case, Norval, J., gives strong reasons for refusing to join with his brethren in giving the opinion. It seems to have been not an uncommon practice in Nebraska to give them.

In England the judges are sometimes called upon to exercise what is there called a "consultative" function; but its non-judicial quality is distinctly asserted. *Ex parte* Co. Council of Kent [1891], 1 Q. B. 725; compare *Overseers* v. *L. & N. W. R'y. Co.*, 4 App. Cas. 30. — Ed.

HOUSTON v. WILLIAMS.

SUPREME COURT OF CALIFORNIA. 1859.

[13 *Cal.* 24.]

APPEAL from the Third District.

This was an action of ejectment. The defendant recovered judgment in the District Court. On appeal, the judgment was reversed by the Supreme Court from the bench — no opinion in writing being delivered. The reasons for the decision were stated orally. The counsel for the plaintiff afterwards presented a petition asking the court to file a written opinion.

Wm. T. Wallace, for petitioner.

Spencer & Rhodes, for respondent.

FIELD, J., delivered the opinion of the court — TERRY, C. J., concurring.

At the present term the judgment in this case was reversed, without any opinion being given setting forth the reasons for the reversal. The appellant now moves the court to file an opinion, and cites section 69 of the statute of May 15th, 1854, amending the Practice Act, which provides that "all decisions given upon an appeal in any Appellate Court of this State, shall be given in writing, with the reason therefor, and filed with the clerk of the court," except in cases tried in the County Court, on appeal from a justice's court.

The provisions of the statute had not been overlooked when the decision was rendered. It is but one of many provisions embodied in different statutes by which control over the judiciary department of the government has been attempted by legislation. To accord to it any obligatory force, would be to sanction a most palpable encroachment upon the independence of this department. If the power of the legislatur to prescribe the mode and manner in which the judiciary shall discharge their official duties be once recognized, there will be no limit to the dependence of the latter. If the legislature can require the reasons of our decisions to be stated in writing, it can forbid their statement in writing, and enforce their oral announcement, or prescribe the paper upon which they shall be written, and the ink which shall be used. And yet no sane man will justify any such absurd pretension, but where is the limit to this power if its exercise in any particular be admitted?

The truth is, no such power can exist in the legislative department, or be sanctioned by any court which has the least respect for its own dignity and independence. In its own sphere of duties, this court cannot be trammelled by any legislative restrictions. Its constitutional duty is discharged by the rendition of decisions. The legislature can no more require this court to state the reasons of its decisions, than this court can require, for the validity of the statutes, that the legislature

shall accompany them with the reasons for their enactment. The principles of law settled are to be extracted from the records of the cases in which the decisions are rendered. The reports are full of adjudged cases, in which opinions were never delivered. The facts are stated by the reporter, with the points arising thereon, and are followed by the judgments rendered, and yet no one ever doubted that the courts, in the instances mentioned, were discharging their entire constitutional obligations. (See, by way of illustration, cases in 1 Day's Conn. Reports; in 1 Brockenborough's Va. Cases; and in 4 Harris & McHenry's Maryland Reports.)

The practice of giving the reasons in writing for judgments, has grown into use in modern times. Formerly, the reasons, if any were given, were generally stated orally by the judges, and taken down by the reporters in short-hand. 1 Blackstone, 71.

In the judicial records of the King's Courts, "the reasons or causes of the judgment," says Lord Coke, "are not expressed, for wise and learned men do, before they judge, labor to reach to the depth of all the reasons of the case in question, but in their judgments express not any; and, in truth, if judges should set down the reasons and causes of their judgments within every record, that immense labor should withdraw them from the necessary services of the commonwealth, and their records should grow to be like *Elephantini Libri*, of infinite length, and, in mine opinion, lose somewhat of their present authority and reverence; and this is also worthy for learned and grave men to imitate." Coke's Rep., part 3, pref. 5.

The opinions of the judges, setting forth their reasons for their judgments, are, of course, of great importance in the information they impart as to the principles of law which govern the court, and should guide litigants; and right-minded judges, in important cases — when the pressure of other business will permit — will give such opinions. It is not every case, however, which will justify the expenditure of time necessary to write an opinion. Many cases involve no new principles, and are appealed only for delay. It can serve no purpose of public good to repeat elementary principles of law which have never been questioned for centuries. The court must therefore exercise its own discretion as to the necessity of giving an opinion upon pronouncing judgment, and if one is given, whether it shall be orally or in writing. In the exercise of that discretion, the authority of the court is absolute. The legislative department is incompetent to touch it.

With the expression of these views, we might close this opinion, by denying the motion, but it will not be impertinent to the matter under consideration, to say a few words as to the control of the court over its opinions and records. There are some misapprehensions on the subject, arising chiefly from a confusion of terms, and from a misconception of the relation of the different departments of government to each other, and the entire independence in its line of duties of the

judiciary. The terms "opinions" and "decisions" are often confounded, yet there is a wide difference between them, and in ignorance of this, or by overlooking it, what has been a mere revision of an opinion, has been sometimes regarded as a mutilation of a record. A decision of the court is its judgment, the opinion is the reasons given for that judgment. The former is entered of record immediately upon its rendition, and can only be changed through a regular application to the court, upon a petition for a rehearing, or a modification. The latter is the property of the judges, subject to their revision, correction, and modification, in any particular deemed advisable, until, with the approbation of the writer, it is transcribed in the records. In the haste of composition, some errors will occur; in the copying, several; in the printing, many. There will also be, at times, expressions of opinion on incidental questions, too strong and unqualified. All these errors, whether in language, form, or substance, should be corrected before a publication is permitted, as an authoritative exposition of the law, and, as such, binding upon the court. The power of enforcing a correct publication, when the publication is authorized, cannot reasonably be denied. In no civilized State, except in California, has the existence of this power ever been doubted. Every judge, from the Chief Justice of the Supreme Court of the United States, down, claims and exercises, without question, the right of revision, including thereby modification and partial suppression of his opinions. In the recent case in relation to the Sutter grant, we are informed that application was made for a copy of the opinion delivered, and that the application was refused, on the ground that Mr. Justice Campbell, who delivered it, wished to revise it before it left the clerk's office. When the opinions have been revised and finally approved and recorded, then they cease to be the subject of change. They then become like judgment records, and are beyond the interference of the judges, except through regular proceedings before the court by petition.

The records of the courts are necessarily subject to the control of the judges, so far as may be essential to the proper administration of justice. The court hears arguments upon its records; it decides upon its records; it acts by its records; its openings, and sessions, and adjournments, can be proved only by its records; its judgments can only be evidenced by its records; in a word, without its records it has no vitality. Legislation, which could take from its control its records, would leave it impotent for good, and the just object of ridicule and contempt. The clerk, it is true, is a constitutional officer — not subject to appointment or removal by the court — but subject, in the control of the records, to its orders. It is true the court cannot, without great abuse of its powers, take, directly or indirectly, from the clerk, the perquisites of his office for copies of opinions, and papers on file, nor authorize the destruction or mutilation of any of the records, but, subject to these limitations, it must necessarily exercise control that justice may be done to litigants before it.

The power over our opinions and the records of our court we shall exercise at all times while we have the honor to sit on the bench, against all encroachments from any source, but in a manner, we trust, befitting the highest tribunal in the State. We cannot possibly have any interest in the opinions except that they shall embody the results of our most mature deliberation, and be presented to the public in an authentic form, after they have been subjected to the most careful revision. *Motion denied.*[1]

IN RE SANBORN.

SUPREME COURT OF THE UNITED STATES. 1892.

[148 *U. S.* 222.]

THE case is stated in the opinion.

Mr. George A. King (with whom were *Mr. Charles King* and *Mr. William B. King* on the brief), for petitioner.

Mr. Assistant Attorney-General Maury opposing.

MR. JUSTICE SHIRAS delivered the opinion of the court.

A claim of John B. Sanborn, presented in the Department of the Interior, for certain fees under a contract with Sisseton and Wahpeton Indians, of ten per cent of the amount appropriated for said Indians by section 27 of the Indian Appropriation Act of March 3, 1891, 26 Stat. 989, c. 543, was referred by the Secretary of that Department, with the consent of the claimant, to the Court of Claims, in pursuance of § 12 of the Act of March 3, 1887, 24 Stat. 505, c. 359; 1 Sup. Rev. Stat. 2d ed. 561. That court having concluded that Sanborn was not entitled to recover, and having reported its findings of fact and conclusions of law to the department, Sanborn, on the 6th day of July, 1892, asked for the allowance of an appeal to the Supreme Court of the United States. This application, being made in a vacation of the Court of Claims, was heard and denied by the Chief Justice, but was renewed and argued before all the judges on November 2, 1892, and was denied by the court, which adopted the opinion of the Chief Justice previously filed upon the motion before him.

Thereupon Sanborn filed, in this court, his petition praying that a writ of *mandamus* be allowed to the Chief Justice and judges of the Court of Claims, commanding them to allow his appeal as prayed for.

The question for us to answer is whether, where a claim or matter is pending in one of the executive departments, which involves controverted questions of fact or law, and the head of such department, with

[1] In *Ex parte* Griffiths, Reporter, 118 Ind. 83 (1888), it was held beyond the power of the legislature to require the judges of the Supreme Court to write headnotes for their opinions. — ED.

the consent of the claimant, has transmitted the claim, with the vouchers, papers, proofs and documents pertaining thereto, to the Court of Claims, and that court has reported its findings of fact and law to the department by which it was transmitted, the claimant has a right by appeal to bring the action of that court before us for review.

The petitioner does not complain of any illegality on the part of the court below in dealing with his claim. He concedes that the action of that court had been invoked with his consent. What he complains of is the refusal of the court to allow his appeal; and we learn, from the opinion of the court, that its refusal to allow the appeal was not put upon any irregularity or defect in the claim, or in the application for the allowance of an appeal, but upon its view that the proceedings before it were not the subject of appeal to this court.

We must find an answer to the question thus put to us by a construction of the Act of March 3, 1887, read in the light of the previous legislation establishing the Court of Claims, and regulating the subject of appeals from its judgments to this court.

This subject came, for the first time, before this court in the case of *Gordon* v. *The United States*, 2 Wall. 561, wherein it was held that, as the law then stood, no appeal would lie from the Court of Claims to this court. The reasons for this conclusion are stated in the opinion of Chief Justice Taney, reported in the appendix to 117 U. S. 697, and interesting as his last judicial utterance. Briefly stated, the court held that as the so-called judgments of the Court of Claims were not obligatory upon Congress or upon the executive department of the government, but were merely opinions which might be acted upon or disregarded by Congress or the departments, and which this court had no power to compel the court below to execute, such judgments could not be deemed an exercise of judicial power, and could not, therefore, be revised by this court.

A similar question arose in this court as early as 1794, in the case of the *United States* v. *Yale Todd*, an abstract of which case appears in a note by Chief Justice Taney to the later case of the *United States* v. *Ferreira*, 13 How. 52, and wherein it was held that an Act of Congress conferring powers on the judges of the Circuit Court to pass upon the rights of applicants to be placed upon the pension lists, and to report their findings to the Secretary of War, who had the right to revise such findings, was not an Act conferring judicial power, and was, therefore, unconstitutional.[1]

The case of the *United States* v. *Ferreira* was that of an appeal from the District Court of the United States for the District of Florida. The judge of that court had acted in pursuance of certain Acts of Congress, directing the judge to receive, examine and adjust claims for losses suffered by Spaniards by reason of the operations of the American army in Florida. It was decided that the judge's decision was not

[1] *Semble*, an error. See *ante*, p. 105 *n.* — Ed.

the judgment of the court, but a mere award, with a power to review it conferred upon the Secretary of the Treasury, and that from such an award no appeal could lie to this court.

Afterwards, and perhaps in view of the conclusion reached by this court in these cases, on March 17, 1866, 14 Stat. 9, c. 19, Congress passed an Act giving an appeal to the Supreme Court from judgments of the Court of Claims, and repealing those provisions of the Act of March 3, 1863, which practically subjected the judgments of the Supreme Court to the re-examination and revision of the departments, and since that time no doubt has been entertained that the Supreme Court can exercise jurisdiction on appeal from final judgments of the Court of Claims. *United States* v. *Alire*, 6 Wall. 573; *United States* v. *O'Grady*, 22 Wall. 641; *United States* v. *Jones*, 119 U. S. 477.

Express provision for such appeals was made by section 707 of the Revised Statutes, as follows: "An appeal to the Supreme Court shall be allowed, on behalf of the United States, from all judgments of the Court of Claims adverse to the United States, and on behalf of the plaintiff, in any case where the amount in controversy exceeds three thousand dollars, or where his claim is forfeited to the United States by the judgment of said court."

Additions were made to the statutory law on this subject by the Act of March 3, 1887, 24 Stat. 505, c. 359 (1 Sup. Rev. Stat. 2d ed. 559), the 9th section of which is as follows: "That the plaintiff or the United States, in any suit brought under the provisions of this Act, shall have the same rights of appeal or writ of error as are now reserved in the statutes of the United States in that case made, and upon the conditions and limitations therein contained. The modes of procedure in claiming and perfecting an appeal or writ of error shall conform in all respects and as near as may be to the statutes and rules of court governing appeals and writs of error in like causes."

The 12th section of the statute is in the following words: "That when any claim or matter may be pending in any of the executive departments which involves controverted questions of fact or law, the head of such department, with the consent of the claimant, may transmit the same, with the vouchers, papers, proofs, and documents pertaining thereto, to said Court of Claims, and the same shall be there proceeded in under such rules as the court shall adopt. When the facts and conclusions of law shall have been found, the court shall report its findings to the department by which it was transmitted."

With these statutory provisions and decisions of the Supreme Court before it, the court below held that a finding of fact and law made, at the request of a head of a department, with the consent of the claimant, and transmitted to such department, is not a judgment within the meaning of the 9th section of the Act of March 3, 1887, or of the 707th section of the Revised Statutes, and is not, therefore, appealable to this court.

Such a finding is not made obligatory on the department to which it

is reported — certainly not so in terms, — and not so, as we think, by any necessary implication. We regard the function of the Court of Claims, in such a case, as ancillary and advisory only. The finding or conclusion reached by that court is not enforceable by any process of execution issuing from the court, nor is it made, by the statute, the final and indisputable basis of action either by the department or by Congress.

It is, therefore, within the scope of the decision in *Gordon* v. *United States*. The provisions providing for appeals, in the 9th section of the Act of 1887, have reference to cases under the prior sections of the Act which treat of cases or suits brought against the United States, whether in the District Courts, Circuit Courts, or Court of Claims, and wherein final judgments or decrees shall be entered. This seems to be clear from the terms used — "the plaintiff or the United States, in any suit brought under the provisions of this Act, shall have the same rights of appeal or writ of error as are now reserved in the statutes of the United States in that behalf made, and upon the limitations and conditions therein contained." The reference here is to the 707th section of the Revised Statutes, which, as already said, provides for an "appeal to the Supreme Court on behalf of the United States, from all judgments of the Court of Claims, adverse to the United States, and on behalf of the plaintiff in any case where the amount in controversy exceeds three thousand dollars."

In the case before us there was, as held by the Court of Claims, no final judgment obligatory upon the Department of the Interior, or enforceable by execution from any court. Moreover, there was really no suit to which the United States were parties. The claimant did not pretend that the government owed him anything for property sold or services rendered. His effort was to get the Department of the Interior, which was paying money over to Indians under treaties, to withhold from them an agreed percentage thereof for services rendered by him to the Indians. While such a claim may be rightfully regarded as a matter pending in one of the executive departments, which involves controverted questions of fact or law, within the meaning of the 12th section of the Act of 1887, we are unable to regard it as a suit brought against the United States, within the contemplation of the 9th section of that Act. It is true that, by several statutes which appear in a compendious form in sections 2103, 2104 and 2105 of the Revised Statutes, the form and substance of contracts between Indians and agents or attorneys, for services to be performed in reference to claims by such Indians against the United States, are prescribed, and the approval of such contracts by the Secretary of the Interior and the Indian Commissioner is made necessary. But such enactments, intended to protect the Indians from improvident and unconscionable contracts, by no means create a legal obligation on the part of the United States to see that the Indians perform their part of such contracts.

Section 2104 provides that "the Secretary of the Interior and Com-

missioner of Indian Affairs shall determine therefrom whether, in their judgment, such contract or agreement has been complied with or fulfilled; if so, the same may be paid, and if not, it shall be paid in proportion to the services rendered under the contract."

Such a claim may be, as already said, a matter pending in the Department of the Interior, within the meaning of the 12th section of the Act of 1887, but it is plainly not a suit against the United States, with respect to which an appeal is provided for by the 9th section.

The application for a writ of *mandamus* must, therefore, be

Denied.[1]

LUTHER *v.* BORDEN.

SUPREME COURT OF THE UNITED STATES. 1848.

[7 *How.* 1.]

THE first of these cases came up by a writ of error, the second upon a certificate of division of opinion by the judges of the Circuit Court of the United States for the District of Rhode Island. The first case is stated in the opinion of the court. The second requires no statement, as it went off for want of jurisdiction.

Hallett and *Clifford*, for the plaintiff.

Webster and *Whipple*, *contra.*

TANEY, C. J., delivered the opinion of the court.

This case has arisen out of the unfortunate political differences which agitated the people of Rhode Island in 1841 and 1842.

It is an action of trespass brought by Martin Luther, the plaintiff in error, against Luther M. Borden and others, the defendants, in the Circuit Court of the United States for the District of Rhode Island, for breaking and entering the plaintiff's house. The defendants justify upon the ground that large numbers of men were assembled in different

[1] "The Court of Claims declined to go behind the treaty of 1846 upon the ground that it was not within the province of a court, either of law or equity, to determine that a treaty or an Act of Congress had been procured by duress or fraud, and declare it inoperative for that reason. *Fletcher* v. *Peck*, 6 Cranch, 87, 130; *Ex parte McCardle*, 7 Wall. 506, 514; *People* v. *Draper*, 15 N. Y. 545, 555; *Railroad Company* v. *Cooper*, 33 Penn. St 278; *Wright* v. *Defrees*, 8 Indiana, 302.

"And while it was conceded that Congress might confer upon that court extra-judicial powers, yet the court was of opinion that this could not be held to have been done by the Act authorizing the institution of this suit, since it was therein provided that whatever judgment might be rendered, whether for the complainants or defendants, might be appealed to the Supreme Court, whose jurisdiction, as defined by the Constitution, was strictly judicial, and could neither be enlarged nor diminished by legislative authority. *Gordon* v. *United States*, 2 Wall. 561; Taney, C. J., 117 U. S. 697, Appx.; *In re Sanborn*, *ante*, 222." — FULLER, C. J. (for the court) in *U. S.* v. *Old Settlers*, 148 U. S. 466. — ED.

parts of the State for the purpose of overthrowing the government by military force, and were actually levying war upon the State; that, in order to defend itself from this insurrection, the State was declared by competent authority to be under martial law; that the plaintiff was engaged in the insurrection; and that the defendants, being in the military service of the State, by command of their superior officer, broke and entered the house and searched the rooms for the plaintiff, who was supposed to be there concealed, in order to arrest him, doing as little damage as possible. The plaintiff replied, that the trespass was committed by the defendants of their own proper wrong, and without any such cause; and upon the issue joined on this replication, the parties proceeded to trial. . . . [The case involved the question which of two organizations was the legal government of Rhode Island.]

Moreover, the Constitution of the United States, as far as it has provided for an emergency of this kind, and authorized the general government to interfere in the domestic concerns of a State, has treated the subject as political in its nature, and placed the power in the hands of that department.

The fourth section of the fourth article of the Constitution of the United States provides that the United States shall guarantee to every State in the Union a republican form of government, and shall protect each of them against invasion; and on the application of the legislature or of the executive (when the legislature cannot be convened) against domestic violence.

Under this article of the Constitution it rests with Congress to decide what government is the established one in a State. For as the United States guarantee to each State a republican government, Congress must necessarily decide what government is established in the State before it can determine whether it is republican or not. And when the senators and representatives of a State are admitted into the councils of the Union, the authority of the government under which they are appointed, as well as its republican character, is recognized by the proper constitutional authority. And its decision is binding on every other department of the government, and could not be questioned in a judicial tribunal. It is true that the contest in this case did not last long enough to bring the matter to this issue; and as no senators or representatives were elected under the authority of the government of which Mr. Dorr was the head, Congress was not called upon to decide the controversy. Yet the right to decide is placed there, and not in the courts.

So, too, as relates to the clause in the above-mentioned article of the Constitution, providing for cases of domestic violence. It rested with Congress, too, to determine upon the means proper to be adopted to fulfil this guarantee. They might, if they had deemed it most advisable to do so, have placed it in the power of a court to decide when the contingency had happened which required the Federal government to interfere. But Congress thought otherwise, and no doubt wisely; and by

the Act of February 28, 1795, provided that, "in case of an insurrection in any State against the government thereof, it shall be lawful for the President of the United States, on application of the legislature of such State or of the executive, when the legislature cannot be convened, to call forth such number of the militia of any other State or States, as may be applied for, as he may judge sufficient to suppress such insurrection."

By this Act, the power of deciding whether the exigency had arisen upon which the government of the United States is bound to interfere, is given to the President. He is to act upon the application of the legislature, or of the executive, and consequently he must determine what body of men constitute the legislature, and who is the Governor, before he can act. The fact that both parties claim the right to the government, cannot alter the case, for both cannot be entitled to it. If there is an armed conflict, like the one of which we are speaking, it is a case of domestic violence, and one of the parties must be in insurrection against the lawful government. And the President must, of necessity, decide which is the government, and which party is unlawfully arrayed against it, before he can perform the duty imposed upon him by the Act of Congress.

After the President has acted and called out the militia, is a Circuit Court of the United States authorized to inquire whether his decision was right? Could the court, while the parties were actually contending in arms for the possession of the government, call witnesses before it, and inquire which party represented a majority of the people? If it could, then it would become the duty of the court (provided it came to the conclusion that the President had decided incorrectly) to discharge those who were arrested or detained by the troops in the service of the United States, or the government which the President was endeavoring to maintain. If the judicial power extends so far, the guarantee contained in the Constitution of the United States is a guarantee of anarchy, and not of order. Yet if this right does not reside in the courts when the conflict is raging — if the judicial power is, at that time, bound to follow the decision of the political, it must be equally bound when the contest is over. It cannot, when peace is restored, punish as offences and crimes the acts which it before recognized, and was bound to recognize, as lawful.

It is true that in this case the militia were not called out by the President. But upon the application of the Governor under the charter government, the President recognized him as the executive power of the State, and took measures to call out the militia to support his authority, if it should be found necessary for the general government to interfere; and it is admitted in the argument that it was the knowledge of this decision that put an end to the armed opposition to the charter government, and prevented any further efforts to establish by force the proposed Constitution. The interference of the President, therefore, by announcing his determination, was as effectual as if the militia had been

assembled under his orders. And it should be equally authoritative. For certainly no court of the United States, with a knowledge of this decision, would have been justified in recognizing the opposing party as the lawful government, or in treating as wrong-doers or insurgents the officers of the government which the President had recognized, and was prepared to support by an armed force. In the case of foreign nations, the government acknowledged by the President is always recognized in the courts of justice. And this principle has been applied by the Act of Congress to the sovereign States of the Union.

It is said that this power in the President is dangerous to liberty, and may be abused. All power may be abused if placed in unworthy hands. But it would be difficult, we think, to point out any other hands in which this power would be more safe, and at the same time equally effectual. When citizens of the same State are in arms against each other, and the constituted authorities unable to execute the laws, the interposition of the United States must be prompt, or it is of little value. The ordinary course of proceedings in courts of justice would be utterly unfit for the crisis. And the elevated office of the President, chosen as he is by the people of the United States, and the high responsibility he could not fail to feel when acting in a case of so much moment, appear to furnish as strong safeguards against a wilful abuse of power as human prudence and foresight could well provide. At all events, it is conferred upon him by the Constitution and laws of the United States, and must, therefore, be respected and enforced in its judicial tribunals.

A question very similar to this arose in the case of *Martin* v. *Mott*, 12 Wheat. 29-31. The first clause of the first section of the Act of February 28, 1795, of which we have been speaking, authorizes the President to call out the militia to repel invasion. It is the second clause in the same section which authorizes the call to suppress an insurrection against a State government. The power given to the President in each case is the same, with this difference only, that it cannot be exercised by him in the latter case, except upon the application of the legislature or executive of the State. The case above mentioned arose out of a call made by the President, by virtue of the power conferred by the first clause; and the court said that "whenever a statute gives a discretionary power to any person, to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction that the statute constitutes him the sole and exclusive judge of the existence of those facts." The grounds upon which that opinion is maintained are set forth in the report, and, we think, are conclusive. The same principle applies to the case now before the court. Undoubtedly, if the President, in exercising this power, shall fall into error, or invade the rights of the people of the State, it would be in the power of Congress to apply the proper remedy. But the courts must administer the law as they find it. . . .

Much of the argument on the part of the plaintiff turned upon political rights and political questions, upon which the court has been urged

to express an opinion. We decline doing so. The high power has been conferred on this court of passing judgment upon the acts of the State sovereignties, and of the legislative and executive branches of the Federal government, and of determining whether they are beyond the limits of power marked out for them respectively by the Constitution of the United States. This tribunal, therefore, should be the last to overstep the boundaries which limit its own jurisdiction. And while it should always be ready to meet any question confided to it by the Constitution, it is equally its duty not to pass beyond its appropriate sphere of action, and to take care not to involve itself in discussions which properly belong to other forums. No one, we believe, has ever doubted the proposition that, according to the institutions of this country, the sovereignty in every State resides in the people of the State, and that they may alter and change their form of government at their own pleasure. But whether they have changed it or not, by abolishing an old government, and establishing a new one in its place, is a question to be settled by the political power. And when that power has decided, the courts are bound to take notice of its decision, and to follow it.

The judgment of the Circuit Court must, therefore, be affirmed.[1]

[1] And so *Cæsar Griffin's Case*, Chase's Dec. 364, 412 (1869); and, as to the continued existence of an Indian tribe, *United States* v. *Holliday*, 3 Wall. 407, 419.

See *Martin* v. *Mott*, 12 Wheat. 19, and compare *Opinion of Justices*, 8 Mass. 548.

In *Com. of Kentucky* v. *Dennison, Governor of Ohio*, 24 How. 66 (1860), on an application to the Supreme Court of the United States for a writ of *mandamus* to the defendant to compel the delivery of an alleged fugitive from justice, charged with assisting the escape of a fugitive slave, the court denied the application. In the course of the opinion of the court, Taney, C. J., said: "'The demand being thus made, the Act of Congress declares that 'it shall be the duty of the executive authority of the State' to cause the fugitive to be arrested and secured, and delivered to the agent of the demanding State. The words 'it shall be the duty,' in ordinary legislation, imply the assertion of the power to command and to coerce obedience. But looking to the subject-matter of this law, and the relations which the United States and the several States bear to each other, the court is of opinion, the words 'it shall be the duty' were not used as mandatory and compulsory, but as declaratory of the moral duty which this compact created, when Congress had provided the mode of carrying it into execution. . . . But if the Governor of Ohio refuses to discharge this duty, there is no power delegated to the General Government, either through the Judicial Department or any other department, to use any coercive means to compel him. And upon this ground the motion for the *mandamus* must be overruled." — Ed.

STATE OF MISSISSIPPI *v.* ANDREW JOHNSON, PRESIDENT OF THE UNITED STATES.

SUPREME COURT OF THE UNITED STATES. 1867.

[4 *Wall.* 475.]

THIS was a motion made by *Messrs. Sharkey* and *R. J. Walker*, on behalf of the State of Mississippi, for leave to file a bill in the name of the State praying this court perpetually to enjoin and restrain Andrew Johnson, a citizen of the State of Tennessee and President of the United States, and his officers and agents appointed for that purpose, and especially E. O. C. Ord, assigned as military commander of the district where the State of Mississippi is, from executing or in any manner carrying out two Acts of Congress named in the bill, one "An Act for the more Efficient Government of the Rebel States," passed March 2, 1867, notwithstanding the President's veto of it as unconstitutional, and the other an Act supplementary to it, passed in the same way March 23, 1867; Acts commonly called the Reconstruction Acts. . . .

The bill set out the political history of Mississippi so far as related to its having become one of the United States; and "that forever after it was impossible for her people, or for the State in its corporate capacity, to dissolve that connection with the other States, and that any attempt to do so by secession or otherwise was a nullity;" and she "now solemnly asserted that her connection with the Federal government was not in anywise thereby destroyed or impaired;" and she averred and charged "that the Congress of the United States cannot constitutionally expel her from the Union, and that any attempt which practically does so is a nullity." . . .

It then charged that, from information and belief, the said Andrew Johnson, President, in violation of the Constitution, and in violation of the sacred rights of the States, would proceed, notwithstanding his vetoes, and as a mere ministerial duty, to the execution of said Acts, as though they were the law of the land, which the vetoes prove he would not do if he had any discretion, or that in doing so he performed anything more than a mere ministerial duty; and that with the view to the execution of said Acts he had assigned General E. O. C. Ord to the command of the States of Mississippi and Arkansas.

Upon an intimation made a few days before by Mr. Sharkey, of his desire to file this bill, the Attorney-General objected to it *in limine*, as containing matter not fit to be received. The Chief Justice then stated that while as a general thing a motion to file a bill was granted as of course, yet if it was suggested that the bill contained scandalous or impertinent matter, or was in other respects improper to be received, the court would either examine the bill or refer it to a master for examination. The only matter, therefore, which would now be considered was the question of leave to file the bill.

Messrs. Sharkey, R. J. Walker, and *Garland*, by briefs filed. . . .
Mr. Stanbery, A. G., contra. . . .

Now, I beg attention to the cases upon which the counsel rely, not as in point, but as in close analogy; and, first of all, is what was decided in the case of Burr, by Chief Justice Marshall. In the course of the prosecution against Colonel Burr, his counsel deemed it necessary that they should have possession of a certain letter written to the then President, Mr. Jefferson, by General Wilkinson. It did not exactly appear whether it was a private letter or an official letter, but it was said to be a letter in the possession of the President. The counsel of Colonel Burr moved for a subpœna to be issued by the court to the President, commanding him to appear and bring with him that paper. The question was argued by the counsel for the United States, and by the counsel for Colonel Burr; and, although the counsel for the United States did not admit that such process could be issued against the President, they waived the point, and the whole argument was upon the right of the party to have the paper itself. They got upon that side issue, and did not argue, but merely stated the other point, that, according to their idea, a subpœna could not issue against the President. However, when Chief Justice Marshall came to decide the matter, undoubtedly he was of opinion that a subpœna might issue against the President, as President, to produce a paper in his possession as President. Counsel in this case argue from that, if the President is liable to the process of the court by subpœna to testify, he is liable to the process and the action of the court as a party to abide any order which the court may make. I will go a step or two further with that case, to show how, notwithstanding the opinion that was delivered by the Chief Justice, the court came to a point in which they would not take another step.

When the subpœna was received by the President, Mr. Jefferson, he did not give to it any notice. He did not even make any return to the court, nor any excuse to the court. He simply wrote a letter to the district attorney, in which he stated, that he could not conceive how it was that, under such circumstances, the court should order him to go there by subpœna; that he would not go; that he did not propose to go; but he said to the district attorney that there was no difficulty in obtaining the paper in the proper way. But he would pay no respect to the subpœna. Thereupon Colonel Burr himself moved for compulsory process to compel the President to come. Of course that was legitimate. If the court, in saying that the President was amenable to subpœna, was right, the court was bound, at the instance of the defendant, to follow it up by process of attachment to compel obedience to its lawful order. At that point, however, the court hesitated, and not a step further was taken toward enforcing the doctrine laid down by the Chief Justice. It then became quite too apparent that a very great error had been committed. I say a very great error, with the greatest submission to the great Chief Justice, who, on circuit, at *nisi prius*,

suddenly, on a motion of this kind, had held that the President of the United States was liable to the subpœna of any court as President. . . .

It is with the approbation, advice, and instruction of the President that I appear here to make this objection. I should have felt bound to make it on my own motion, as the law officer of the government. But although counsel, in their bill, have said that the President has vetoed these Acts of Congress as unconstitutional, I must say, in defence of the President, this, that when the President did that, he did everything he intended to do in opposition to these laws. From the moment they were passed over his veto there was but one duty in his estimation resting upon him, and that was faithfully to carry out and execute these laws. He has instructed me to say that in making this objection, it is not for the purpose of escaping from any responsibility either to perform or to refuse to perform. . . .

THE CHIEF JUSTICE delivered the opinion of the court.

A motion was made, some days since, in behalf of the State of Mississippi, for leave to file a bill in the name of the State, praying this court perpetually to enjoin and restrain Andrew Johnson, President of the United States, and E. O. C. Ord, general commanding in the District of Mississippi and Arkansas, from executing, or in any manner carrying out, certain Acts of Congress therein named.

The Acts referred to are those of March 2, and March 23, 1867, commonly known as the Reconstruction Acts.

The Attorney-General objected to the leave asked for, upon the ground that no bill which makes a President a defendant, and seeks an injunction against him to restrain the performance of his duties as President, should be allowed to be filed in this court.

This point has been fully argued, and we will now dispose of it.

We shall limit our inquiry to the question presented by the objection, without expressing any opinion on the broader issues discussed in argument, whether, in any case, the President of the United States may be required, by the process of this court, to perform a purely ministerial act under a positive law, or may be held amenable, in any case, otherwise than by impeachment for crime.

The single point which requires consideration is this: Can the President be restrained by injunction from carrying into effect an Act of Congress alleged to be unconstitutional?

It is assumed by the counsel for the State of Mississippi, that the President, in the execution of the Reconstruction Acts, is required to perform a mere ministerial duty. In this assumption there is, we think, a confounding of the terms ministerial and executive, which are by no means equivalent in import.

A ministerial duty, the performance of which may, in proper cases, be required of the head of a department, by judicial process, is one in respect to which nothing is left to discretion. It is a simple, definite duty, arising under conditions admitted or proved to exist, and imposed by law.

The case of *Marbury* v. *Madison*, *Secretary of State*, 1 Cranch, 137, furnishes an illustration. A citizen had been nominated, confirmed, and appointed a justice of the peace for the District of Columbia, and his commission had been made out, signed, and sealed. Nothing remained to be done except delivery, and the duty of delivery was imposed by law on the Secretary of State. It was held that the performance of this duty might be enforced by *mandamus* issuing from a court having jurisdiction.

So, in the case of *Kendall*, *Postmaster-General*, v. *Stockton & Stokes*, 12 Peters, 527, an Act of Congress had directed the Postmaster-General to credit Stockton & Stokes with such sums as the Solicitor of the Treasury should find due to them; and that officer refused to credit them with certain sums, so found due. It was held that the crediting of this money was a mere ministerial duty, the performance of which might be judicially enforced.

In each of these cases nothing was left to discretion. There was no room for the exercise of judgment. The law required the performance of a single specific act; and that performance, it was held, might be required by *mandamus*.

Very different is the duty of the President in the exercise of the power to see that the laws are faithfully executed, and among these laws the Acts named in the bill. By the first of these Acts he is required to assign generals to command in the several military districts, and to detail sufficient military force to enable such officers to discharge their duties under the law. By the supplementary Act, other duties are imposed on the several commanding generals, and these duties must necessarily be performed under the supervision of the President as Commander-in-Chief. The duty thus imposed on the President is in no just sense ministerial. It is purely executive and political.

An attempt on the part of the judicial department of the government to enforce the performance of such duties by the President might be justly characterized, in the language of Chief Justice Marshall, as "an absurd and excessive extravagance."

It is true that in the instance before us the interposition of the court is not sought to enforce action by the executive under constitutional legislation, but to restrain such action under legislation alleged to be unconstitutional. But we are unable to perceive that this circumstance takes the case out of the general principles which forbid judicial interference with the exercise of executive discretion.

It was admitted in the argument that the application now made to us is without a precedent; and this is of much weight against it.

Had it been supposed at the bar that this court would, in any case, interpose, by injunction, to prevent the execution of an unconstitutional Act of Congress, it can hardly be doubted that applications with that object would have been heretofore addressed to it.

Occasions have not been wanting.

The constitutionality of the Act for the annexation of Texas was

vehemently denied. It made important and permanent changes in the relative importance of States and sections, and was by many supposed to be pregnant with disastrous results to large interests in particular States. But no one seems to have thought of an application for an injunction against the execution of the Act by the President.

And yet it is difficult to perceive upon what principle the application now before us can be allowed and similar applications in that and other cases have been denied.

The fact that no such application was ever before made in any case indicates the general judgment of the profession that no such application should be entertained.

It will hardly be contended that Congress [the judges] can interpose, in any case, to restrain the enactment of an unconstitutional law; and yet how can the right to judicial interposition to prevent such an enactment, when the purpose is evident and the execution of that purpose certain, be distinguished, in principle, from the right to such interposition against the execution of such a law by the President?

The Congress is the legislative department of the government; the President is the executive department. Neither can be restrained in its action by the judicial department; though the acts of both, when performed, are, in proper cases, subject to its cognizance.

The impropriety of such interference will be clearly seen upon consideration of its possible consequences.

Suppose the bill filed and the injunction prayed for allowed. If the President refuse obedience, it is needless to observe that the court is without power to enforce its process. If, on the other hand, the President complies with the order of the court and refuses to execute the Acts of Congress, is it not clear that a collision may occur between the executive and legislative departments of the government? May not the House of Representatives impeach the President for such refusal? And in that case could this court interfere, in behalf of the President, thus endangered by compliance with its mandate, and restrain by injunction the Senate of the United States from sitting as a court of impeachment? Would the strange spectacle be offered to the public world of an attempt by this court to arrest proceedings in that court?

These questions answer themselves.

It is true that a State may file an original bill in this court. And it may be true, in some cases, that such a bill may be filed against the United States. But we are fully satisfied that this court has no jurisdiction of a bill to enjoin the President in the performance of his official duties; and that no such bill ought to be received by us.

It has been suggested that the bill contains a prayer that, if the relief sought cannot be had against Andrew Johnson, as President, it may be granted against Andrew Johnson as a citizen of Tennessee. But it is plain that relief as against the execution of an Act of Congress by Andrew Johnson, is relief against its execution by the President. A bill praying an injunction against the execution of an Act of Congress

by the incumbent of the Presidential office cannot be received, whether it describes him as President or as a citizen of a State.

The motion for leave to file the bill is, therefore,

Denied.[1]

STATE OF GEORGIA *v.* STANTON.

SUPREME COURT OF THE UNITED STATES. 1867.

[6 *Wall.* 50.]

THIS was a bill filed April 15, 1867, in this court, invoking the exercise of its original jurisdiction, against Stanton, Secretary of War, Grant, General of the Army, and Pope, Major-General, assigned to the command of the Third Military District, consisting of the States of Georgia, Florida, and Alabama (a district organized under the Acts of Congress of the 2d March, 1867, entitled "An Act to provide for the more Efficient Government of the Rebel States," and an Act of the 23d of the same month supplementary thereto), for the purpose of restraining the defendants from carrying into execution the several provisions of these Acts; Acts known in common parlance as the "Reconstruction Acts." Both these Acts had been passed over the President's veto. . . .

The bill set forth the existence of the State of Georgia, the complainant, as one of the States of this Union under the Constitution; the Civil War of 1861–1865 in which she was involved; the surrender of the Confederate armies in the latter year, and submission to the Constitution and laws of the Union; the withdrawal of the military government from Georgia by the President, Commander-in-Chief of the army; and the revival and reorganization of the civil government of the State with his permission; and that the government thus reorganized was in the possession and enjoyment of all the rights and privileges in her several departments — executive, legislative, and judicial — belonging to a State in the Union under the Constitution, with the exception of a representation in the Senate and House of Representatives of the United States.

It set forth further that the intent and design of the Acts of Congress, as was apparent on their face and by their terms, was to overthrow and to annul this existing State government, and to erect

[1] As to the power of courts to control the action of other departments, see 1 Tucker's Bl. 358, note; 1 Burr's Trial (Phila. 1808), 114, 127, 131, 180, 249, 254; *Low* v. *Towns*, 8 Ga. 360, 372; *Appeal of Hartranft*, Governor, 85 Pa. St. 433; s. c. Thayer's Cas. Ev. 1153; *Martin* v. *Ingham*, 38 Kans. 641; *In re* Gunn, 50 Kans. 155 (1893). In the dissenting opinion of Allen, J., in the case last named, the authorities are very fully cited.

See also *United States* v. *Guthrie*, 17 How. 284, as to the limits of the power to control the action of a subordinate member of the executive department. — ED.

another and different government in its place, unauthorized by the Constitution and in defiance of its guarantees; and that, in furtherance of this intent and design, the defendants (the Secretary of War, the General of the Army, and Major-General Pope), acting under orders of the President, were about setting in motion a portion of the army to take military possession of the State, and threatened to subvert her government, and to subject her people to military rule; that the State was wholly inadequate to resist the power and force of the Executive Department of the United States. She therefore insisted that such protection could, and ought to be afforded by a decree, or order, of this court in the premises. . . .

Mr. Stanbery, A. G., at the last term moved to dismiss the bill for want of jurisdiction.

Messrs. Charles O'Connor, *R. J. Walker* (with whom were *Messrs. Sharkey*, *Black*, *Brent*, and *E. Cowan*), *contra.*

The bill having been dismissed at the last term, MR. JUSTICE NELSON now delivered the opinion of the court.

A motion has been made by the counsel for the defendants to dismiss the bill for want of jurisdiction, for which a precedent is found in the case of *The State of Rhode Island* v. *The State of Massachusetts*, 12 Peters, 669. It is claimed that the court has no jurisdiction either over the subject-matter set forth in the bill or over the parties defendants. And, in support of the first ground, it is urged that the matters involved, and presented for adjudication, are political and not judicial, and, therefore, not the subject of judicial cognizance.

This distinction results from the organization of the government into the three great departments, executive, legislative, and judicial, and from the assignment and limitation of the powers of each by the Constitution.

The judicial power is vested in one supreme court, and in such inferior courts as Congress may ordain and establish: the political power of the government in the other two departments.

The distinction between judicial and political power is so generally acknowledged in the jurisprudence both of England and of this country, that we need do no more than refer to some of the authorities on the subject. They are all in one direction. *Nabob of Carnatic* v. *The East India Co.*, 1 Vesey, Jr., 375–393, S. C., 2 *Ib.* 56–60; *Penn* v. *Lord Baltimore*, 1 Vesey, 446–447; *New York* v. *Connecticut*, 4 Dallas, 4–6; *The Cherokee Nation* v. *Georgia*, 5 Peters, 1, 20, 29, 30, 51, 75: *The State of Rhode Island* v. *The State of Massachusetts*, 12 *Ib.* 657, 733, 734, 737, 738.

It has been supposed that the case of *The State of Rhode Island* v. *The State of Massachusetts*, 12 Peters, 657, is an exception, and affords an authority for hearing and adjudicating upon political questions in the usual course of judicial proceedings on a bill in equity. But it will be seen on a close examination of the case, that this is a mistake. It involved a question of boundary between the two States. Mr.

Justice Baldwin, who delivered the opinion of the court, states the objection, and proceeds to answer it. He observes (p. 736), "It is said that this is a political, not civil controversy, between the parties; and, so not within the Constitution, or thirteenth section of the Judiciary Act. As it is viewed by the court, on the bill alone, had it been demurred to, a controversy as to the locality of a point three miles south of the southernmost point of Charles River, is the only question that can arise under the charter. Taking the case on the bill and plea, the question is, whether the stake set up on Wrentham Plain by Woodward and Saffrey, in 1842, is the true point from which to run an east and west line as the compact boundary between the States. In the first aspect of the case it depends on a fact; in the second, on the law of equity, whether the agreement is void or valid; neither of which present a political controversy, but one of an ordinary judicial nature of frequent occurrence in suits between individuals." In another part of the opinion, speaking of the submission by sovereigns or States, of a controversy between them, he observes, "From the time of such submission the question ceases to be a political one, to be decided by the *sic volo, sic jubeo*, of political power. It comes to the court to be decided by its judgment, legal discretion, and solemn consideration of the rules of law, appropriate to its nature as a judicial question, depending on the exercise of judicial powers, as it is bound to act by known and settled principles of national or municipal jurisprudence, as the case requires." And he might have added, what, indeed, is probably implied in the opinion, that the question thus submitted by the sovereign or State, to a judicial determination, must be one appropriate for the exercise of judicial power; such as a question of boundary, or as in the case of *Penn* v. *Lord Baltimore*, a contract between the parties in respect to their boundary. Lord Hardwicke places his right in that case to entertain jurisdiction upon this ground.

The objections to the jurisdiction of the court in the case of Rhode Island against Massachusetts were, that the subject-matter of the bill involved sovereignty and jurisdiction, which were not matters of property, but of political rights over the territory in question. They are forcibly stated by the Chief Justice, who dissented from the opinion. 12 Peters, 752, 754. The very elaborate examination of the case by Mr. Justice Baldwin, was devoted to an answer and refutation of these objections. He endeavored to show, and, we think, did show, that the question was one of boundary, which, of itself, was not a political question, but one of property, appropriate for judicial cognizance; and, that sovereignty and jurisdiction were but incidental, and dependent upon the main issue in the case. The right of property was undoubtedly involved; as in this country, where feudal tenures are abolished, in cases of escheat, the State takes the place of the feudal lord, by virtue of its sovereignty, as the original and ultimate proprietor of all the lands within its jurisdiction.

In the case of *The State of Florida* v. *Georgia*, 17 Howard, 478,

the United States were allowed to intervene, being the proprietors of a large part of the land situated within the disputed boundary, ceded by Spain as a part of Florida. The State of Florida was also deeply interested as a proprietor.

The case, bearing most directly on the one before us, is *The Cherokee Nation* v. *The State of Georgia*, 5 Peters, 1. A bill was filed in that case and an injunction prayed for, to prevent the execution of certain Acts of the Legislature of Georgia within the territory of the Cherokee Nation of Indians, they claiming a right to file it in this court, in the exercise of its original jurisdiction, as a foreign nation. The Acts of the Legislature, if permitted to be carried into execution, would have subverted the tribal government of the Indians; and subjected them to the jurisdiction of the State. The injunction was denied, on the ground that the Cherokee Nation could not be regarded as a foreign nation within the Judiciary Act; and, that, therefore, they had no standing in court. But Chief Justice Marshall, who delivered the opinion of the majority, very strongly intimated, that the bill was untenable on another ground, namely, that it involved simply a political question. He observed, "That the part of the bill which respects the land occupied by the Indians, and prays the aid of the court to protect their possessions, may be more doubtful. The mere question of right might, perhaps, be decided by this court in a proper case with proper parties. But the court is asked to do more than decide on the title. The bill requires us to control the Legislature of Georgia, and to restrain the exertion of its physical force. The propriety of such an interposition by the court may be well questioned. It savors too much of the exercise of political power, to be within the province of the judicial department." Several opinions were delivered in the case; a very elaborate one, by Mr. Justice Thompson, in which Judge Story concurred. They maintained that the Cherokee Nation was a foreign nation within the Judiciary Act, and competent to bring the suit; but agreed with the Chief Justice, that all the matters set up in the bill involved political questions, with the exception of the right and title of the Indians to the possession of the land which they occupied. Mr. Justice Thompson, referring to this branch of the case, observed: "For the purpose of guarding against any erroneous conclusions, it is proper I should state, that I do not claim for this court, the exercise of jurisdiction upon any matter properly falling under the denomination of political power. Relief to the full extent prayed for by the bill may be beyond the reach of this court. Much of the matters therein contained by way of complaint, would seem to depend for relief upon the exercise of political power; and, as such, appropriately devolving upon the executive, and not the judicial department of the government. This court can grant relief so far, only, as the rights of persons or property are drawn in question, and have been infringed." And, in another part of the opinion, he returns, again, to this question, and is still more emphatic in disclaiming jurisdiction. He observes: "I certainly do

not claim, as belonging to the judiciary, the exercise of political power. That belongs to another branch of the government. The protection and enforcement of many rights secured by treaties, most certainly do not belong to the judiciary. It is only where the rights of persons or property are involved, and when such rights can be presented under some judicial form of proceedings, that courts of justice can interpose relief. This court can have no right to pronounce an abstract opinion upon the constitutionality of a State law. Such law must be brought into actual, or threatened operation upon rights properly falling under judicial cognizance, or a remedy is not to be had here." We have said Mr. Justice Story concurred in this opinion; and Mr. Justice Johnson, who also delivered one, recognized the same distinctions. 5 Peters, 29–30.

By the second section of the third article of the Constitution "the judicial power extends to all cases, in law and equity, arising under the Constitution, the laws of the United States," &c., and as applicable to the case in hand, "to controversies, between a State and citizens of another State," — which controversies, under the Judiciary Act, may be brought, in the first instance, before this court in the exercise of its original jurisdiction, and we agree, that the bill filed, presents a case, which, if it be the subject of judicial cognizance, would, in form, come under a familiar head of equity jurisdiction, that is, jurisdiction to grant an injunction to restrain a party from a wrong or injury to the rights of another, where the danger, actual or threatened, is irreparable, or the remedy at law inadequate. But, according to the course of proceeding under this head in equity, in order to entitle the party to the remedy, a case must be presented appropriate for the exercise of judicial power; the rights in danger, as we have seen, must be rights of persons or property, not merely political rights, which do not belong to the jurisdiction of a court, either in law or equity.

The remaining question on this branch of our inquiry is, whether, in view of the principles above stated, and which we have endeavored to explain, a case is made out in the bill of which this court can take judicial cognizance. In looking into it, it will be seen that we are called upon to restrain the defendants, who represent the executive authority of the government, from carrying into execution certain Acts of Congress, inasmuch as such execution would annul, and totally abolish the existing State government of Georgia, and establish another and different one in its place; in other words, would overthrow and destroy the corporate existence of the State, by depriving it of all the means and instrumentalities whereby its existence might, and, otherwise would, be maintained.

This is the substance of the complaint, and of the relief prayed for. The bill, it is true, sets out in detail the different and substantial changes in the structure and organization of the existing government, as contemplated in these Acts of Congress; which, it is charged, if carried into effect by the defendants, will work this destruction. But they are grievances, because they necessarily and inevitably tend to the

overthrow of the State as an organized political body. They are stated, in detail, as laying a foundation for the interposition of the court to prevent the specific execution of them; and the resulting threatened mischief. So in respect to the prayers of the bill. The first is, that the defendants may be enjoined against doing or permitting any act or thing, within or concerning the State, which is or may be directed, or required of them, by or under the two Acts of Congress complained of; and the remaining four prayers are of the same character, except more specific as to the particular acts threatened to be committed.

That these matters, both as stated in the body of the bill, and in the prayers for relief, call for the judgment of the court upon political questions, and, upon rights, not of persons or property, but of a political character, will hardly be denied. For the rights for the protection of which our authority is invoked, are the rights of sovereignty, of political jurisdiction, of government, of corporate existence as a State, with all its constitutional powers and privileges. No case of private rights or private property infringed, or in danger of actual or threatened infringement, is presented by the bill, in a judicial form, for the judgment of the court.

It is true, the bill, in setting forth the political rights of the State, and of its people to be protected, among other matters, avers, that Georgia owns certain real estate and buildings therein, State Capitol, and executive mansion, and other real and personal property; and that putting the Acts of Congress into execution, and destroying the State, would deprive it of the possession and enjoyment of its property. But, it is apparent, that this reference to property and statement concerning it, are only by way of showing one of the grievances resulting from the threatened destruction of the State, and in aggravation of it, not as a specific ground of relief. This matter of property is neither stated as an independent ground, nor is it noticed at all in the prayers for relief. Indeed the case, as made in the bill, would have stopped far short of the relief sought by the State, and its main purpose and design given up, by restraining its remedial effect, simply to the protection of the title and possession of its property. Such relief would have called for a very different bill from the one before us.

Having arrived at the conclusion that this court, for the reasons above stated, possesses no jurisdiction over the subject-matter presented in the bill for relief, it is unimportant to examine the question as it respects jurisdiction over the parties defendants.

THE CHIEF JUSTICE: Without being able to yield my assent to the grounds stated in the opinion just read for the dismissal of the complainant's bill, I concur fully in the conclusion that the case made by the bill, is one of which this court has no jurisdiction.

Bill dismissed for want of jurisdiction.

CHAPTER II.

MAKING AND CHANGING WRITTEN CONSTITUTIONS.

1. Constitution of the United States.

"In 1774, Massachusetts recommended the assembling of a Continental Congress to deliberate upon the state of public affairs; and according to her recommendation, delegates were appointed by the colonies for a congress to be held in Philadelphia in the autumn of the same year. In some of the legislatures of the colonies, which were then in session, delegates were appointed by the popular or representative branch; and in other cases they were appointed by conventions of the people in the colonies. The congress of delegates (calling themselves in their more formal acts 'the delegates appointed by the good people of these colonies') assembled on the 4th of September, 1774; and having chosen officers, they adopted certain fundamental rules for their proceedings.

"Thus was organized under the auspices and with the consent of the people, acting directly in their primary, sovereign capacity, and without the intervention of the functionaries, to whom the ordinary powers of government were delegated in the colonies, the first general or national government, which has been very aptly called 'the revolutionary government,' since in its origin and progress it was wholly conducted upon revolutionary principles. The congress thus assembled, exercised *de facto* and *de jure* a sovereign authority; not as the delegated agents of the governments *de facto* of the colonies, but in virtue of original powers derived from the people. The revolutionary government, thus formed, terminated only when it was regularly superseded by the confederated government under the articles finally ratified, as we shall hereafter see, in 1781. . . .

"In *Ware* v. *Hylton*, 3 Dall. 199, Mr. Justice Chase (himself also a Revolutionary statesman) said: 'It has been inquired, what powers Congress possessed from the first meeting in September, 1774, until the ratification of the confederation on the 1st of March, 1781. It appears to me that the powers of Congress during that whole period were derived from the *people* they represented, expressly given through the medium of their State conventions or State legislatures; or that after they were exercised, they were impliedly ratified by the acquiescence and obedience of the people, &c. The powers of Congress originated from necessity, and arose out of it, and were only limited by events; or, in other words, they were revolutionary in their nature. Their extent depended on the exigencies and necessities of public

affairs. I entertain this general idea, that the several States retained all internal sovereignty; and that Congress properly possessed the rights of external sovereignty. In deciding on the powers of Congress, and of the several States before the confederation, I see but one safe rule, namely, that all the powers actually exercised by Congress before that period were rightfully exercised on the presumption not to be controverted, that they were so authorized by the people they represented, by an express or implied grant; and that all the powers exercised by the State conventions or State legislatures were also rightfully exercised on the same presumption of authority from the people.' . . .

"On the 11th of June, 1776, the same day on which the committee for preparing the Declaration of Independence was appointed, Congress resolved that 'a committee be appointed to prepare and digest the form of a confederation to be entered into between these colonies;' and on the next day a committee was accordingly appointed, consisting of a member from each colony. Nearly a year before this period (*viz.*, on the 21st of July, 1775), Dr. Franklin had submitted to Congress a sketch of Articles of Confederation, which does not, however, appear to have been acted on. These articles contemplated a union until a reconciliation with Great Britain, and, on failure thereof, the confederation to be perpetual.

"On the 12th of July, 1776, the committee appointed to prepare Articles of Confederation presented a draft, which was in the handwriting of Mr. Dickenson, one of the committee, and a delegate from Pennsylvania. The draft, so reported, was debated from the 22d to the 31st of July, and on several days between the 5th and 20th of August, 1776. On this last day Congress, in committee of the whole, reported a new draft, which was ordered to be printed for the use of the members.

"The subject seems not again to have been touched until the 8th of April, 1777, and the articles were debated at several times between that time and the 15th of November of the same year. On this last day the articles were reported with sundry amendments, and finally adopted by Congress. A committee was then appointed to draft, and they accordingly drafted a circular letter, requesting the States respectively to authorize their delegates in Congress to subscribe the same in behalf of the State. . . .

"Many objections were stated, and many amendments were proposed. All of them, however, were rejected by Congress, not probably because they were all deemed inexpedient or improper in themselves, but from the danger of sending the instrument back again to all the States for reconsideration. Accordingly, on the 26th of June, 1778, a copy, engrossed for ratification, was prepared, and the ratification began on the 9th day of July following. It was ratified by all the States, except Delaware and Maryland, in 1778; by Delaware in 1779, and by Maryland on the 1st of March, 1781, from which last date its final ratification took effect, and was joyfully announced by Congress. . . .

"Such is the substance of this celebrated instrument, under which the

treaty of peace, acknowledging our independence, was negotiated, the War of the Revolution concluded, and the Union of the States maintained until the adoption of the present Constitution. . . .

"The leading defects of the confederation may be enumerated under the following heads: —

"In the first place, there was an utter want of all coercive authority to carry into effect its own constitutional measures. This, of itself, was sufficient to destroy its whole efficiency, as a superintending government, if that may be called a government which possessed no one solid attribute of power. It has been justly observed that, 'a government authorized to declare war, but relying on independent States for the means of prosecuting it; capable of contracting debts, and of pledging the public faith for their payment, but depending on thirteen distinct sovereignties for the preservation of that faith, could only be rescued from ignominy and contempt by finding those sovereignties administered by men exempt from the passions incident to human nature.' That is, by supposing a case in which all human governments would become unnecessary, and all differences of opinion would become impossible. In truth, Congress possessed only the power of recommendation. It depended altogether upon the good-will of the States, whether a measure should be carried into effect or not. And it can furnish no matter of surprise, under such circumstances, that great differences of opinion as to measures should have existed in the legislatures of the different States; and that a policy, strongly supported in some, should have been denounced as ruinous in others. Honest and enlightened men might well divide on such matters; and in this perpetual conflict of opinion the State might feel itself justified in a silent or open disregard of the Act of Congress. . . .

"In this state of things, commissioners were appointed by the Legislatures of Virginia and Maryland, early in 1785, to form a compact relative to the navigation of the rivers Potomac and Pocomoke, and the Chesapeake Bay. The commissioners having met at Alexandria in Virginia in March, in that year, felt the want of more enlarged powers, and particularly of powers to provide for a local naval force and a tariff of duties upon imports. Upon receiving their recommendation, the Legislature of Virginia passed a resolution for laying the subject of a tariff before all the States composing the Union. Soon afterwards, in January, 1786, the legislature adopted another resolution, appointing commissioners, 'who were to meet such as might be appointed by the other States in the Union at a time and place to be agreed on, to take into consideration the trade of the United States; to examine the relative situation and trade of the States; to consider how far a uniform system in their commercial relations may be necessary to their common interest and their permanent harmony; and to report to the several States such an Act, relative to this great object, as, when unanimously ratified by them, will enable the United States in Congress assembled to provide for the same.'

"These resolutions were communicated to the States, and a convention of commissioners from five States only, namely, New York, New Jersey, Pennsylvania, Delaware, and Virginia, met at Annapolis in September, 1786. After discussing the subject, they deemed more ample powers necessary, and as well from this consideration, as because a small number only of the States was represented, they agreed to come to no decision, but to frame a report to be laid before the several States, as well as before Congress. In this report they recommended the appointment of commissioners from all the States, 'to meet at Philadelphia on the second Monday of May, then next, to take into consideration the situation of the United States; to devise such further provisions as shall appear to them necessary to render the Constitution of the Federal government adequate to the exigencies of the Union; and to report such an Act for that purpose to the United States in Congress assembled, as, when agreed to by them, and afterwards confirmed by the legislature of every State, will effectually provide for the same.'

"On receiving this report, the Legislature of Virginia passed an Act for the appointment of delegates to meet such as might be appointed by other States, at Philadelphia. The report was also received in Congress. But no step was taken until the Legislature of New York instructed its delegation in Congress to move a resolution, recommending to the several States to appoint deputies to meet in convention for the purpose of revising and proposing amendments to the Federal Constitution. On the 21st of February, 1787, a resolution was accordingly moved and carried in Congress, recommending a convention to meet in Philadelphia, on the second Monday in May ensuing, 'for the purpose of revising the Articles of Confederation, and reporting to Congress and the several legislatures such alterations and provisions therein, as shall, when agreed to in Congress and confirmed by the States, render the Federal Constitution adequate to the exigencies of government and the preservation of the Union.' The alarming insurrection then existing in Massachusetts, without doubt, had no small share in producing this result. The report of Congress on that subject at once demonstrates their fears and their political weakness.

"At the time and place appointed, the representatives of twelve States assembled. Rhode Island alone declined to appoint any on this momentous occasion. After very protracted deliberations, the convention finally adopted the plan of the present Constitution on the 17th of September, 1787; and by a contemporaneous resolution, directed it to be 'laid before the United States in Congress assembled,' and declared their opinion, 'that it should afterwards be submitted to a convention of delegates chosen in each State by the people thereof, under a recommendation of its legislature for their assent and ratification;' and that each convention assenting to and ratifying the same should give notice thereof to Congress. The convention, by a further resolution, declared their opinion, that as soon as nine States had ratified the Constitution, Congress should fix a day on which electors should be appointed by the

States which should have ratified the same, and a day on which the electors should assemble and vote for the president, and time and place of commencing proceedings under the Constitution; and that after such publication the electors should be appointed and the senators and representatives elected. The same resolution contained further recommendations for the purpose of carrying the Constitution into effect. . . .

"Congress, having received the report of the convention on the 28th of September, 1787, unanimously resolved, 'that the said report, with the resolutions and letter accompanying the same, be transmitted to the several legislatures in order to be submitted to a convention of delegates chosen in each State by the people thereof, in conformity to the resolves of the convention, made and provided in that case.'

"Conventions in the various States which had been represented in the general convention were accordingly called by their respective legislatures; and the Constitution having been ratified by eleven out of the twelve States, Congress, on the 13th of September, 1788, passed a resolution appointing the first Wednesday in January following for the choice of electors of president; the first Wednesday of February following, for the assembling of the electors to vote for a president; and the first Wednesday of March following, at the then seat of Congress [New York], the time and place for commencing proceedings under the Constitution. Electors were accordingly appointed in the several States, who met and gave their votes for a president; and the other elections for senators and representatives having been duly made, on Wednesday, the 4th of March, 1789, Congress assembled and commenced proceedings under the new Constitution. A quorum of both Houses, however, did not assemble until the 6th of April, when, the votes for President being counted, it was found that George Washington was unanimously elected President, and John Adams was elected Vice-President. On the 30th of April President Washington was sworn into office, and the government then went into full operation in all its departments.

"North Carolina had not, as yet, ratified the Constitution. The first convention called in that State, in August, 1788, refused to ratify it without some previous amendments and a declaration of rights. In a second convention, however, called in November, 1789, this State adopted the Constitution. The State of Rhode Island had declined to call a convention; but finally, by a convention held in May, 1790, its assent was obtained; and thus all the thirteen original States became parties to the new government." — 1 *Story's Commentaries on the Constitution of the United States* (*5th ed.*), §§ 200, 201, 216, 222–224, 225, 242, 248, 272–276, 277–280.[1]

[1] Reprinted by permission. — Ed.

NOTE.

FOR the methods of changing the Constitution of the United States, see Article V. of that instrument. Can it legally be changed in any other way? See Jameson, Const. Conv. (4th ed.) s. 575.

It should, however, be carefully noted that the term "sovereignty," as long as it is accurately employed in the sense in which Austin sometimes (compare Austin, Jurisprudence, i. (4th ed.) p. 268) uses it, is a merely legal conception, and means simply the power of law-making unrestricted by any legal limit. If the term "sovereignty" be thus used, the sovereign power under the English Constitution is clearly "Parliament." But the word "sovereignty" is sometimes employed in a political rather than in a strictly legal sense. That body is "politically" sovereign or supreme in a State the will of which is ultimately obeyed by the citizens of the State. In this sense of the word the electors of Great Britain may be said to be, together with the Crown and the Lords, or perhaps in strict accuracy independently of the King and the Peers, the body in which sovereign power is vested. For, as things now stand, the will of the electorate and certainly of the electorate in combination with the Lords and the Crown is sure ultimately to prevail on all subjects to be determined by the British Government. The matter indeed may be carried a little further, and we may assert that the arrangements of the Constitution are now such as to insure that the will of the electors shall by regular and constitutional means always in the end assert itself as the predominant influence in the country. But this is a political, not a legal fact. The electors can in the long run always enforce their will. But the courts will take no notice of the will of the electors. The judges know nothing about any will of the people except in so far as that will is expressed by an Act of Parliament, and would never suffer the validity of a statute to be questioned on the ground of its having been passed or being kept alive in opposition to the wishes of the electors. The political sense of the word "sovereignty" is, it is true, fully as important as the legal sense or more so. But the two significations, though intimately connected together, are essentially different, and in some parts of his work Austin has apparently confused the one sense with the other. — DICEY, *Law of the Constitution* (4th ed.), 69, 71.

In spite of the doctrine enunciated by some jurists that in every country there must be found some person or body legally capable of changing every institution thereof, it is hard to see why it should be held inconceivable[1] that the founders of a polity should have deliberately omitted to provide any means for lawfully changing its bases. Such an omission would not be unnatural on the part of the authors of a Federal union, since one main object of the States entering into the compact is to prevent further encroachments upon their several State rights; and in the fifth article of the United States Constitution may still be read the record of an attempt to give to some of its provisions temporary immutability. The question, however, whether a Federal Constitution necessarily involves the existence of some ultimate sovereign power authorized to amend or alter its terms is of merely speculative interest, for under existing Federal governments the Constitution will be found to provide the means for its own improvement. It is, at any rate, certain that whenever the foun-

[1] Eminent American lawyers, whose opinion is entitled to the highest respect, maintain that under the Constitution there exists no person, or body of persons, possessed of legal sovereignty, in the sense given by Austin to that term, and it is difficult to see that this opinion involves any absurdity. Compare Constitution of United States, art. 5. It would appear further that certain rights reserved under the Constitution of the German Empire to particular States cannot under the Constitution be taken away from a State without its assent. (See *Reichsverfassung*, art. 78.) The truth is that a Federal Constitution partakes of the nature of a treaty, and it is quite conceivable that the authors of the Constitution may intend to provide no constitutional means of changing its terms, except the assent of all the parties to the treaty.

ders of a Federal government hold the maintenance of a Federal system to be of primary importance, supreme legislative power cannot in a confederacy be vested in any ordinary legislature acting under the Constitution.[1] For so to vest legislative sovereignty would be inconsistent with the aim of Federalism, namely, the permanent division between the spheres of the National Government and of the several States. If Congress could change the Constitution, New York and Massachusetts would have no legal guarantee for the amount of independence reserved to them under the Constitution, and would be as subject to the sovereign power of Congress as is Scotland to the sovereignty of Parliament; the Union would cease to be a Federal State, and would become a unitarian republic. If, on the other hand, the Legislature of South Carolina could of its own will amend the Constitution, the authority of the central government would (from a legal point of view) be illusory; the United States would sink from a nation into a collection of independent countries united by the bond of a more or less permanent alliance. Hence the power of amending the Constitution has been placed, so to speak, outside the Constitution, and one may say, with sufficient accuracy for our present purpose, that the legal sovereignty of the United States resides in the majority of a body constituted by the joint action of three fourths of the several States at any time belonging to the Union. See Constitution of U. S., art. 5. Now from the necessity for placing ultimate legislative authority in some body outside the Constitution a remarkable consequence ensues. Under a federal as under a unitarian system there exists a sovereign power, but the sovereign is in a Federal State a despot hard to rouse. He is not, like the English Parliament, an ever-wakeful legislator, but a monarch who slumbers and sleeps. The sovereign of the United States has been roused to serious action but once during the course of ninety years. It needed the thunder of the Civil War to break his repose, and it may be doubted whether anything short of impending revolution will ever again arouse him to activity. But a monarch who slumbers for years is like a monarch who does not exist. A Federal Constitution is capable of change, but for all that, a Federal Constitution is apt to be unchangeable. *Ib.* 137–140. — ED.

2. STATE CONSTITUTIONS.

"WHEN the colonies entered upon that course of opposition to the Crown which ripened into the Revolution, it was neither their intention nor their desire to effect a separation from Great Britain. . . . The organizations provided were of the simplest character, consisting of Provincial Conventions or Congresses, modelled on the same plan as the General Congress at Philadelphia, comprising a single chamber, in which was vested all the powers of government. These bodies, found in all the colonies, save Connecticut and Rhode Island, whose Assemblies, fairly chosen by the people, it was not found necessary to supersede, were made up of deputies elected by the constituencies established under the Crown, or appointed by meetings of the principal citizens or by the municipal authorities of the chief towns and cities. All legislative authority was exercised by those bodies directly. Their executive functions were intrusted to Committees of Correspondence, of Public Safety, and the like, appointed by themselves, and during the sittings of the Conventions or Congresses, were discharged under their own supervision. In the *interims* between their sessions, however, the powers of those committees were substantially absolute.

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[1] Under the Constitution of the German Empire the Imperial legislative body can amend the Constitution. But the character of the Federal Council (Bundesrath) gives ample security for the protection of State rights. No change in the Constitution can be effected which is opposed by fourteen votes in the Federal Council. This gives a veto on change to any one of three States and to combinations of minor States. The extent to which national sentiment and State patriotism respectively predominate under a Federal system may be conjectured from the nature of the authority which has the right to modify the Constitution. . . .

"Under organizations thus loose and unrestricted, government was carried on in the colonies for many months, and that without protest or discontent, so long as the general expectation of a return to allegiance, following upon a redress of grievances, continued to exist. As time advanced, however, and it became evident, on the one hand, that the mother country would not purchase the submission of her revolted subjects by compromise or even by conciliation, and, on the other, that the work of subduing them, if possible at all, could be accomplished only by a long and bloody contest, there arose a general desire for the establishment of more regular governments than those by Congresses and committees. Thus, in May, 1775, the Provincial Convention of Massachusetts, charged with the government of the colony, applied to the Congress at Philadelphia for explicit advice respecting the proper exercise of the powers of government. In reply, after declaring that no obedience was due to the Act of Parliament lately passed for altering her charter, that body recommended that the convention should write letters to the several towns entitled to representation in the Assembly, requesting them to choose representatives to form an Assembly, and to instruct the latter, when convened, to elect counsellors; adding their wish, that the bodies thus formed should exercise the powers of government until a governor of the king's appointment would consent to govern the colony according to its charter. This answer was made in June, 1775, and the advice given was followed, and the government thus constituted was the only one Massachusetts had until the establishment of her first Constitution in 1780. In October, 1775, the delegates to the Continental Congress from New Hampshire laid before that body instructions, received by them from the New Hampshire Convention, to obtain the advice and direction of Congress in relation to the establishment of civil government in that colony. Similar requests were, about the same time, sent up from the Provincial Conventions of Virginia and South Carolina. At length, on the 3d and 4th of November, 1775, Congress agreed upon a reply to these applications, in which those bodies were advised 'to call a full and free representation of the people, in order to form such a form of government as, in their judgment, would best promote the happiness of the people, and most effectually secure peace and good order in their provinces during the continuance of the dispute with Great Britain.' . . .

"The first colony to act upon the recommendations of Congress was New Hampshire. In less than a fortnight after the passage by Congress of the resolutions of November 3d, 1775, the Provincial Convention of that Colony took into consideration the mode in which 'a full and free representation' for the purpose indicated by Congress should be constituted. It was finally determined that it should take the form of a new convention, to be summoned by the Provincial Convention, and that for the purpose of apportioning fairly the delegates to be chosen to it, a census of the inhabitants should be taken. It was moreover recommended, that the representatives chosen 'should be empowered by their constituents to assume government, as recommended by the General Congress, and to continue for one whole year from the time of such assumption.' Having recommended this plan, and 'sent copies of it to the several towns, the convention dissolved.' In pursuance of the recommendations accompanying the plan, a new convention was chosen, and assembled on the 21st of December following, by which the first Constitution of New Hampshire was framed, and her first formal government, independent of the Crown, established. According to Dr. Belknap, the historian of the State, 'as soon as the new convention came together, they drew up a temporary form of government; and, agreeably to the trust reposed in them by their constituents, having assumed the name and authority of a House of Representatives, they proceeded to choose twelve persons, to be a distinct branch of the legislature, by the name of a council.' This form of government was practically limited to a single year by an ordinance providing 'that the present Assembly should subsist one year, and if the dispute with Great Britain should continue longer, and the General Congress should give no directions to the contrary, that precepts should be issued annually' for the return of 'new Counsellors and Representatives.' By the convention thus called and organized were assumed all the powers of government. In a word, it was a revolutionary convention. As distinguished from the body itself, there was no judiciary, and no executive. The only feature in which it resembled a regularly

constituted government, was in its division into two chambers. But even this resemblance vanishes, when it is considered that it was a voluntary division, the council being its own creation, and, of course, as little independent of the main body as any one of its committees. All the powers of the State were concentrated in that single body, which was revolutionary not only in its proceedings, but in its origin, as called by one revolutionary convention at the instance of another, and as exercising, when assembled, the functions of a government, provisionally, in place of that by which it was convened.

"The people of New Hampshire, however, becoming dissatisfied with the temporary Constitution of 1776, an attempt was made three years later to frame a new one. A convention of delegates, chosen for that purpose, under the direction of the existing government, drew up and presented to the people a form of a constitution, but so deficient in its principles and so inadequate in its provisions, that, being proposed to the people in their town-meetings, it was rejected. On the failure to adopt this, a new convention was elected for the same purpose, and commenced its sessions in 1781. The year before, Massachusetts had adopted a constitution, in the main from a draft prepared by John Adams, which was supposed to be an improvement on all that had been framed in America. Having the advantage of this, the New Hampshire Convention digested a plan and submitted it to the people in their town-meetings, with a request that they should state their objections distinctly to any particular part, and return them to the convention at a fixed time. The objections were so many and various, that it became necessary to alter the form and send it out a second time. The second plan was generally approved by the people, and thus, finally, after nine sessions of the convention, running through more than two years, a constitution was adopted and put in operation, — the instrument being completed October 31, 1783, and established with religious solemnities June 2, 1784.

"Of these two last conventions, it is to be noted, that, unlike the first, they were, in the strict sense of the term, constitutional conventions. They were initiated by the existing government of the State, which, whatever may be thought of its legitimacy or regularity, was a *de facto* government, by revolution placed in power, and made the basis on which the political structure of the State has ever since rested; the people were fairly represented in them; they confined themselves strictly to their constitutional duty, that of proposing a code of organic laws, abstaining from all usurpation of governmental powers; and, finally, they severally submitted their projected constitutions to a vote of the electors of the State, in their town-meetings — an act which, as we shall see, constitutes the best guarantee of the sovereign right of the people over the form of their government that has ever been devised." — JAMESON, *Const. Conv.* (4th ed.) ss. 126, 127, 131, 132.[1]

"AT a quite early date, June 6, 1776, a proposition was made in the General Court[2] that a committee should be appointed to prepare a form of government, and such committee was appointed; but the business was not proceeded in, as the opinion was generally expressed that the subject should originate with the people, who were the proper source of the organic law. The House therefore contented themselves with recommending to their constituents to choose their deputies to the next General Court with power to adopt a form of government for the State; and, to give greater effect to this recommendation, it was renewed more formally in the following spring. In this interval, a con-

[1] Reprinted by permission of the publishers, Messrs. Callaghan & Co. of Chicago, and of the owners of the copyright. — ED.

[2] Of Massachusetts. The facts relating to the formation of this particular constitution are here given because it is the oldest of those now existing, and for other reasons, indicated at pp. 54–55, *ante*. — ED.

vention was held in the county of Worcester of the Committees of Safety from a majority of the towns, who voted that it would be improper for the existing General Court to form a constitution, but that a convention of delegates from all the towns in the State should be called for that purpose.

"How far the decision of this convention influenced the action of the people does not appear; but a majority of the towns in the State, it would seem, chose their representatives for the next annual session of the General Court with a special view, or, at least, with an implied consent, to the formation of a constitution by that body. The citizens of Boston, and of a number of other towns, as well as the Committees of Safety in the county of Worcester, were opposed to this proceeding, and favored the calling of a convention of delegates. . . .

"At the usual time the General Court was convened; and, a few weeks after the opening of its sessions, a committee was appointed, consisting of four members of the Council and eight members of the House, for the purpose of preparing a constitution. Of the proceedings of this committee but little is known, as their records have not been published; but the result of their deliberations was a draft of a constitution, which was debated at length, approved by the convention, February 28, 1778, presented to the legislature, and submitted to the people, by whom it was rejected. . . .

"The opinion was still current that a convention was the proper body to decide upon a Constitution for the State, and that no other body could successfully discharge that duty. A majority of the people, therefore, favored the calling of such a convention; and, at the annual election in the following year, by the advice of the General Court previously given, the returns from the towns were so conclusive that precepts were issued for the choice of delegates, to meet at Cambridge in the ensuing September." — 3 *Barry's Hist. Mass.* 173–176.

IN THE HOUSE OF REPRESENTATIVES, Feb. 19, 1779.

Whereas, the Constitution or Form of Civil Government, which was proposed by the late convention of this State to the people thereof, hath been disapproved by a majority of the inhabitants of said State, —

And whereas, It is doubtful from the representations made to this court, what are the sentiments of the major part of the good people of this State, as to the expediency of now proceeding to form a new constitution of government, —

Therefore resolved, That the selectmen of the several towns within this State cause the freeholders and other inhabitants in their respective towns, duly qualified to vote for representatives,[1] to be lawfully warned to meet together in some convenient place therein, on or before the last Wednesday of May next, to consider of, and determine upon, the following questions:

[1] For the property qualifications of such electors see the Province Charter. 1 Acts and Resolves of the Province, 11–12; 1 Poore's Charters, 949. — ED.

First. — Whether they choose, at this time, to have a new constitution or form of government made.

Secondly. — Whether they will empower their representatives for the next year to vote for the calling a State convention, for the sole purpose of forming a new constitution; provided it shall appear to them, on examination, that a major part of the people present and voting at the meetings, called in the manner and for the purpose aforesaid, shall have answered the first question in the affirmative?

And in order that the sense of the people may be known thereon, —

Be it further resolved, That the selectmen of each town be and hereby are directed to return into the secretary's office, on or before the first Wednesday in June next, the doings of their respective towns, on the first question above mentioned, certifying the numbers voting in the affirmative, and the numbers voting in the negative, on said question.

Sent up for concurrence. JOHN PICKERING, *Speaker.*

IN COUNCIL, February 20, 1779. Read and concurred.

JOHN AVERY, *D. Secretary.*

Journal of Mass. Convention, 1779–80, pp. 189, 190.

IN THE HOUSE OF REPRESENTATIVES, June 15, 1779.

Whereas, By the returns made into the secretary's office, from more than two thirds of the towns belonging to this State, agreeably to a Resolve of the General Court, of the 20th of February last, it appears, that a large majority of the inhabitants of such towns, as have made return as aforesaid, think it proper to have a new constitution or form of government, and are of opinion, that the same ought to be formed by a convention of delegates, who should be specially authorized to meet for this purpose,

Therefore resolved, That it be, and it hereby is recommended to the several inhabitants of the several towns in this State to form a convention, for the sole purpose of framing a new constitution, consisting of such number of delegates, from each town throughout this State, as every different town is entitled to send representatives to the General Court, to meet at Cambridge, in the county of Middlesex, on the first day of September next. And the selectmen of the several towns and places within this State, empowered by the laws thereof to send members to the General Assembly, are hereby authorized and directed to call a meeting of their respective towns, at least fourteen days before the meeting of said convention, to elect one or more delegates, to represent them in said convention, at which meeting, for the election of such delegate or delegates, every freeman, inhabitant of such town, who is twenty-one years of age, shall have a right to vote.

Be it also resolved, That it be, and it hereby is recommended, to the inhabitants of the several towns in this State, to instruct their respective delegates, to cause a printed copy of the form of a constitution

they may agree upon in convention, to be transmitted to the selectmen of each town, and the committee of each plantation; and the said selectmen and committees are hereby empowered and directed to lay the same before their respective towns and plantations, at a regular meeting of the male inhabitants thereof, being free and twenty-one years of age, to be called for that purpose, in order to its being duly considered and approved or disapproved by said towns and plantations. And it is also recommended to the several towns within this State, to instruct their respective representatives to establish the said form of a Constitution, as the Constitution and form of government of the State of Massachusetts Bay, if, upon a fair examination, it shall appear, that it is approved of by at least two thirds of those, who are free and twenty-one years of age, belonging to this State, and present in the several meetings.

Sent up for concurrence. JOHN HANCOCK, *Speaker.*

IN COUNCIL, June 17, 1779. Read and concurred.

JOHN AVERY, *Deputy Secretary.*

Consented to by a major part of the Council. A true copy.

Attest, JOHN AVERY, *Deputy Secretary.*

Ib. 5, 6.

The Convention met at Cambridge, September 1, 1779.

IN CONVENTION, March 2, 1780.

Resolved, That this convention be adjourned to the first Wednesday in June next, to meet at Boston; and that eighteen hundred copies of the form of government, which shall be agreed upon, be printed; and including such as shall be ordered to each member of the convention, be sent to the selectmen of each town, and the committees of each plantation, under the direction of a committee to be appointed for the purpose: and that they be requested, as soon as may be, to lay them before the inhabitants of their respective towns and plantations. And if the major part of the inhabitants of the said towns and plantations disapprove of any particular part of the same, that they be desired to state their objections distinctly, and the reasons therefor: and the selectmen and committees aforesaid are desired to transmit the same to the secretary of the convention, on the first Wednesday in June, or if may be, on the last Wednesday in May, in order to his laying the same before a committee, to be appointed for the purpose of examining and arranging them for the revision and consideration of the convention at the adjournment; with the number of voters in the said town and plantation meetings, on each side of every question; in order that the said convention, at the adjournment, may collect the general sense of their constituents on the several parts of the proposed Constitution: And if there doth not appear to be two thirds of their constituents in favor thereof, that the convention may alter it in such a manner as that it

may be agreeable to the sentiments of two thirds of the voters throughout the State.

Resolved, That it be recommended to the inhabitants of the several towns and plantations in this State, to empower their delegates, at the next session of this convention, to agree upon a time when this form of government shall take place, without returning the same again to the people: *Provided*, That two thirds of the male inhabitants of the age of twenty-one years and upwards, voting in the several town and plantation meetings, shall agree to the same, or the Convention shall conform it to the sentiments of two thirds of the people as aforesaid.

Resolved, That the towns and plantations through this State have a right to choose other delegates, instead of the present members, to meet in convention on the first Wednesday in June next, if they see fit.

A true copy. Attest, SAMUEL BARRETT, *Secretary*.

Ib. 168, 169.

IN CONVENTION, June 16, 1780.

Whereas, Upon due examination of the returns made by the several towns and plantations, within this State, it appears that more than two thirds of the inhabitants thereof, who have voted on the same, have expressed their approbation of the form of government agreed upon by this convention, and laid before them for their consideration, in conformity to a Resolve of the said convention, of the second day of March last. This convention do, hereupon, declare the said form to be the constitution of government established by and for the inhabitants of the State of Massachusetts Bay.

And as the said inhabitants have authorized and empowered this convention to agree upon a time when the same shall take place, in order that the good people of this State may have the benefit thereof, as soon as conveniently may be.

It is resolved, That the said Constitution or frame of government shall take place on the last Wednesday in October next; and not before, for any purpose, save only for that of making elections agreeable to this resolution.

And the first General Court under the same shall be holden on the said last Wednesday in October, at the State-House in Boston, at ten o'clock in the forenoon. And in order thereto, there shall be a meeting of the inhabitants of each town and plantation in the several counties within this State, legally warned and held, on the first Monday in September next, for the purpose of electing a governor, lieutenant-governor, and persons for councillors and senators. And there shall also be a meeting of the inhabitants of the several towns within this State, duly warned and held, some time in October next, and ten days at the least before the last Wednesday in the same month, for the purpose of choosing representatives to serve in the said General Court. And the selectmen are hereby enjoined to call such meetings and to

preside at the same. And in all elections, and in making, receiving, and examining returns, and in conducting the whole business of organizing and establishing the said General Court, the same rules are to be observed, that are prescribed in the form of government for making such elections, and for the constituting the first General Court; saving only the difference of time.[1]

And be it further resolved, That Samuel Barrett, Esq. (secretary to this convention), do, on or before the fifteenth day of July next, cause printed copies of this resolution to be sent to the selectmen of the several towns, and the assessors of the several plantations aforesaid, who are respectively to perform the duties required by this resolution, and to make seasonable and regular returns of the persons elected to the several offices herein mentioned, into the secretary's office of this State, agreeably to the rules contained in the form of government above referred to.

In the name, and pursuant to a resolution of the convention.

JAMES BOWDOIN, *President.*

Attest, SAMUEL BARRETT, *Secretary.*

Ib. 186, 187.

NOTE.

No steps were taken in 1795 towards revising the Constitution of Massachusetts under Part II. c. 6, art. 10, — the only provision made for that purpose in the instrument. Nevertheless, in 1820, the legislature passed an Act submitting to the electors the question whether it was expedient to hold a convention for "revising or altering" the Constitution, and providing, in case of an affirmative vote, for the subsequent election of delegates and the holding of the convention. In accordance with this law, a convention met in 1820, and fourteen amendments were submitted to the people (*i. e.*, electors), of which nine were adopted. The last of these, Art. IX., will be found below, in the Appendix to Part I. p. 399, n.

In 1853, another convention was called for the same purpose and in the same manner as that of 1820. It submitted to the people a new draft of the Constitution; this was rejected.

As regards the now prevalent mode of amending, by means of a legislative proposal submitted to the people, — adopted in the ninth Massachusetts Amendment, — the origin of it is traced to the Articles of Confederation, Art. XIII., requiring that any alteration should be "agreed to in a Congress of the United States, and be afterwards confirmed by the legislatures of every State." And so the Constitution of the United States, Art. V., provided for amendments through a legislative proposal ratified by the States. As among State constitutions, Connecticut seems to have been the first to introduce it. An intelligent and accurate French writer has said: "La procédure inaugurée au Massachusetts [II. c. 6, 10] était bonne pour une révision totale, mais cette occurrence était rare et, dans les cas de plus en plus fréquents où l'on désirait une révision partielle, ne comportant parfois qu'un seul amendement, l'élection d'une convention, après consultation préalable du peuple, était un moyen coûteux, encombrant, et susceptible de provoquer une agitation inutile. Il appartenait à un autre État de la Nouvelle-Angleterre de donner sa formule à la méthode qui devait répondre à cette nécessité nouvelle et prévaloir également peu à peu dans l'Union.

"En 1818, lorsque l'antique charte du Connecticut, dépassée par le progrès de cette démocratie dont elle avait elle-même frayé le chemin, fut remplacée par la Constitution

[1] For the property qualifications of the electors under the new Constitution, see Const. Mass. Part II. c. 1, § 2, art. 2, and § 3, art. 4; and c. 2, § 1, art. 3. — ED.

actuelle, la convention d'Hartford, avant de soumettre son œuvre au peuple, y inséra l'article suivant : —

" ' Art. II. — Lorsque la chambre des représentants jugera nécessaire d'apporter des amendements ou des modifications à cette Constitution, la majorité pourra en faire la proposition. Les amendements projetés seront renvoyés à la prochaine assemblée générale et publiés avec les lois qui pourront avoir été faites pendant la session. Si, par un vote de division provoqué au cours de la session suivante, les deux tiers des membres de chaque chambre approuvent les dits amendements, ils seront transmis par le chancelier aux secrétaires municipaux (*town clerks*) de chacunes des communes de l'État.

" ' Ces derniers auront à les soumettre aux habitants, pour être examinés, dans un *town meeting* légalement convoqué et tenu à cet effet. S'il résulte de cette consultation, dont la loi déterminera les formes, que ces amendements ont été sanctionnés par la majorité des électeurs présents, ils deviendront exécutoires comme partie intégrante de cette Constitution.'

" Cet article était le résultat d'une transaction heureuse entre le système du Massachusetts et un autre, celui qu'avait consacré, en 1776, la Constitution du Maryland et qu'avait adopté la Caroline méridionale, en 1790, et la Géorgie en 1798. Dans ces États, un vote des deux chambres, répété après une élection générale, était la condition requise pour l'adoption d'un ou de plusieurs amendements constitutionnels. Cette procédure facilitait, dans une certaine mesure, la révision partielle. La convention d'Hartford en fit son profit, mais sans abandonner le principe que le peuple doit avoir le dernier mot. Dans la disposition qu'elle rédigea, les députés à la législature reçurent le droit d'initiative, exercé à la majorité des deux tiers, ce qui était la clause insérée en 1787 dans la Constitution Fédérale, et les town meetings conservèrent la décision, conformément aux traditions de la Nouvelle-Angleterre.

" L'article passa presque aussitôt dans la Constitution du Maine, vaste district du Massachusetts, dont on faisait un nouvel État. La Convention de Portland, qui élabora cette Constitution, en 1819, était animée d'un esprit très démocratique. En s'assimilant l'article créé par la Convention d'Hartford, elle y apporta, d'emblée, une modification qui ne devait être imitée que beaucoup plus tard dans les autres États. Elle y supprima la condition de la double épreuve pour l'exercice du droit d'initiative. L'adoption par une seule législature, à la majorité des deux tiers des membres dans les deux chambres, lui paraissait suffisante pour qu'un amendement pût être soumis au peuple."

Annales de l'École Libre des Sciences Politiques (1893); *L'Établissement et la Révision des Constitutions aux États-Unis d'Amérique*, by Charles Borgeaud.

Jameson's note on this subject (Const. Conv. (4th ed.) § 574 *d*, note) is not entirely accurate. — ED.

OPINION OF THE JUSTICES.

THE JUSTICES OF THE SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1833.

[6 *Cush.* 573.]

THE justices of the Supreme Judicial Court have taken into consideration the two questions submitted to them [by the House of Representatives], and upon which the honorable House has requested their opinion, of the following tenor, namely : —

First. Whether, if the legislature should submit to the people to vote upon the expediency of having a convention of delegates of the people,

for the purpose of revising or altering the Constitution of the Commonwealth in any specified parts of the same; and a majority of the people voting thereon should decide in favor thereof, could such convention holden in pursuance thereof act upon, and propose to the people, amendments in other parts of the Constitution not so specified?

Second. Can any specific and particular amendment or amendments to the Constitution be made in any other manner than that prescribed in the ninth article of the amendments adopted in 1820?

And thereupon have the honor to submit the following opinion: —

The court do not understand that it was the intention of the House of Representatives to request their opinion upon the natural right of the people in cases of great emergency, or upon the obvious failure of their existing Constitution to accomplish the objects for which it was designed, to provide for the amendment or alteration of their fundamental laws; nor what would be the effect of any change and alteration of their Constitution, made under such circumstances and sanctioned by the assent of the people. Such a view of the subject would involve the general question of natural rights, and the inherent and fundamental principles upon which civil society is founded, rather than any question upon the nature, construction, or operation of the existing Constitution of the Commonwealth, and the laws made under it. We presume, therefore, that the opinion requested applies to the existing Constitution and laws of the Commonwealth, and the rights and powers derived from and under them. Considering the questions in this light, we are of opinion, taking the second question first, that, under and pursuant to the existing Constitution, there is no authority given by any reasonable construction or necessary implication, by which any specific and particular amendment or amendments of the Constitution can be made, in any other manner than that prescribed in the ninth article of the amendments adopted in 1820. Considering that previous to 1820 no mode was provided by the Constitution for its own amendment, that no other power for that purpose, than in the mode alluded to, is anywhere given in the Constitution, by implication or otherwise, and that the mode thereby provided appears manifestly to have been carefully considered, and the power of altering the Constitution thereby conferred to have been cautiously restrained and guarded, we think a strong implication arises against the existence of any other power, under the Constitution, for the same purposes.

Upon the first question, considering that the Constitution has vested no authority in the legislature, in its ordinary action, to provide by law for submitting to the people the expediency of calling a convention of delegates, for the purpose of revising or altering the Constitution of the Commonwealth, it is difficult to give an opinion upon the question, what would be the power of such a convention, if called. If, however, the people should, by the terms of their vote, decide to call a convention of delegates to consider the expediency of altering the Constitution in some particular part thereof, we are of opinion that such delegates would

derive their whole authority and commission from such vote; and, upon the general principles governing the delegation of power and authority, they would have no right, under such vote, to act upon and propose amendments in other parts of the Constitution not so specified.

LEMUEL SHAW,
SAMUEL PUTNAM,
S. S. WILDE,
MARCUS MORTON.

January 24, 1833.

IN RE THE CONSTITUTIONAL CONVENTION.

THE JUSTICES OF THE SUPREME COURT OF RHODE ISLAND. 1883.

[14 *R. I.* 649.]

ARTICLE 13 of the Constitution of the State of Rhode Island is as follows:

"The General Assembly may propose amendments to this Constitution by the votes of a majority of all the members elected to each House. Such propositions for amendment shall be published in the newspapers, and printed copies of them shall be sent by the Secretary of State, with the names of all the members who shall have voted thereon, with the yeas and nays, to all the town and city clerks in the State. The said propositions shall be, by said clerks, inserted in the warrants or notices by them issued for warning the next annual town and ward meetings in April; and the clerks shall read said propositions to the electors when thus assembled, with the names of all the representatives and senators who shall have voted thereon, with the yeas and nays, before the election of senators and representatives shall be had. If a majority of all the members elected to each House, at said annual meeting, shall approve any proposition thus made, the same shall be published and submitted to the electors in the mode provided in the Act of approval; and if then approved by three fifths of the electors of the State present and voting thereon in town and ward meetings, it shall become a part of the Constitution of the State."

Article 10, section 3, provides, that "the judges of the Supreme Court shall . . . give their written opinion upon any question of law whenever requested . . . by either House of the General Assembly."

March 20, 1883, the Senate of the State adopted the following resolution:

"Whereas, a difference of opinion has arisen among members of the General Assembly,

"I. As to the legal competency thereof under the Constitution of the State to call upon the electors to elect members to constitute a convention to frame a new Constitution of the State, and to provide that the new Constitution should be submitted for adoption, either to the qualified electors of the State, or to the persons who would be entitled

to vote under said new Constitution, for adoption, and if a majority of such electors or persons voting should vote in favor thereof, whether the new Constitution would then become the legally adopted Constitution of the State and be binding as such upon all of the people thereof.

"II. As to whether it is legally competent for the General Assembly to submit to the qualified electors the question whether said electors will call a convention to frame a new Constitution, and to provide by law if a majority of the electors voting upon said question shall vote in favor of calling such convention, that the same be held, and the new Constitution framed by said convention be submitted to the electors for their adoption, either to the electors qualified by law, or to the persons who may be qualified to vote under such new Constitution, and whether if a majority of the electors, or persons voting thereon, vote for the adoption of such Constitution, whether the Constitution so to be framed and adopted would be the legal Constitution of the State, and as such be binding upon all the people thereof.

"And whereas, the existing Constitution provides that either House of the General Assembly may require the opinion of the judges of the Supreme Court upon any question of law, it is therefore hereby

"Resolved, that the said judges of the said Supreme Court be, and they hereby are requested without unnecessary delay to give their opinion to the Senate upon the two questions stated in the preamble hereto, upon which differences of opinion have arisen between the members of this General Assembly.

"Resolved, that his Excellency the Governor be, and he hereby is, requested to forward copies of the preceding preamble and resolution to each of the judges of the said Supreme Court."

[redacted]N OF THE COURT.[1]

[redacted]March 30, 1883.

To the Honorable the Senate of the State of Rhode Island and Providence Plantations:

We received from your Honors on the 24th inst. a resolution requesting our opinion in regard to the legal competency of the General Assembly to call a convention for the revision of the Constitution. In reply we have to say that we are of opinion that the mode provided in the Constitution for the amendment t[redacted]of is the only mode in which it can be constitutionally amended. [redacted]ordinary rule is that where power is given to do a thing in a particular way, there the affirmative words, marking out the particular way, prohibit all other ways by implication, so that the particular way is the only way in which the power can be legally executed. The rule was recently recognized by the Supreme Court of the United States in *Smith* v. *Stevens*, 10 Wall. 321. There by Act of Congress, lands were ceded to Indians with power

[1] See *Taylor* v. *Place*, *ante*, 180 n. — [redacted]

to sell them, or parts of them, in a particular manner, and the court held that a sale in any other manner was void. The rule was likewise recently recognized by the English Court of Exchequer in a case in which it was thus expressed: "If authority is given expressly, though by affirmative words, upon a defined condition, the expression of that condition excludes the doing of the Act authorized under other circumstances than those so defined: '*Expressio unius est exclusio alterius.*'" *North Stafford Steel, &c. Co.* v. *Ward*, L. R. 3 Exch. 172, 177. Cases to the same point might be indefinitely multiplied. 1 Kent Comment. *467, note *d;* 1 Sugden on Powers, 258 *et seq.; City of New Haven* v. *Whitney*, 36 Conn. 373; *District Township of the City of Dubuque* v. *The City of Dubuque*, 7 Iowa, 262. It has been claimed, indeed, that the rule, though applicable in the interpretation of statutes, deeds, wills, and other ordinary instruments, is inapplicable in the interpretation of a State constitution. Those who assert this difference, however, do not appear to have any reason to give for it but this, namely: that under stress of strong political excitement, the rule, if it exists, is pretty sure to be disregarded, as past experience proves, and therefore it is better to conclude that it does not exist. We do not consider the reason satisfactory. The rule is simply a guide to the meaning of language when used in a particular way, and we do not see why it is not as trustworthy a guide to the meaning when the language so used occurs in a State Constitution, as when it occurs in a statute or a will. Men do not put away their spontaneous and habitual modes of expressing themselves merely because they are engaged in the unaccustomed work of framing or adopting a constitution. In this view we are not without precedent. One of the greatest of modern jurists, Chief Justice Shaw, was of the same way of thinking, and conjointly with his associates, declared it to be his opinion that the Constitution of Massachusetts is constitutionally amendable only as therein provided. Opinion of the Justices, 6 Cush. 573. The provision for amendment in our Constitution is singularly explicit. The proposed amendment is first to pass the two Houses of the General Assembly by a majority of the members elected; it is then to be published, with the vote thereon, in the newspapers, and otherwise brought to the attention of the people; it is then to pass the Assembly elected after such publication by a majority of both Houses; and finally it is to be submitted to the approval of the electors, and if it be approved by three fifths of the electors voting, and not otherwise, it is to become incorporated in the Constitution. Evidently the purpose was to insure the calm and considerate action of both the Assembly and the people. Hence these pass two Assemblies, so that the members of the second, elected after publication, might, if the electors thought proper, be elected specially to consider it. The popular mind was not to be taken by surprise or to be carried away by any sudden sentiment, but it was to act deliberately after reflection. To this end a three fifths vote was required for approval. The object was not to hamper or baffle the

popular will, but to insure its full expression. Our ancestors knew, what we all know, that in spite of all precautions a majority may be worked up for an occasion, which is not the true and permanent majority. They also knew, what we all know, that many electors, perfectly satisfied with the existing state of things, stay away from the polls on election day from mere inertness of temperament. It is inconceivable to us, that they would have elaborated so guarded a mode of amendment, unless they had intended to have it exclusive and controlling. They doubtless did so intend, and if they did, we cannot say they did not, simply because since then the constitutions of other States, having similar provisions, have been amended through the medium of conventions. The framers of our Constitution could not foreknow this action in other States, and therefore cannot have been influenced by it. If our Constitution had no provision for amendment, then, indeed, a power in the Assembly to call a convention or to initiate amendments in some other manner might be implied *ex necessitate*. The Assembly, under the charter, exercised such a power because the charter had no such provision; though it is proper to remark that under the charter the legislative power of the Assembly was practically unlimited. Again, if the provision for amendment was impracticable, there might be, if no legal reason, yet some excuse for disregarding it. But it is practicable, as a successful resort to it in several instances has demonstrated. The only things which can be said against it are that it is dilatory, and that it requires the assent of more than a bare majority. But these are the very things which recommended it to its authors, and therefore they cannot be alleged as reasons for believing that they did not mean it to be exclusive and controlling.

Our Constitution is, by its own express declaration, the supreme law of the State; any law inconsistent with it is void, and, therefore, if the provision which it contains for its own amendment is exclusive, implying a prohibition of amendments in any other manner, then, of course, any Act of the Assembly providing for a convention to amend the Constitution is unconstitutional and void.

An argument in favor of a convention has been suggested which is not specifically met in the preceding. It is this, namely: that though the General Assembly has no power to introduce amendments and carry them to their consummation in any manner not provided in the Constitution, it nevertheless has power to call a convention to frame a new constitution for submission to the people. The argument is, in our opinion, rather specious than sound. The convention, if called, would be confined by the Constitution of the United States to the formation of a constitution for a republican form of government, and our present Constitution contains the fundamental provisions, the great ground plan, of such a form of government as it is known throughout the Union. Any changes which are in contemplation are merely changes of superstructure or detail. Our Constitution, too, contains in its Bill of Rights the great historic safeguards of liberty and property, which certainly

no convention would venture either materially to alter or to abolish. Any new constitution, therefore, which a convention would form, would be a new constitution only in name; but would be in fact our present Constitution amended. It is impossible for us to imagine any alteration, consistent with a republican form of government, which cannot be effected by specific amendment as provided in the Constitution.

Again, it has been maintained that the General Assembly has power to call a convention under section 10, of article 4, which provides that "the General Assembly shall continue to exercise the powers they have heretofore exercised, unless prohibited in this Constitution." But, under this section, the General Assembly can only exercise powers which are not prohibited; and, if the provision for amendment is, as we think it is, exclusive, then a power to call a convention is prohibited by implication, and, as was clearly shown in *Taylor* v. *Place*, 4 R. I. 324, an implied is as effectual as an express prohibition.

Finally, it has been contended that there is a great unwritten common law of the States, which existed before the Constitution, and which the Constitution was powerless to modify or abolish, under which the people have the right, whenever invited by the General Assembly, and as some maintain, without any invitation, to alter and amend their constitutions. If there be any such law, for there is no record of it, or of any legislation or custom in this State recognizing it, then it is, in our opinion, rather a law, if law it can be called, of revolutionary than of constitutional change. Our Constitution is, as already stated, by its own terms, "the supreme law of the State." We know of no law, except the Constitution and laws of the United States, which is paramount to it.

We think the foregoing is in effect, if not in form, an answer to the questions propounded to us in the resolutions. The questions are extremely important, and we should have been glad of an opportunity to give them a more careful study, but under the request of the Senate for our opinion, "without any unnecessary delay," we have thought it to be our duty to return our opinion as soon as we could, without neglecting other duties, prepare it.

THOMAS DURFEE,
CHARLES MATTESON,
JOHN H. STINESS,
P. E. TILLINGHAST,
G. M. CARPENTER, JUN.[1]

[1] For the practice in different States, see a valuable pamphlet, called out by this opinion, entitled "The methods of changing the Constitutions of the States, especially that of Rhode Island" (Boston: Alfred Mudge & Son, Printers, 1885), written by Hon. Charles S. Bradley, formerly Chief Justice of Rhode Island. See also the comments of Judge Jameson on this opinion in *Const. Conventions* (4th ed.), ss. 573, 574, *et seq.* — ED.

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WELLS v. BAIN.

SUPREME COURT OF PENNSYLVANIA. 1874.

[75 *Pa. St.* 39.][1]

DECEMBER 2d, 1873. At Nisi Prius, before GORDON, J., with AGNEW, C. J., SHARSWOOD, WILLIAMS, and MERCUR, JJ., as assessors. The matter considered arose upon two bills in equity in the Supreme Court, No. 13 and No. 14, to January Term, 1874.

No. 13 was a bill filed by Francis Wells and others, citizens and voters of Philadelphia, against James Bain and others, commissioners of the city of Philadelphia, and Edwin H. Fitler and others, commissioners of election under an ordinance of the convention to revise and amend the Constitution of Pennsylvania.

No. 14 was a bill filed by John H. Donnelly, an inspector of elections of the Fifth Ward of Philadelphia, against Edwin H. Fitler and others, commissioners of elections, &c., as above stated.

An Act of the Legislature of June 2, 1871, submitted to the people the question of "calling a convention to amend the Constitution of Pennsylvania." In pursuance of the popular vote in the affirmative, an Act of April 11, 1872, provided for the election of delegates to such a convention, fixing the number of members, the manner of voting, and other details. The convention was to meet on the second Tuesday of November, 1872, and was to "have power to propose to the citizens of this Commonwealth, for their approval or rejection, a new constitution or amendments to the present one, or specific amendments to be voted for separately." It was provided that "the election to decide for or against the adoption of the new constitution or specific amendments shall be conducted as the general elections of this Commonwealth are now by law conducted."

The Constitutional Convention prepared a new constitution, and passed an "ordinance" for submitting it to the people which departed from the provisions of the statute of April 11th; it named, for example, five persons (not the regular officials) who should act as commissioners of election in Philadelphia.

Bill No. 13, above mentioned, averred that the commissioners named in this ordinance were proposing to hold an election in Philadelphia on the sixteenth of December, 1873, under the authority of the ordinance, and contrary to certain provisions of the statute of April 11th, and that Bain and other city commissioners of Philadelphia were proposing to expend the money of the city for the purposes of such election; and it prayed for an injunction restraining the said persons from holding the election and paying out the money.

Bill No. 14 averred that the plaintiff was a duly appointed inspector of elections in the Fifth Ward of Philadelphia, and, after setting forth

[1] The statement of facts is condensed. — ED.

the same state of facts contained in the other bill, it alleged that the defendants, the commissioners under the ordinance of the convention, designed to prevent him and the other election officers of Philadelphia from performing their duties, and prayed for an injunction to restrain the defendants from interfering with the plaintiff in the exercise of their office.[1]

The cases were argued by *R. S. Ashurst*, *J. E. Gowen*, and *B. H. Brewster*, for the plaintiffs, and by *C. R. Buckalew*, *W. H. Armstrong*, and *G. W. Biddle*, for the defendants.

The opinion of the court was delivered, December 6th, 1873, by

AGNEW, C. J. Since the Declaration of Independence in 1776, it has been an axiom of the American people that all just government is founded in the consent of the people. This is recognized in the second section of the Declaration of Rights of the Constitution of Pennsylvania, which affirms that the people "have at all times an inalienable and indefeasible right to alter, reform, or abolish their government in such manner as they may think proper." A self-evident corollary is, that an existing lawful government of the people cannot be altered or abolished unless by the consent of the same people, and this consent must be legally gathered or obtained. The people here meant are the whole, — those who constitute the entire State, male and female citizens, infants and adults. A mere majority of those persons who are qualified as electors are not the people, though when authorized to do so, they may represent the whole people.

The words "in such manner as they may think proper," in the Declaration of Rights, embrace but three known recognized modes by which the whole people, the State, can give their consent to an alteration of an existing lawful frame of government, *viz.*: —

1. The mode provided in the existing constitution.

2. A law, as the instrumental process of raising the body for revision and conveying to it the powers of the people.

3. A revolution.

The first two are peaceful means through which the consent of the people to alteration is obtained, and by which the existing government consents to be displaced without revolution. The government gives its consent, either by pursuing the mode provided in the Constitution, or by passing a law to call a convention. If consent be not so given by the existing government the remedy of the people is in the third mode, — revolution.

When a law becomes the instrumental process of amendment, it is not because the legislature possesses any inherent power to change the existing constitution through a convention, but because it is the only means through which an authorized consent of the whole people, the entire State, can be lawfully obtained in a state of peace. Irregular action,

[1] The report does not state in what manner the pleadings were concluded, or how the case was shaped. — ED.

whereby a certain number of the people assume to act for the whole, is evidently revolutionary. The people, that entire body called the State, can be bound as a whole only by an act of authority proceeding from themselves. In a state of peaceful government they have conferred this authority upon a part to speak for the whole only at an election authorized by law. It is only when an election is authorized by law, the electors, who represent the State or whole people, are bound to attend, and if they do not, can be bound by the expression of the will of those who do attend. The electors who can pronounce the voice of the people are those alone who possess the qualifications sanctioned by the people in order to represent them, otherwise they speak for themselves only, and do not represent the people.

The people, having reserved the right to alter or abolish their form of government, have, in the same declaration of their rights, reserved the means of procuring a law as the instrumental process of so doing. The twentieth section is as follows: —

"The citizens have a right, in a peaceable manner, to assemble together for their common good, and to apply to those invested with the powers of government for redress of grievances or other proper purposes, by petition, address, or remonstrance."

If the legislature, possessing these powers of government, be unwilling to pass a law to take the sense of the people, or to delegate to a convention all the powers the people desire to confer upon their delegates, the remedy is still in their own hands; they can elect new representatives that will. If their representatives are still unfaithful, or the government becomes tyrannical, the right of revolution yet remains. To what extent the Constitution of the United States controls this it is unnecessary now to inquire.

It is not pretended that the late convention sat as a revolutionary body, or in defiance of the existing government, and it did not proceed in the mode provided for amendment in the Constitution, that being a legislative proceeding only. It was, therefore, the offspring of law. It had no other source of existence. The process was an application or petition to the legislature to call a convention; the passage of a law to gather the sense of the people on the question whether a convention should be called; an election authorized by this law to take the sense of the whole people on this question, and, finally, the passage of a law to call the convention and define its powers and duties. A law is the only form in which the legislature, the body invested with the powers of government, can act, and thereby its own consent be given and revolution avoided. The people having adopted a proceeding by law as the means of executing their will, having acted under it and chosen their delegates by virtue of its authority, submitted themselves to it, as their own selected and approved means of carrying out peacefully their purpose of amendment. The law, being thus the instrument of their own choice to express their will, necessarily became the channel of their authority. Having furnished no other means of arriving at their

will, it is the only channel through which it has been conveyed. The law, therefore, being the instrument of delegation, this warrant to the delegates from the people becomes the only chart of their powers. The will of the people has been expressed in no other form, and the powers of the delegates, therefore, come in no other wise.

It will not do to assert that the whole original power of the people was conferred by the election. This election itself was a part of the instrumental process of the law, the means provided by this very law, of selecting the delegates. The law was the warrant for their election, and expressed the very terms chosen and adopted by the people, under which they delegated their power to these agents. The delegates possess no inherent power, and when convened by the law at the time and place fixed in it, sit and act under it, as their letter of attorney from the people themselves, and can know and discover the will of the people only so far as they can discern it through this the only warrant they have ever received to act for the people. If they claim through any other source, they must be able to point to it.

Outside of the law to take the sense of the people whether a convention should be called, and the law to call the convention, no other source has been or can be shown. To make this more distinct, let us suppose a voluntary election unauthorized by law, and delegates elected. It is plain a convention composed of such delegates would possess no power to displace the existing government, and impose a new constitution on the whole people. Those voting at the unauthorized election had no power to represent or to bind those who did not choose to vote. A majority of the adult males having the qualifications of electors can bind the whole people only when they have authority to do so.

To make this still more plain. Suppose a constitution formed by a volunteer convention, assuming to represent the people, and an attempt to set it up and displace the existing lawful government. It is clear that neither the people as a whole nor the government having given their assent in any binding form, the executive, judiciary, and all officers sworn to support the existing constitution would be bound, in maintenance of the lawfully-existing institutions of the people, to resist the usurpation, even to the whole extent of the force of the State. If overpowered, the new government would be established, not by peaceful means, but by actual revolution.

It follows, therefore, that in a state of peace a law is the only means by which the will of the whole people can be collected in an authorized form, and the powers of the people can be delegated to the agents who compose the convention. The form of the law is immaterial in this question of derivative authority. It may be a law to confer general authority or one to confer special authority. It may be an invitation in the first place, as was the Act of 1789, under which the convention of 1790 was convened, and an authority to the people to meet in primary assemblies to select delegates and confer on them unrestricted powers; or it may be a law to take the sense of the people on the

question of calling a convention, and then a law to make the call and confer the powers the people intend to confer upon their agents. The power to pass the law carries with it of necessity that to frame and declare the terms of the law. The terms of delegation, which the people themselves declare, when acting under and by virtue of the law which they have called to their aid, as the instrumental process of conferring their authorities and reaching their purpose of amendment, become of necessity the terms of their own will. All outside of this channel is revolutionary, for it has neither the consent of the government nor of the people who have called the government to their aid and acted through it. The process of amendment being through the instrumentality of legislation, these laws must be enacted in the forms of the Constitution and be interpreted by the rules which govern in the interpretation of laws.

The next inquiry is, What powers of the people were conferred upon the late convention? A change in the fundamental relations of the people and of that sacred compact which they have instituted to guard and protect their own rights and interests is one of vast, indeed most solemn import; for to impose a new constitution without authority, or to usurp powers not delegated, may lead to bloodshed and ruin. The power to act, then, should be clearly conferred. The sacred fire from the altar of the people's authority cannot be snatched by unhallowed hands.

The present inquiry is not how much power may be conferred by law, but what power was conferred on this convention? A law must be passed according to the forms of the Constitution. One of these is that no bill shall contain "more than one subject, which shall be clearly expressed in the title." The title of the Act of June 2d, 1871, is "An Act to authorize a Popular Vote upon the Question of calling a Convention to amend the Constitution of Pennsylvania." The text of the Act is: "That the question of calling a convention to amend the Constitution of this Commonwealth be submitted to a vote of the people at the general election, to be held," &c. The one subject of both title and text is the question of calling a convention. That question was authorized to be submitted to a popular vote. In that election each elector expressed his individual opinion on that question, and that alone, by voting "for a convention" or "against a convention." This question was answered in the affirmative by a majority of votes, and the people, answering the legislature, said: "You may call a convention." This was all the vote expressed. Each vote expressing the opinion of the elector on that question, the majority expressed no more, for the majority was composed of the sum total of the votes on that side. Thus an analysis of the Act, both in its title and its text, demonstrates that the vote was not a delegation of power, except to the legislature. There is no principle of sound interpretation which can extend the voice of the elector or the sum total of those voices, beyond the question each was called to answer. The result of that vote, therefore, was that the

legislature might call a convention. It was not in itself a call, nor did it declare when, how, or on what terms the call should be made. That, the very answer to the question proposed to the electors, necessarily left to those who asked their judgment on the propriety of making the call.

It was not even a mandate, further than the moral force contained in an expressed desire of the people. It is very evident, had the matter dropped there, and the legislature had made no call, no convention and no terms would ever have existed. Not a line, nor a word, nor a syllable in this Act expresses an intent of the people to make the call themselves, or on what terms it shall be made, or what powers should be conferred. Did the people by this Act, without an expressed intent, and by mere inference, intend to abdicate all their own power, their rights, their interests, and their duty to each other in favor of a body of mere agents, and to confer upon them, by a blank warrant, the absolute power to dictate their institutions, and to determine finally upon all their most cherished interests? If the argument be admitted for an instant that because nothing was said in this law on the subject of delegation, therefore greater powers were conferred than were granted in the subsequent Act of 1872, then all power belonging to the people passed, and they did grant by it the enormous power stated. Then, by a covert intent, hidden in the folds of this Act, the people delegated power to repeal all laws, abolish all institutions, and drive from place the legislature, the Governor, the judges, and every officer of the Commonwealth, without submitting the work of the delegates to the ratification of the people. If by an ordinance under a power derived from this Act of 1871, the delegates can set aside the lawfully-existing election laws for Philadelphia, where shall their power end? Can they draw money from the treasury to pay their own salaries? Can they seize and condemn a hall for their own use under the power of eminent domain? It is not possible, by any sound rule of interpretation, natural or civil, we can attribute to the Act of 1871 such an enormous, fearful, portentous delegation of power, founded on a vote upon the mere question of calling a convention. The result of the vote on this question declared the sense of the greater number of electors that a convention might be called. But how called? It was not itself a call. It left that to those invested with the powers of government. In and of itself it conferred no authority upon the delegates, but left that to a subsequent Act. The call proceeding from the legislature was necessarily by means of a law, for in no other form can the legislative will be expressed. When the people called in legislative aid to procure the call of a convention, they knew, therefore, that a law could be the only instrumental process the legislature could give; and a law being invoked, they knew that the power to legislate carried with it the power to frame the terms of the law. They knew still more, when they accepted the law as the means of making the call, that they adopted its terms by acting under it. When, therefore, they, in 1872, elected delegates under the Act of

1872, they elected them under the terms and provisions of that law, and none other, for there was no other law under which an authorized and binding election was or could be had. The people themselves, therefore, ratified and adopted the terms of the Act of 1872, as the terms on which they delegated their powers to those elected under it. The delegates so elected are clearly estopped, by the record itself, from denying the terms under which they hold their seats, for they hold them under the Act of 1872, and no other. The entire process of raising a convention and conferring upon it the powers of the people was a matter of law, in a state of peace, under the forms of the Constitution, through which the consent both of the people and of the existing government was given to prevent the convention from being or becoming a revolutionary body.

Accordingly, the Act of April 11th, 1872, is entitled "An Act to provide for calling a Convention to amend the Constitution." The text of the Act is, "that at the general election to be held, &c., there shall be elected by the qualified voters of the Commonwealth, delegates to a convention to revise and amend the Constitution of the State," &c. The Act then provides for the election, the assembling of the delegates, their powers and duties, and the submission of the Constitution or amendments agreed upon to a vote of the people for adoption or rejection. When the people voted under this law, did they not vote for delegates upon the express terms that they should submit their work to the people for approval? Did not every man who went to the polls do so with the belief in his heart that, by the express condition on which his vote was given, the delegates could not bind him without his subsequent assent to what the delegates had done? On what principle of interpretation of human action can the servant now set himself up against the condition of his master and say the condition is void? Who made it void? Not the electors; they voted upon it. The people required the law, as the act of the existing government, to which they had appealed under the Bill of Rights, to furnish them legal process to raise a convention for revision of their fundamental compact, and without which legal process the act of no one man could bind another. This law, being unrepealed, and being acted upon by the people, became their own delegation of authority, — the chart of the delegates to guide and control them in the duties they were elected to perform as the servants of the people. Without this legislation the convention had not existed; and to exist on terms not found in or contrary to the law, is to seek for a grant of powers to be found nowhere else, except in a state of revolution, and therefore do not exist in this peaceful process of amendment.

The absolute necessity of the convention to claim the protection of the Act of 1872 is seen in another view. Of the one hundred and thirty-three members of this body, less than one hundred in number were elected by the people. Some never received a single vote, but sat by the appointment of men themselves not elected by the people at

large. It is not meant to discuss the wisdom or the merits of the so-called limited system of voting, by which a majority of the electors are prevented from voting against persons seeking to represent them; but the purpose now is to show that without the authority of this very Act of 1872, more than thirty-three members of the body had no warrant whatever to represent the people. On what principle of right, dominion, or power, had these persons any claim to exercise the power of the people, and by their votes, perhaps, to fix upon a people they do not represent the most odious features of a proposed constitution? Is it not clear that their whole delegated power to speak and to vote for the people comes from the force and effort of the statute? They have that, and none other.

In considering this question of delegated power some are apt to forget that the people are already under a constitution and an existing frame of government instituted by themselves, which stand as barriers to the exercise of the original powers of the people, unless in an authorized form. They glide insensibly into the domain of abstract rights, and clothe mere agents with primordial power. But delegated authority is derived, and those who claim it must show whence and how they derived it. Three and a half or four millions of people cannot assemble themselves together in their primary capacity, — they can act only through constituted agencies. No one is entitled to represent them unless he can show their warrant, how and when he was constituted their agent. The great error of the argument of those who claim to be the people or the delegates of the people, is in the use of the word "people." Who are the people? Not so many as choose to assemble in a county, or a city, or a district, of their own mere will, and to say, We, the people. Who gave them power to represent all others who stay away? Not even the press, that wide-spread and most powerful of all subordinate agencies, can speak for them by authority. The voice of the people can be heard only through an authorized form, for, as we have seen, without this authority a part cannot speak for the whole, and this brings us back to a law as the only authority by which the will of the whole people — the body politic called the State — can be collected under an existing lawful government. To wander outside of this channel is to run in search of original powers, which, though possessed by the people, they have conferred in no other form. If the power be delegated, it must be seen in the derivation, otherwise it does not exist. If, then, the delegates elected by the people themselves, under the Act of 1872, have greater powers than are contained in it, when, where, and how did they obtain them? It is not in the Act of 1871, for that, as we have shown, decided but one question and conferred but one power, to wit, that a convention might be called, and that the legislature might call it. There is no other source to which this convention can appeal, and not being found there it is found nowhere.

This brings us to an examination of the powers conferred by the Act of 1872, as the dernier resort. The power claimed for the convention

is, by ordinance, to raise a commission to direct the election upon the amended constitution in the city of Philadelphia, and to confer power on this commission to make a registration of voters, and furnish the lists so made to the election officers of each precinct; to appoint a judge and two inspectors for each division, by whom the election therein shall be conducted. This ordinance further claims the power to regulate the qualifications of the officers thus appointed to hold the election and to control the general returns of the election. It is clear, therefore, that the ordinance assumes a present power to displace the election officers now in office under the election laws for the city, to substitute officers appointed under the authority of the convention, and to set aside these election laws so far as relates to the qualification of the officers and the manner in which the general returns shall be made, and in other respects not necessary to be noticed. The authority to do this is claimed under the fifth section of the Act of 1872. . . .

Now we come to the sixth section, which begins a different subject. "The election to decide for or against the adoption of the new Constitution, or specific amendments, shall be conducted as the general elections of this Commonwealth are now by law conducted." Thus the legislature said to the convention in these three sections — You shall have power to propose your work in three forms; you shall have power to determine the time and the manner in which these propositions shall be submitted; but the election by the citizens shall be conducted as the law itself directs as to general elections. The sixth section, as to how the election on the propositions submitted shall be conducted, is mandatory, and is so for the best of reasons, — it is the only legally authorized means of taking the sense of the people upon adoption of the amendments which can bind the whole people. In this way only can a majority of voters, who are not a majority of the people, bind them as the body politic or State. The legislature intended that the election should be conducted by known officers legally elected, and should be governed by a known system of laws with which the people are familiar, and thereby that they should both know and respect the authority under which the election should be held. No implication can be drawn from the word "manner" to contradict the plain and positive enactment that the election shall be conducted according to the laws governing general elections. It would violate the plainest rules for the interpretation of statutes to make the merest inference stand higher than an intent expressed in distinct language. It is, therefore, clear to our minds that the ordinance relating to the election in the city of Philadelphia is flatly opposed to the Act of 1872, and is therefore illegal and void. The prospective validation in the 32d section of the schedule only betrays the doubt the convention itself had of the validity of the ordinance in this respect.

The next question is one of great importance, but stands on a very different footing from that upon the ordinance, — I mean the alleged refusal of the convention to submit the judiciary article separately to a

vote of the people. The convention was clothed with express power to act upon the question of submitting the amendments in whole or in part. It is a deliberative body, having all the necessary authority to make rules for its own procedure, and to decide upon all questions falling within the scope of its authority. The power over the manner of submitting amendments is expressly conferred in the fifth section. It is true the law gives to one third of all the members a right to require a separate submission of any amendment. But while this right is awarded to a minority of the body, it is one upon which the convention itself must act, and it must act according to its own rules of procedure. The question of a separate submission being one committed to the whole body, of which the requiring third is itself a part, it must be presumed that the decision of the body as a whole was rightly made, and either that the request was not made by a full one third of all the members, or, if made by one third, it was not in a regular or orderly way. It would be a violent presumption to suppose that the body would wilfully disregard their own oaths as well as a full and orderly request. And if they did this wrong, no appeal is given to the judiciary, and the error can be corrected only by the people themselves, by rejecting the work of the convention. If the people, notwithstanding, choose to ratify their work, with them lies the consequence. Mere errors of procedure will then be of no avail. The convention having in that matter acted within the scope of its undoubted power, we must take its decisions as final, and leave correction to the power to which it belongs.

Not to omit to notice the arguments drawn from precedents, we think none referred to throw much light on the general question in these cases, — this power of the convention to pass the ordinance setting aside the election laws governing the city of Philadelphia and substituting provisions of its own. Even the proceedings in 1789 in our own State furnish a precedent of but little service. There the legislature not only invited the action of the people in primary assemblies, but in advance committed to their hands all the authority legislation can confer to act in those assemblies. The convention was summoned without restriction, and acted without trammel, while the people reserved no power of ratification, and subsequently disposed of all questions of power by living under and acting upon the Constitution, thereby ratifying the work of the convention in the most efficacious manner. The question before us is, can the convention, before they either proclaim a constitution themselves, if they have the power, or before any ratification, if they have not, pass an ordinance to repeal an existing system of law on a particular subject? This is a question of power, not of wisdom. However wise the substitution of their own election machinery for that provided by law for this city may be, the question is not for us. We can decide only the question of power. At last, therefore, we must come to the decision on principle, and in the light of reason, having a due regard to the rights, interests, welfare, and peace of a people living under a recognized government of their own choice,

and seeking to amend it in a peaceful way, and to such extent as they may deem salutary and wise.

The question of jurisdiction has been reserved for the conclusion. The first remark to be made is, that all the departments of government are yet in full life and vigor, not being displaced by any authorized act of the people. As a court we are still bound to administer justice as heretofore. If the acts complained of in these bills are invasions of rights without authority, we must exercise our lawful jurisdiction to restrain them. One of our equity powers is the prevention or restraint of the commission or continuance of acts contrary to law, and prejudicial to the interests of the community or the rights of individuals. *Page* v. *Allen*, 8 P. F. Smith, 338, and the authorities cited by counsel, are precedents sufficient to justify the exercise in this case. Here the court is asked to restrain a body of men attempting to proceed contrary to law, — to set aside the lawful election system of the city, and substitute an unlawful system in its place. Their acts are not only contrary to law, but are prejudicial to the interests of the community, by endangering the rights of all the electors, through means of an illegal election held by unauthorized officers. In *Patterson* v. *Barlow*, 10 P. F. Smith, 54, the aid of the court was asked, not to prevent acts contrary to law, but to strike down the only lawful system of election in the city, and thereby to disfranchise all its citizens, for all other election laws had been actually repealed. We said then it was more than doubtful how far private citizens can call for an injunction beyond their own invaded rights, or ask to restrain a great system of law in its public aspects. In this case we are called upon, not to strike down, but to protect a lawful system, and to prevent intrusion by unlawful authority. If this ordinance is invalid, as we have seen it is as to the city elections, the taxes of the citizens will be diverted to unlawful uses, the electors will be endangered in the exercise of their lawful franchise, and an officer necessary to the lawful execution of the election law ousted by unlawful usurpation of his functions.

The convention is not a co-ordinate branch of the government. It exercises no governmental power, but is a body raised by law, in aid of the popular desire to discuss and propose amendments, which have no governing force so long as they remain propositions. While it acts within the scope of its delegated powers, it is not amenable for its acts, but when it assumes to legislate, to repeal and displace existing institutions before they are displaced by the adoption of its propositions, it acts without authority, and the citizens injured thereby are entitled, under the Declaration of Rights, to an open court and to redress at our hands.

In conclusion, we regret that the nature of the case requires prompt, instant action, and that the circumstances under which we act demand a written expression of our views. We gladly would have had more time for discussion among ourselves, and for the preparation of the opinion. As it is, we have given to the subject all our most anxious thoughts and

labor, and have arrived at the best conclusions honest convictions can reach.

[Injunctions were issued Dec. 5, 1873.][1]

WOODS'S APPEAL.

SUPREME COURT OF PENNSYLVANIA. 1874.

[75 *Pa. St.* 59.][2]

OCTOBER 9th, 1874. (At Pittsburg.) Before AGNEW, C. J., SHARSWOOD, WILLIAMS, MERCUR, and GORDON, JJ. Appeal from the Court of Common Pleas of Allegheny County: In Equity: No. 37, to October and November Term, 1874.

On the 2d of December, 1873, Robert Woods and Reese Owens filed a bill against Matthew S. Quay, Secretary of the Commonwealth of Pennsylvania, John H. Hare, sheriff of Allegheny County, James G. Murray, and others, commissioners of Allegheny County.

The bill set forth that the plaintiffs were citizens and tax-payers of Allegheny County, and of the Commonwealth of Pennsylvania; it also set forth the Act of June 2d, 1871, and other matters relating to the convention, which are found in the case of *Wells* v. *Bain*.

The bill charged that M. S. Quay, Secretary of the Commonwealth, declared that he would comply with the provisions of the aforementioned "ordinance" of the convention, imposing duties upon him in relation to the submission of the amended Constitution to a popular vote; that John H. Hare, sheriff of the county of Allegheny, has published in sundry newspapers his proclamation for holding an election on the 16th of December next to pass upon the amendments, and that James G. Murray and others, commissioners of Allegheny County, had declared that they would perform the duties imposed on them by the aforesaid ordinance, &c. The prayer was for an injunction to restrain the defendants from acting in the premises as above set forth; that the Acts of June 2d, 1871, and April 11th, 1872, be declared unconstitutional and void; that the convention convened under the Act of 1872 was an illegal body and its acts without authority of law; that the "ordinance" of the convention was unconstitutional and void. . . .

The defendants demurred to the bill, and the case was heard on bill and demurrer.

The court (STOWE, J.) dismissed the bill in the following opinion: — . . . I have no difficulty in concluding that if the Acts of Assembly in question are unconstitutional and void, the convention was an illegal

[1] See comments on this case and some additional facts in Jameson, Const. Conv. (4th ed.) ss. 409 *a*–410, and ss. 520 *a*, 520 *b*. — ED.

[2] The statement of facts is condensed. — ED.

body, and its acts revolutionary, and that in such case it would be the duty of courts to exercise all their authority to prevent its mandates being carried into effect to the injury of any individual; that the legislature would be bound to enact such laws as might be necessary to punish any attempt to force upon the people its revolutionary work, and the executive officers of the State to use all their power, civil and military, to suppress it.

If, however, in the face of all this, such force, moral or physical, was brought to bear as to overawe or compel the submission of the legal authorities of the State, then, indeed, the arm of the law would be paralyzed, and the proposed constitution would become effective, not by the law, but by that higher right of revolution which is above all law, but is nowhere recognized by it. Courts can know nothing by anticipation. They are bound to determine the law as it is previous to the successful accomplishment of revolution, as though such a fact were impossible; but when accomplished and duly recognized by the political powers of the government, the courts have no alternative but to accept the fact without question and act accordingly.

While, then, courts must recognize the powers that be, though the product of revolution, they are bound to use all their legitimate authority to suppress acts actually or ostensibly revolutionary, as though they were simply rebellious and could never become legitimate.

Coming, then, to the question of the constitutionality of the Act to authorize a popular vote upon the question of calling a convention to amend the Constitution, approved June 2d, 1871, and also the Act passed subsequent to the election, held in pursuance of the same, entitled "An Act to provide for calling a Convention to amend the Constitution," approved April 11th, 1872, raised by the 2d, 3d, 4th, 5th, 6th, and 7th sections of complainants' bill, it is claimed that they are both unconstitutional and invalid, because: —

1. There is no power given by the present Constitution to the legislature authorizing such a proceeding.

2. There is a different method provided by the Constitution, by which it may be amended, and, therefore, upon well-recognized principles of law, the legal conclusion arises that no other exists.

It cannot be claimed that the authority for the legislation and proceedings taken in reference to calling this convention are expressly set out in the Constitution, but it is argued that the power arises under the second section of the Declaration of Rights, which declares that "all power is inherent in the people and all free governments are founded on their authority, and instituted for their peace, safety, and happiness. For the advancement of these ends they have at all times an inalienable and indefeasible right to alter, reform, or abolish their government in such a manner as they may think proper," all of which is, *inter alia*, excepted out of the general powers of government, and is "forever to remain inviolate."

It is difficult to see how the withholding of power from the govern-

ment can, strictly speaking, create a right in the legislature from which it is thus withheld, to exercise that power; but if it should appear that such power exists above and before the Constitution as a great natural and indefeasible right, and has been so recognized and acted upon frequently as a fundamental principle underlying all free government, this provision will sufficiently appear to be a solemn declaration of the existence of such a right, and may in ordinary parlance fairly be said, without any great breach of legal accuracy, to confer a power under the Constitution.

Before, however, entering into a consideration of this question, it will be necessary to examine whether there is anything in the Constitution, as urged in the second proposition, which directly or by necessary legal implication takes away such a fundamental right as we have suggested, in case it existed, where there is no constitutional restriction.

It is urged, and with much apparent force, that because the Constitution in the tenth article "of amendments" provides a certain and carefully defined way for amending the fundamental law, the well-recognized legal maxim ordinarily applied to the construction of deeds and written instruments, as well as Acts of legislation, *Expressio unius est exclusio alterius*, leads to the fixed legal presumption that no amendment can, under the Constitution, be made to it, except in the way thus especially provided.

This rule enunciates one of the first principles to the construction of any ordinary instruments between parties: Lord Denman, C. J., 5 Bing. N. C. 185; but great caution is requisite in its application: *Price* v. *The Great Western Railway Co.*, 16 M. & W. 244; Broom's Legal Maxims, 595; and it has long been settled in commercial transactions that custom and usage are allowed to control or rebut the implication arising under the rule. . . .

Mr. Jameson, in his work on Constitutional Conventions, p. 573, says, with great force, upon this question: "Viewed upon principle, were there no authority upon the point, it would be doubtful whether, dealing in great questions of politics and government, the same maxim ought to prevail which regulates the construction of contracts between man and man. As a matter of speculation it may be admitted that the rule expresses the weight of probability equally in cases of great and small magnitude. But there is always a doubt; and between the cases indicated there is the wide difference, that in ordinary contracts it is possible to enforce the construction which the courts shall pronounce the true one, whilst in the case of constitutional provisions regulating great organic movements, to hold such a maxim applicable would be, by presenting barriers to the attainment of what the people generally desire, to make that revolutionary which perhaps was not so. Where the intention of the framers of a constitution is doubtful, the people assuming power under the broader construction should have the benefit of the doubt; and that all the more because in opposition to them our courts are comparatively powerless. It is infinitely better where no principle

is violated, that a constitution should be so construed as to make their action legal rather than illegal."

So far as judicial opinion is concerned, it has been said by the Supreme Court of New York that the maxim is to be applied to ordinary contracts rather than constitutional provisions: *Barto* v. *Himrod*, 4 Selden, 483; while the judges of the Supreme Court of Massachusetts have expressed a different opinion (6 Cushing, 573), holding that under the Constitution of Massachusetts, containing a provision substantially like our own, no power existed to amend, except as provided in the Article of Amendments. As a matter of history, however, a convention was called by the legislature in 1853, twenty years after this opinion was given, to propose a constitution; and while the question was raised as to the legality of such convention, it was ably vindicated by the best lawyers in the State, among them Choate, Parker, and Morton, the latter one of the judges of the court at the time the opinion was given; and a constitution prepared and submitted to the people.

Turning now to the history of the government of the various States, for the purpose of discovering what the usage in such cases has been, we find the practice has been so frequent and uniform as clearly to indicate what the common understanding of the people, lawyers and laymen, has been in regard to this question.

So far as I am able to learn, there had been, in 1865 (throwing out of consideration the rebel States during 1861, and afterwards while undergoing reconstruction), twenty-five constitutional conventions called by the legislatures of the various States, without any special authorization in their constitutions. In Georgia, January 4th, 1789, May 4th, 1789, and 1838; in South Carolina, 1790; in New Hampshire, 1791; in New York, 1801, 1821, and 1846; in Connecticut, 1818; in Massachusetts, 1829, 1853; in Rhode Island, 1824, 1834, 1841, and 1842; in Virginia, 1829, 1854, and 1864; in North Carolina, 1835; in Pennsylvania, 1837; in New Jersey, 1844; in Missouri, 1845, 1861, and 1865; in Indiana, 1850.

Mr. Webster stated in 1848, in his argument before the Supreme Court of the United States, in the case of *Luther* v. *Borden*, "that of the old thirteen States, their constitution with but one exception contained no provision for their own amendment, yet there is hardly one that has not altered its constitution, and it has been done by conventions called by the legislature, as an ordinary exercise of power." If this is true, and my own examination, so far as, with the limited time and opportunity since the argument of this case, I have been able to make it, has verified it, as well as shown the continuation of the same practice to the present day, — it would seem as though the question as to whether the calling of a constitutional convention was a legal exercise of power by the legislature, should now be considered by all judicial tribunals as settled so firmly as a part of the common law of our governments, that any attempt to disturb it at this day would savor more

of revolution than legitimacy. He would be bold, indeed, who would now assert that all these conventions were usurpations, and that all the constitutions proposed by them and adopted by the people were revolutionary.

The conclusion that I have drawn from all this is, that there is underlying our whole system of American government a principle of acknowledged right in the people to change their constitutions, except where especially prohibited in a constitution itself, in all cases and at all times, whether there is a way provided in their constitution or not, by the interposition of the legislature, and the calling of a convention, as was done in the case in hand.

The offspring of revolution originally, but restrained and modified by the necessity arising out of the new principle established in this country, by the accomplishment of our national independence, that the people are the government, and not the king, and the source of all political power, — it has become legitimated, and without mention in our constitutions, is as much the law of the land as if specifically set out in them; and that as a solemn recognition of this, and not as a revolutionary right, the section of the Declaration of Rights in our own, and similar clauses in other State constitutions, were inserted.

The somewhat similar expression contained in the Declaration of Independence was clearly revolutionary and so intended to be; but that was a paper published to the world to justify our refusal to submit longer to governmental authority, and spoke of the rights of the people, as against the oppression of constituted authorities; but in all instruments established by the people themselves for their own government, the only rational view is to consider it as above stated, — the introduction of a constitutional and legal revolution, by the consent of the constituted authorities of the State. This last is absolutely indispensable, as is now admitted by all. To give the force and effect of the law to the proceeding, it must emanate from the legislative authority, and be the result of its permission or direction. The only way the people can legally act under a constitution such as ours, is through their representatives, and therefore, no matter how many may favor a convention to change the Constitution, if one should be called, and convene without proper authority from the existing government, its action would be clearly illegal, and the result of illegitimate power. It follows, then, that the action of the legislature in authorizing a vote of the people on the question of the amendment of their constitution, and subsequently by another Act authorizing the election of delegates, was a legal exercise of legislative power, and constitutional, unless something in the Acts themselves is in conflict with some constitutional provision. . . .

The 8th, 9th, and 10th paragraphs of the bill complain of illegal acts done by the convention: first, in refusing a separate submission to a popular vote of the fifth article, relating to the judiciary, the contingency having arisen, under which, by an Act of the Legislature, they were bound to do so; and second, in altering several of the provisions

of the Bill of Rights contrary to the limitations imposed in the fourth section of the Act of April 11th, 1872; and third, in disregarding the Act of Assembly, under which the convention was called, in regard to submitting the amended Constitution to a vote of the people, and ordaining a different method.

These objections are all consistent with the conclusions already arrived at, and if valid would raise further questions under the bill, notwithstanding what has already been said, and should therefore be considered.

In examining these questions, the first and second may be taken together.

Looking upon general principles at the real question involved, which is how far, if at all, a constitutional convention regularly called may legally disregard limitations imposed upon its actions by the legislature, I have no difficulty in arriving at what seems to me to be the correct rule. A convention to amend the Constitution, without there is an express limitation as to the extent of their power, passed upon by the people in determining the question of amendment, has inherently, by the very nature of the case under the great principle peculiarly American, and *quasi* revolutionary in its character heretofore mentioned, absolute power, so far as may be necessary to carry out the purpose for which they were called into existence, by the popular will. Unless prohibited or restricted in the manner specified by the people, the convention has a right, untrammelled by mere legislative limitations, to propose to the people for their consideration and adoption any plan they may see fit. In saying this, we are not to be understood as saying that the convention is in any respect the supreme power of the State. We take it to be simply the attorney for the people, with plenary power to do what is required of it, but nothing beyond.

Subject to the limitation just mentioned, a constitutional convention, in the language of Mr. Wilson, in the Federal Convention of 1787, has the power to conclude nothing, but to propose anything.

Such, too, is the inevitable result of the views already expressed as to the purpose and effect of the second section of the Declaration of Rights. If it be taken as a constitutional recognition of the principle of legal revolution (so to speak), and of a popular power as we believe, the obvious result follows, that when once called into operation by proper authority, it cannot be subverted nor restrained by the legislature.

If this is correct, the convention was right in disregarding the limitations sought to be imposed upon its power, both as to what it should propose to change in the present Constitution, and how the proposal should be submitted to the people for their adoption or rejection.

The third point, raising the question of the right of the convention to provide a way by ordinance, different from and substantially repealing the Act of the Legislature, presents a very different question from the one just considered. It is, however, immaterial to the determination of the real issue in this case. Assuming it to be an excess of power,

the complainants can be in no wise affected by it as tax-payers. It is entirely immaterial to them in that respect, whether the ordinance is legal or illegal. Their only interest is that of knowing whether the convention had such a power or not, as a mere abstract question, which gives them no standing in court. So far as this county is concerned, there was no attempt by the convention to change the law made by the legislature. The election which will be held within our jurisdiction, and for which the complainants as tax-payers may be called upon to pay, will be held under what the complainants themselves say is the law, unless the submission of the proposed new Constitution is itself, as it stands to-day, illegal and unconstitutional.

There are other questions involved in the case, as to the standing and equity of the plaintiffs under this bill, in view of the relief prayed for, but the conclusions already expressed render it unnecessary to examine them.

The result is, the demurrer must be sustained and plaintiffs' bill dismissed.

The plaintiffs appealed to the Supreme Court, and assigned for error the decree sustaining the demurrer and dismissing the bill.

R. Woods, for appellants.

R. B. Carnahan, for appellees.

The opinion of the court was delivered, November 2d, 1874, by

AGNEW, C. J. The change made by the people in their political institutions, by the adoption of the proposed Constitution since this decree, forbids an inquiry into the merits of this case. The question is no longer judicial, but in affirming the decree we must not seem to sanction any doctrine in the opinion, dangerous to the liberties of the people. The claim for absolute sovereignty in the convention, apparently sustained in the opinion, is of such magnitude and overwhelming importance to the people themselves, it cannot be passed unnoticed. In defence of their just rights, we are bound to show that it is unsound and dangerous. Their liberties would be suspended by a thread more slender than the hair which held the tyrant's sword over the head of Damocles, if they could not, while yet their existing government remained unchanged, obtain from the courts protection against the usurpation of power by their servants in the convention. When they become complainants, the convention must defend and show their authority.

It was contended in the case of *Francis Wells et al.* v. *James Bain et al.*, involving the legality of an ordinance of the convention, argued at Philadelphia in December last (*antea*, p. 39), that the convention had the power to ordain ordinances having the present force of law; and the instant power to proclaim a constitution, binding without ratification, irrespective of the matter adopted by the people to exercise their right to alter or amend their frame of government. This imputed sovereignty in a convention called and organized under a law, as the very means adopted by the people to exercise their reserved right of

amendment, owing to the briefness of the time, was not discussed in that case with the fulness the importance of the question to the people demanded.

There is no subject more momentous or deeply interesting to the people of this State than an assumption of absolute power by their servants. The claim of a body of mere deputies to exercise all their sovereignty, absolutely, instantly, and without ratification, is so full of peril to a free people, living under their own instituted government, and a well-matured Bill of Rights, the bulwark and security of their liberties, that they will pause before they allow the claim and inquire how they delegated this fearful power, and how they are thus absolutely bound and can be controlled by persons appointed to a special service. Struck by the danger, and prompted by self-interest, they will at once distinguish between their own rights and the powers they commit to others. These rights it is, the judiciary is called in to maintain. The very rights of the people and freedom itself demand, therefore, that no such absolute power shall be imputed to the mere delegates of the people to perform the special service of amendment, unless it is clearly expressed, or as clearly implied, in the manner chosen by the people to communicate their authority.

A convention has no inherent rights; it exercises powers only. Delegated power defines itself. To be delegated it must come in some adopted manner to convey it by some defined means. This adopted manner, therefore, becomes the measure of the power conferred. The right of the people is absolute, in the language of the Bill of Rights, "to alter, reform, or abolish their government in such manner as they may think proper." This right being theirs, they may impart so much or so little of it as they shall deem expedient. It is only when they exercise this right, and not before, they determine, by the mode they choose to adopt, the extent of the powers they intend to delegate. Hence the argument which imputes sovereignty to a convention, because of the reservation in the Bill of Rights, is utterly illogical and unsound. The Bill of Rights is a reservation of rights out of the general powers of government to themselves, but is no delegation of power to a convention. It defines no manner or mode in which the people shall proceed to exercise their right, but leaves that to their after choice. Until then it is unknown how they will proceed, or what powers they will confer on their delegates. Hence we must look beyond the Bill of Rights to the mode adopted by the people, to find the extent of the power they intend to delegate. These modes were stated and discussed in the opinion in *Wells et al.* v. *Bain et al., supra.* If, by a mere determination of the people to call a convention, whether it be by a vote or otherwise, the entire sovereignty of the people passes *ipso facto* into a body of deputies or attorneys, so that these deputies can, without ratification, alter a government and abolish its Bill of Rights at pleasure, and impose at will a new government upon the people without restraints upon the governing power, no true liberty remains. Then the servants sit

above their masters by the merest imputation, and a people's welfare must always rest upon the transient circumstances of the hour, which produce the convention and the accidental character of the majority which controls it. Such a doctrine, however suited to revolutionary times, when new governments must be formed, as best the people can, is wholly unfitted when applied to a state of peace and to an existing government, instituted by the people themselves and guarded by a well-matured Bill of Rights. . . .

The people have the same right to limit the powers of their delegates that they have to bound the power of their representatives. Each are representatives, but only in a different sphere. It is simply evasive to affirm that the legislature cannot limit the right of the people to alter or reform their government. Certainly it cannot. The question is, not upon the power of the legislature to restrain the people, but upon the right of the people, by the instrumentality of the law, to limit their delegates. Law is the highest form of a people's will in a state of peaceful government. When a people act through a law the act is theirs, and the fact that they used the legislature as their instrument to confer their powers makes them the superiors and not the legislature. The idea which lies at the root of the fallacy, that a convention cannot be controlled by law is, that the convention and the people are identical. But when the question to be determined is between the people and the convention, the fallacy is obvious. Such a metonymy may do for a flourish of rhetoric, but not for grave argument. The parties to the question are the people on the one hand and the convention on the other. The people allege an usurpation of power in this, that the convention seeks to bind them without their ratification. The question then is, what power was conferred? The judiciary sits to decide between them. The people having challenged their power to set a government over them at will, the agents must show their authority to do this. The latter put in evidence the Act of 1871 as their authority. Then the issue is, does the Act of 1871, simply ordering a convention to be called, confer this absolute, extraordinary, and dangerous power upon a body of men not yet called into being, and which can have neither being nor power except by the further act of the people through the instrumentality of a law? To make the law odious, it is assumed that the legislature is or may be corrupt. But this is aside from the true question of power. In a governmental and proper sense, law is the highest act of a people's sovereignty, while their government and constitution remain unchanged. It is the supreme will of the people expressed in the forms and by the authority of their constitution. It is their own appointed mode through which they govern themselves, and by which they bind themselves. So long as their frame of government is unchanged in its grant of all legislative power, these laws are supreme over all subjects unforbidden by the instrument itself. The calling of a convention, and regulating its action by law, is not forbidden in the Constitution. It is a conceded manner, through which the people may

exercise the right reserved in the Bill of Rights. It falls, therefore, within the protection of the Bill of Rights as a very manner in which the people may proceed to amend their constitution, and delegate the only powers they intend to confer, and as the means whereby they may, by limitation, defend themselves against those who are called in to exercise their powers. The legislature may not confer powers by law inconsistent with the rights, safety, and liberties of the people, because no consent to do this can be implied, but they may pass limitations in favor of the essential rights of the people. The right of the people to restrain their delegates by law cannot be denied, unless the power to call a convention by law, and the right of self-protection be also denied. It is, therefore, the right of the people and not of the legislature to be put by law above the convention, and to require the delegates to submit their work for ratification or disapproval. . . .

Decree affirmed.[1]

[1] Another American principle growing out of this, and just as important and well settled as is the truth that the people are the source of power, is that, when in the course of events it becomes necessary to ascertain the will of the people on a new exigency, or a new state of things or of opinion, the legislative power provides for that ascertainment by an ordinary act of legislation. Has not that been our whole history? It would take me from now till the sun shall go down to advert to all the instances of it, and I shall only refer to the most prominent, and especially to the establishment of the Constitution under which you sit. The old Congress, upon the suggestion of the delegates who assembled at Annapolis in May, 1786, recommended to the States that they should send delegates to a convention to be holden at Philadelphia to form a constitution. No article of the old Confederation gave them power to do this; but they did it, and the States did appoint delegates, who assembled at Philadelphia and formed the Constitution. It was communicated to the old Congress, and that body recommended to the States to make provision for calling the people together to act upon its adoption. Was not that exactly the case of passing a law to ascertain the will of the people in a new exigency? And this method was adopted without opposition, nobody suggesting that there could be any other mode of ascertaining the will of the people.

My learned friend went through the constitutions of several of the States. It is enough to say that, of the old thirteen States, the constitutions, with but one exception, contained no provision for their own amendment. In New Hampshire there was a provision for taking the sense of the people once in seven years. Yet there is hardly one that has not altered its Constitution, and it has been done by conventions called by the legislature, as an ordinary exercise of legislative power. Now, what State ever altered its constitution in any other mode? What alteration has ever been brought in, put in, forced in, or got in anyhow, by resolutions of mass meetings, and then by applying force? In what State has an assembly, calling itself the people, convened without law, without authority, without qualifications, without certain officers, with no oaths, securities, or sanctions of any kind, met and made a constitution, and called it the Constitution of the State? There must be some authentic mode of ascertaining the will of the people, else all is anarchy. It resolves itself into the law of the strongest, or, what is the same thing, of the most numerous for the moment, and all constitutions and all legislative rights are prostrated and disregarded.

But my learned adversary says, that if we maintain that the people (for he speaks in the name and on behalf of the people, to which I do not object) cannot commence changes in their government but by some previous Act of legislation, and if the legislature will not grant such an Act, we do in fact follow the example of the Holy Alliance, "the doctors of Laybach," where the assembled sovereigns said that all

changes of government must proceed from sovereigns; and it is said that we mark out the same rule for the people of Rhode Island.

Now, will any man, will my adversary here, on a moment's reflection, undertake to show the least resemblance on earth between what I have called the American doctrine and the doctrine of the sovereigns at Laybach? What do I contend for? I say that the will of the people must prevail, when it is ascertained; but there must be some legal and authentic mode of ascertaining that will; and then the people may make what government they please. Was that the doctrine of Laybach? Was not the doctrine there held this, that the sovereigns should say what changes shall be made? Changes must proceed from them; new constitutions and new laws emanate from them; and all the people had to do was to submit. That is what they maintained. All changes began with the sovereigns, and ended with the sovereigns. Pray, at about the time that the Congress of Laybach was in session did the allied powers put it to the people of Italy to say what sort of change they would have? And at a more recent date, did they ask the citizens of Cracow what change they would have in their constitution? Or did they take away their constitution, laws, and liberties by their own sovereign act? All that is necessary here is, that the will of the people should be ascertained, by some regular rule of proceeding, prescribed by previous law. But when ascertained, that will is as sovereign as the will of a despotic prince, of the Czar of Muscovy, or the Emperor of Austria himself, though not quite so easily made known. A ukase or an edict signifies at once the will of a despotic prince; but that will of the people, which is here as sovereign as the will of such a prince, is not so quickly ascertained or known; and thence arises the necessity for suffrage, which is the mode whereby each man's power is made to tell upon the Constitution of the government, and in the enactment of laws.

One of the most recent laws for taking the will of the people in any State is the law of 1845, of the State of New York.[1] It begins by recommending to the people to assemble in their several election districts, and proceed to vote for delegates to a convention. If you will take the pains to read that Act, it will be seen that New York regarded it as an ordinary exercise of legislative power. It applies all the penalties for fraudulent voting, as in other elections. It punishes false oaths, as in other cases. Certificates of the proper officers were to be held conclusive, and the will of the people was, in this respect, collected essentially in the same manner, supervised by the same officers, under the same guards against force and fraud, collusion and misrepresentation, as are usual in voting for State or United States officers.

We see, therefore, from the commencement of the government under which we live, down to this late Act of the State of New York, one uniform current of law, of precedent, and of practice, all going to establish the point that changes in government are to be brought about by the will of the people, assembled under such legislative provisions as may be necessary to ascertain that will, truly and authentically. — *Mr. Webster's Argument in Luther* v. *Borden et al.*, Jan. 27, 1848. *Works of Daniel Webster*, vi. 227–229.

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[1] The Constitution of New York then existing (that of 1821, art. 8) provided for its own amendment by legislative proposal, in substantially the same way as the constitutions of Pennsylvania, Rhode Island, and Massachusetts above considered. The Massachusetts provision (Amendment IX.) was introduced by Mr. Webster himself. *Debates of Mass. Conv. of* 1820, 124. — ED.

SPROULE v. FREDERICKS.

SUPREME COURT OF MISSISSIPPI. 1892.

[69 *Miss.* 898.][1]

L. W. Magruder, and *Gibson, Henry, & Bien*, for appellant. *Miller, Smith, & Hirsh*, for appellee.

WOODS, J., delivered the opinion of the court.

The validity of the Constitution of 1890 is called in question by counsel for appellee, in a supplemental brief filed recently, by consent of the court; and, as the challenge meets us on the threshold of the case, we proceed at once to its consideration, briefly. In support of this view of the invalidity of the Constitution, two propositions are asserted: 1. That a constitutional convention has power only to prepare or frame the body of a constitution, and that when prepared or framed the instrument is of no force or effect until ratified by a popular vote of the people; and the Constitution of 1890, having never been submitted to or ratified by the people, is invalid; and 2. That the changes made by the Constitution in the basis of suffrage are violative of the Act of Congress readmitting the State of Mississippi into the Union in the year 1870, and invalidate that instrument.

With confidence, we reject both propositions as unsound. It will be remembered that the case at bar is free from the difficulties which are supposed by some writers to arise out of a failure or refusal of a constitutional convention to yield to the direction of the legislature which summoned it that the Constitution framed shall be submitted to the people for ratification. The Act of the Legislature which provided for the assembling of the constitutional convention of 1890 declared that the end sought to be attained, the work to be done, was the revision and amendment of the Constitution of 1869, or the enactment of a new constitution; and it did not attempt to limit the powers of the convention by imposing, or seeking to impose, upon that sovereign tribunal the mere legislative will that the Constitution enacted should be submitted to the people for ratification. We have simply the case of a constitutional convention enacting a new constitution, and putting it into effect without an appeal to the people, in strict conformity to the legislative call which assembled.

We have spoken of the constitutional convention as a sovereign body, and that characterization perfectly defines the correct view, in our opinion, of the real nature of that august assembly. It is the highest legislative body known to freemen in a representative government. It is supreme in its sphere. It wields the powers of sovereignty, specially delegated to it, for the purpose and the occasion, by the whole electoral

[1] The statement of facts is omitted. — ED.

body, for the good of the whole Commonwealth. The sole limitation upon its powers is that no change in the form of government shall be done or attempted. The spirit of republicanism must breathe through every part of the framework, but the particular fashioning of the parts of this framework is confided to the wisdom, the faithfulness, and the patriotism of this great convocation, representing the people in their sovereignty. The theorizing of the political essayist and the legal doctrinaire, by which it is sought to be established that the expression of the will of the legislature shall fetter and control the constitution-making body, or, in the absence of such attempted legislative direction, which seeks to teach that the constitutional convention can only prepare the frame of a constitution and recommend it to the people for adoption, will be found to degrade this sovereign body below the level of the lowest tribunal clothed with ordinary legislative powers. This theorizing will reduce that great body, which, in our State, at least, since the beginning of its existence, except for a single brief interval, in an exceptional period, by custom and the universal consent of the people, has been regarded as the repository and executor of the powers of sovereignty, to a mere commission, stripped of all power, and authorized only to make a recommendation.

Whatever may be the safer and wiser course, as to putting into operation the completed work of the constitutional convention, the opinions of the political theorists, which we are considering, will be found to rest upon grounds largely imaginary and fanciful. The constitutional convention itself, according to this theory, is looked upon with suspicion and distrust, as being the introduction into our governmental system of a revolutionary device; the chosen representatives of the sovereign people are dreaded, as likely to prove unfaithful to their mighty trust; and the liberties of the people are in danger of subversion. This succinct statement of the grounds of these political theorists will demonstrate the unreal foundation upon which their teachings rest. The general judgment of the people of our own State has practically and strikingly repudiated the theory, from the foundation of the government. The usage in Mississippi, with a solitary exception in an extraordinary conjuncture of public affairs, gives it no support. That the government has lived from its birth to this hour with no valid fundamental law on which to rest, except for a brief interval, cannot be true.

2. There is as little ground for the second branch of the contention. . . . *Reversed and remanded.*[1]

[1] As to the previous constitutions of Mississippi, see the tables in Jameson's Const. Conv. (4th ed.) Appendix, 651. It appears there that three out of five, in all, were, in fact, submitted to the people. — ED.

KOEHLER AND LANGE *v.* HILL.

SUPREME COURT OF IOWA. 1883.

[60 *Iowa*, 543.]

APPEAL from Scott District Court. Saturday, April 21. Action to recover for beer sold and delivered by the plaintiffs to the defendant. Trial to the court, judgment for the plaintiffs, and the defendant appeals.

Smith McPherson, Attorney-General, *Peter A. Boyle*, *William E. Miller*, *J. A. Harvey*, *James F. Wilson*, *C. C. Nourse*, *John F. Duncombe*, and *Liston McMillan*, for appellant.

Bills & Block and *Wright*, *Cummins & Wright*, for appellees.

SEEVERS, J. At a special election held on the 27th day of June, 1882, the electors of the State, by a majority of about thirty thousand, ratified an amendment to the Constitution, which, it is claimed, had been previously agreed to by the Eighteenth and Nineteenth General Assemblies, prohibiting the manufacture and use of intoxicating liquors as a beverage, including ale, wine, and beer, as therein provided.

The question is fairly presented in the record in this case, whether or not the amendment aforesaid has been constitutionally agreed to and adopted, and this is the question discussed by counsel, and the only question we are called on to determine. The validity of the amendment, and whether the same now constitutes a part of the Constitution, depend upon the question whether the Eighteenth General Assembly agreed to the amendment which was ratified and adopted by the electors, and whether the amendment was agreed to by the Eighteenth General Assembly in the form and manner required by the Constitution.

When the Constitution was adopted it was wisely therein provided, or at least it must be so presumed, that "any amendment or amendments to this Constitution may be proposed in either House of the General Assembly; and if the same shall be agreed to by a majority of the members elected to each of the two Houses, such proposed amendment shall be entered on their journals, with the yeas and nays taken thereon, and referred to the legislature to be chosen at the next general election, and shall be published as provided by law for three months previous to the time of making such choice; and if, in the General Assembly so next chosen as aforesaid, such proposed amendment or amendments shall be agreed to by a majority of all the members elected to each House, then it shall be the duty of the General Assembly to submit such proposed amendment to the people, in such manner and at such time as the General Assembly shall provide; and if the people shall approve and ratify such amendment or amendments by a majority of the electors qualified to vote for members of the General Assembly, voting thereon, such amendment or amendments shall become a part of the Constitution of this State."—Art. 10, § 1.

This is the only way the Constitution can be amended or changed except by a convention called for that purpose.

In compliance with the foregoing provision, there was introduced into the House of Representatives of the Eighteenth General Assembly a joint resolution. . . . Thereupon, such enrolled resolution was signed by the Speaker of the House and President of the Senate, and approved by the Governor. The joint resolution thus signed and approved was as follows: "No person shall manufacture for sale, or sell, or keep for sale, as a beverage, any intoxicating liquor whatever, including ale, wine, and beer." This proposed amendment to the Constitution was agreed to by the Nineteenth General Assembly, and ratified by the electors at a special election, held on the 27th day of June, 1882. Counsel for the plaintiff insist that the joint resolution, at the time it was agreed to by the Senate [of the Eighteenth General Assembly], contained the words "or to be used." Their contention is that it then reads as follows: "No person shall manufacture for sale, or sell, or keep for sale, as a beverage, or to be used, any intoxicating liquor whatever, including ale, wine, and beer." The resolution claimed to have been agreed to by the Senate is materially different in substance from the one ratified by the electors. Counsel for the appellant do not claim this is not so as shown by the journals, but their contention is that the enrolled resolution, signed by the Speaker of the House and President of the Senate, and approved by the Governor, is a verity, and is conclusive evidence that the resolution as enrolled was agreed to by both Houses of the Eighteenth General Assembly, or, if this is not so, that the preponderance of the evidence is in favor of the proposition that the resolution which was agreed to was correctly enrolled. The plaintiff contends that it is made clear and certain by an examination of the Senate journal that the words "or to be used" were in the resolution when it passed the Senate, and that the journal is the best evidence of such fact. . . .

[The COURT (BECK, J. dissenting) held that it might examine the journals of the Eighteenth General Assembly; and, as a result of the examination, that the amendment agreed to by the Senate was different from that which was agreed to and submitted to the people by the Nineteenth General Assembly, and therefore, although ratified by the people, had not legally become a part of the Constitution.]

ON REHEARING. DAY, Ch. J. — A petition for rehearing was presented in this cause, and the whole case has been re-argued by eminent counsel with much ability and research. In view of the great interest which has attached to this question, and of its public importance, we deem it not only proper, but necessary, to examine with considerable fulness the leading points relied upon as necessitating a conclusion different from the one reached in the foregoing opinion.

I. It is asserted in the petition for rehearing that "the judicial department of the State has no jurisdiction over political questions, and cannot review the action of the Nineteenth General Assembly, and of the people, in the matter of the adoption or amendment of the Consti-

tution of the State." This position practically amounts to this: that the provisions of the Constitution for its own amendment are simply directory, and may be disregarded with impunity; for it is idle to say that these requirements of the Constitution must be observed, if the departments charged with their observance are the sole judges as to whether or not they have been complied with. This proposition was advanced for the first time upon the petition for rehearing, and, if correct, it is of course an end of the controversy. Upon this branch of the case counsel cite *Luther* v. *Borden*, 7 How. 1. As this case has principally been relied upon by the advocates of the theory now under consideration, and has been given great prominence in the discussions which have taken place, we desire to present its facts with a degree of fulness which, under ordinary circumstances, would perhaps be considered unnecessary, to the end that the degree of its applicability to the present case may be fully understood.

In 1841, the State of Rhode Island was acting under the form of government established by the charter of Charles II. in 1663. In this form of government no mode of proceeding was pointed out by which amendments could be made. It authorized the legislature to prescribe the qualification of voters, and in the exercise of this power the right of suffrage was confined to freeholders. In 1841, meetings were held and associations were formed by those who were in favor of a more extended right of suffrage, which finally resulted in the election of a convention to form a new Constitution, to be submitted to the people for their adoption or rejection. The persons chosen came together and framed a Constitution by which the right of suffrage was extended to every male citizen of twenty-one years of age who had resided in the State for one year. Upon a return of the votes, the convention declared that the Constitution was adopted and ratified by a majority of the people of the State, and was the paramount law and Constitution of Rhode Island. The charter government did not admit the validity of the proceedings, nor acquiesce in them. On the contrary, in January, 1842, when this new Constitution was communicated to the Governor and by him laid before the legislature, it passed resolutions declaring all acts done for the purpose of imposing that Constitution upon the State, to be an assumption of the powers of government, in violation of the rights of the existing government and of the people at large, and that it would maintain its authority and defend the legal and constitutional rights of the people. Thomas W. Dorr, who had been elected Governor under the new Constitution, prepared to assert the authority of that government by force, and many citizens assembled in arms to support him. The charter government thereupon passed an Act declaring the State under martial law, and at the same time proceeded to call out the militia to repel the threatened attack, and to subdue those who were engaged in it. The plaintiff, Luther, was engaged in supporting the new government, and, in order to arrest him, his house was broken and entered by the defendants, who were enrolled in the military force of the

old government, and in arms to support its authority. The government under the new Constitution had but a short and ignoble existence. In May, 1842, Dorr made an unsuccessful attempt, at the head of a military force, to get possession of the State arsenal at Providence, which was repulsed. In June following, an assemblage of some hundreds of armed men, under his command at Chepatchet, dispersed, upon the approach of the troops of the old government, and no further effort was made to establish the new government. In January, 1842, the charter government took measures to call a convention to revise the existing form of government, and a new Constitution was formed, which was ratified by the people, and went into operation in May, 1843, at which time the old government formally surrendered all its powers. Under this government Dorr was tried for treason, and in June, 1844, was sentenced to imprisonment for life. In October, 1842, Luther brought an action in the Circuit Court of the United States, against Borden and others, to recover damages for the breaking and entering of his house in June, 1842. The defendants justified, alleging that there was an insurrection to overthrow the government, that martial law was declared, that plaintiff was aiding and abetting the insurrection, that defendants were enrolled in the militia force of the State and were ordered to arrest the plaintiff. The plaintiff relied upon the fact that the Dorr government, to which he adhered, was the legal government of the State, and, as the new Constitution had never been recognized by any department of the old government, he offered to prove at the trial, by the production of the original ballots, and the original registers of the persons voting, and by the testimony of the persons voting, and by the Constitution itself, and by the census of the United States for the year 1840, that the Dorr Constitution was ratified by a large majority of the male people of the State, of the age of twenty-one and upwards, and also by a majority of those who were entitled to vote for general officers under the then existing laws of the State. The Circuit Court rejected the evidence, and instructed the jury that the charter government, and laws under which the defendants acted, were, at the time the trespass was alleged to have been committed, in full force and effect, and constituted a justification of the acts of the defendants. The correctness of this ruling involved the only question, which was taken to the Supreme Court of the United States for review. The Supreme Court held that the evidence was properly rejected. Of the correctness of that decision no one can entertain the shadow of a doubt. But the differences between that case and this are so many and so evident, as to deprive it of all force as an authority in the present controversy. In that case an entire change in the form of government was undertaken; in this, simply an amendment, in no manner affecting the judicial authority of those acting under the existing government, is sought to be incorporated into the existing Constitution. In that case the charter provided no means for its amendment; in this, the mode of an amendment is specifically provided. In that case the authority of the court was invoked

for the admission of oral evidence to overthrow the existing government and establish a new one in its place; in this, that authority is invoked simply to preserve the existing Constitution intact.

It is evident, from an examination of the entire case of *Luther* v. *Borden*, that the question which the court was considering pertained to the power of the Federal courts to determine between rival constitutions in the States. The power is not denied to the State courts, unless one of the constitutions involved in the controversy be the one under which the court is organized. This is fully apparent from the whole opinion. Referring to the trial of Thomas W. Dorr for treason, in the Supreme Court of Rhode Island, the court say: "It is worthy of remark, however, when we are referring to the authority of State decisions, that the trial of Thomas W. Dorr took place after the Constitution of 1843 went into operation. The judges who decided that case held their authority under that Constitution; and it is admitted on all hands that it was adopted by the people of the State, and is the lawful and established government. It is the decision, therefore, of a State court, whose judicial authority to decide upon the Constitution and laws of Rhode Island is not questioned by either party to this controversy, although the government under which it acted was framed and adopted under the sanction and laws of the charter government. The point, then, raised here has already been decided by the courts of Rhode Island. The question relates altogether to the Constitution and laws of that State; and the well-settled rule in this court is, that the courts of the United States adopt and follow the decisions of the State courts in questions which concern merely the Constitution and laws of the State. Upon what ground could the Circuit Court of the United States, which tried this case, have departed from this rule, and disregarded and overruled the decisions of the courts of Rhode Island?" It seems from the foregoing quotation, which is really the fact, that the courts of Rhode Island had determined the question involved in *Luther* v. *Borden*, and that the courts of the United States were bound by and followed that adjudication.

The language of the court which, it is claimed, asserts the doctrine that the question of a change of constitutions is a political one, with which courts have nothing to do, was clearly employed with reference to the peculiar facts of the case. This is apparent from the following language of the opinion, which is found upon pages 39, 40. "Indeed, we do not see how the question could be tried and judicially decided in the State court. Judicial power presupposes an established government, capable of enacting laws and enforcing their execution, and of appointing judges to expound and administer them. The acceptance of the judicial office is a recognition of the authority of the government from which it is derived, and if the authority of that government is annulled and overthrown, the power of its courts and other officers is annulled with it, and if a State court should enter upon the inquiry proposed in this case, and should come to the conclusion that the

government under which it acted had been put aside and displaced by an opposing government, it would cease to be a court, and be incapable of pronouncing a judicial decision upon the question it undertook to try. If it decides at all as a court, it necessarily affirms the existence and the authority of the government under which it is exercising judicial power." That this reasoning is eminently sound no one can doubt. A court which, under the circumstances named, should enter upon an inquiry as to the existence of the Constitution under which it was acting, would be like a man trying to prove his personal existence, and would be obliged to assume the very point in dispute, before taking the first step in the argument. It is apparent that the reasoning employed in that case can have no application whatever to an amendment to a constitution, which does not affect the form of government, or the judicial powers of existing courts. The case of *Luther* v. *Borden* gives no countenance whatever to the doctrine that the sovereignty of the people extends rightfully to the overturning of constitutions and the adoption of new ones, without regard to the forms of existing provisions. It is true that right, under our form of government, exists, but it is a revolutionary and not a constitutional right. When that right is invoked, a question arises which is above the Constitution, and above the courts, and which contending factions can alone determine by appeal to the *dernier resort*. In such a case as that, might makes right. That there are questions of such a character as to admit of no adjustment but through an appeal to arms, we freely admit. This arises out of the imperfections of human government. A government which could provide for the peaceful adjustment of all questions would be more than human. But surely no sagacious statesman or wise jurist will seek, by a narrow construction of judicial power, to extend the questions which are beyond the domain of the courts, and capable of solution only by an appeal to arms. Happily for the permanency and security of our institutions, the present case, as we believe, involves no such question.

It has been said that changes in the Constitution may be introduced in disregard of its provisions; that, if the majority of the people desire a change, the majority must be respected, no matter how the change may be effected, and that the change, if revolution, is peaceful revolution. But the revolution is peaceful only upon the assumption that the party opposed surrenders its opposition and voluntarily acquiesces. If it objects to the change, then a question arises which can be determined only in one of two methods, by the arbitrament of the courts, or by the arbitrament of the sword. . . . The contest between the rival governments in the State of Rhode Island raised a question which was above the power of the existing courts: and it is a matter of history that it was not determined until the adherents of the Dorr Constitution fled at the point of the bayonet. We have read history to little purpose, if we refuse to learn from its examples or profit by its teachings. The public dangers which threatened the republic from the rival claims

for the Presidency, so graphically and so beautifully described by appellant's attorney, were averted only through a commission created by Congress, intrusted with judicial powers, which judicially determined the questions involved, and to whose decisions the people yielded voluntary obedience. That judicial decision averted the horrors of a civil war. The political department of the government, to which so much reference has been made in this case, stood appalled and impotent in the face of the great danger, and yet we are asked to abdicate our functions, to deny our jurisdiction, and to leave the question of an amendment to the Constitution, unless voluntarily acquiesced in, to be determined by a resort to arms. We ought to ponder long before we adopt a doctrine so fraught with danger to republican institutions. All the danger lies in the line of the argument of appellant's attorneys. The courts can never overturn our institutions or subvert our liberties. They command neither the purse nor the sword of the State. But a people which is educated to disrespect the decisions and disregard the adjudications of the courts, is prepared for anarchy, with all its attendant evils and dreadful consequences. We may, perhaps, be excused, if in the interest of social order and public security, and the permanency of republican institutions, we enter a most earnest protest against the heresies which have been advanced in this case.

The appellant further cites and relies upon *Williams* v. *Suffolk Insurance Company*, 13 Pet. 414. The only point determined in this is, that where the President, in a message to Congress, and in correspondence carried on with the government of Buenos Ayres, denied the jurisdiction of that country over the Falkland Islands, the courts must take the facts to be so.

The determining of the territorial jurisdiction of a foreign country, from the very nature of the subject, cannot reside in the courts of this country, but must be intrusted to the treaty-making power, which rests in the President by and with the advice and consent of the Senate. When, therefore, the President, in his official communications, has denied the jurisdiction of a foreign country over specified territory, it may well be conceded that it would not be within the jurisdiction of the courts to determine the fact to be otherwise. We are, however, unable to see that this case has any bearing upon the question now under consideration.

The case of *United States* v. *Baker et al.*, 5 Blatchford, 12, is also cited and relied upon by appellant. This is a *nisi prius* case. The defendants were indicted for piracy, and were tried in 1861. They were acting as privateers, under a commission from Jefferson Davis, President of the Confederate States, which they claimed was, at least, a government *de facto*, and entitled to the rights and privileges that belong to a sovereign and independent nation. Nelson, J., upon this branch of the case, charged the jury as follows: "The court do not deem it pertinent or material to enter into this wide field of inquiry.

This branch of the defence involves considerations that do not belong to the courts of the country. It involves the determination of great public and political questions, which belong to the departments of our government that have charge of our foreign relations — the legislative and executive departments. When those questions are decided by those departments, the courts follow the decisions, and, until those departments have recognized the existence of the new government, the courts of the nation cannot. Until this recognition of the new government, the courts are obliged to regard the ancient state of things as remaining unchanged." This case falls under the same principle as the preceding case.

The case of *White* v. *Hart*, 13 Wallace, 646, which is the only remaining case cited by the appellant upon this branch of the case, originated as follows: In January, 1866, the plaintiff instituted a suit in the Supreme Court of Chattooga County, Georgia, upon a promissory note. The defendant pleaded in abatement that the consideration of the note was a slave, and that, by the present Constitution of the State of Georgia, the court is prohibited to take and exercise jurisdiction or render judgment thereon. To this plea the plaintiff demurred. The court overruled the demurrer, and gave judgment for the defendants, thus enforcing the constitutional provision. The plaintiff excepted, and removed the case to the Supreme Court of the State, where the judgment was affirmed, and the plaintiff thereupon prosecuted a writ of error in the Supreme Court of the United States. The Constitution of Georgia of 1868 contains the following clause:

"Provided, that no court or officer shall have, nor shall the General Assembly give, jurisdiction to try, or give judgment on, or enforce any debt, the consideration of which was a slave or the hire thereof." The plaintiff insisted that this provision was in conflict with the Constitution of the United States, in that it impaired the obligation of contracts. The defendant sought to maintain the judgment in his favor, upon the ground, amongst others, that the Constitution of Georgia was adopted under the dictation and coercion of Congress, and is the act of Congress rather than of the State, and that, though a State cannot pass a law impairing the validity of contracts, Congress can, and that for this reason the inhibition in the Constitution of the United States has no effect in this case. In passing upon this question the court says: "Congress authorized the State to frame a new constitution, and she elected to proceed within the scope of the authority conferred. The result was submitted to Congress as a voluntary and valid offering, and was so received, and so recognized in the subsequent action of that body. The State is estopped to assail it upon such an assumption. Upon the same ground she might deny the validity of her ratification of the constitutional amendments. The action of Congress upon the subject cannot be inquired into. The case is clearly one in which the judicial is bound to follow the action of the political department of the government, and is concluded by it."

This case is a very peculiar one, from the fact that the defendant did not claim that the Constitution was not in force on account of its being adopted under coercion, but he claimed the benefit of its provisions *because* it was adopted under coercion. We most heartily approve the decision of the court in this case. The court might even have gone further, if the question had been in the case, and decided that, if a question had been raised in the courts of Georgia as to the validity of the Constitution, on the ground that its adoption had been coerced by Congress, the courts of that State could not entertain jurisdiction of the question. But even such a decision as that would not have been at all in conflict with our right to entertain jurisdiction in this case. These are all the authorities relied upon by appellant upon this branch of the case. We think it is apparent that they do not, even by implication, sustain the doctrine contended for, that the judicial department of the State cannot review the action of the General Assembly in the matter of the amendment of the Constitution of the State. Counsel have drawn an appalling picture of the wreck in which our political institutions would be involved, if the courts should conclude to decide that the Constitution of 1857, under which they are organized, had not been properly adopted. The courts of this State possess no such power, and they could not assume such a jurisdiction. The reason why a court could not enter upon the determination as to the validity of a constitution under which it is itself organized, is forcibly set forth in the case of *Luther* v. *Borden*, *supra*, upon which appellant relies. The distinction between such a case and one involving merely an amendment, not in any manner pertaining to the judicial authority, must at once be apparent to the legal mind. The authorities recognize the distinction. We are at a loss to know why appellant's counsel ignore and disregard it.

Appellant's counsel cite and rely upon section 2, Article 1, of the Constitution of the State. This section is a portion of the Bill of Rights, and is as follows: "All political power is inherent in the people. Government is instituted for the protection, security, and benefit of the people, and they have the right, at all times, to alter or reform the same, whenever the public good may require." Abstractly considered, there can be no doubt of the correctness of the propositions embraced in this section. These principles are older than constitutions, and older than governments. The people did not derive the rights referred to from the Constitution, and, in their nature, they are such that the people cannot surrender them. The people would have retained them if they had not been specifically recognized in the Constitution. But let us consider how these rights are to be recognized in an organized government. The people of this State have adopted a constitution which specifically designates the modes for its own amendment. But this section declares the people to have the right at all times to alter or reform the government, whenever the public good may require it. If the people unanimously agree respecting an alteration in

the government, there could be no trouble, for there would be no one to object. Suppose, however, a part of the people conclude that the public good requires an alteration or reformation in the government, and they set about the adoption of a new constitution, in a manner not authorized in the old one. Suppose, also, as would most likely prove to be the case, that a part of the people are content with the existing government, and will not consent to the change, and that the Governor, who, under the Constitution, is the "Commander-in-chief of the militia, the army and navy of the State," determines to maintain the existing government by force. It is evident that the *people* who think the public good requires a change, can establish these changes only by superior force. If they are powerful enough to succeed, well. They will have altered or reformed the government. But if they are not powerful enough to succeed, their attempt to overthrow the government is treason, and they are liable to punishment as traitors. They have the right to alter their government, in a manner not recognized in the Constitution, only when they can maintain that right by superior force. It follows, then, after all, that the much boasted right claimed under this action, is simply the right to alter the government in the manner prescribed in the existing Constitution, or the right of revolution, which is a right to be exercised, not under the Constitution, but in disregard and independently of it.

For a very valuable case upon this subject, see *Wells* v. *Bain*, 75 Pa. St. 39. . . . That eminent jurist and law-writer, Justice Cooley, in his work upon Constitutional Limitations. p. 598, says: "Although by their constitutions the people have delegated the exercise of sovereign powers to the several departments, they have not thereby divested themselves of the sovereignty. The government which they create they retain in their own hands a power to control, so far as they have thought needful, and the three departments are responsible to and subject to be ordered, directed, changed, or abolished by them. But this control and direction must be exercised in the legitimate mode previously agreed upon. The voice of the people can only be of legal force when expressed in the times and under the conditions which they themselves have prescribed and pointed out by the Constitution; and if any attempt should be made by any portion of the people, however large, to interfere with the regular workings of the agencies of government, at any other time, or in any other mode, than as allowed by existing law, either constitutional or statutory, it would be revolutionary in character, and must be resisted and repressed by the officers who for the time being represent legitimate government." The author cites *Gibson* v. *Mason*, 5 Nevada, 291, in which Chief Justice Lewis employs the following language: "The maxim which lies at the foundation of our government is that all political power originates with the people. But since the organization of government, it cannot be claimed that either the legislative, executive, or judicial powers, either wholly or in part, can be exercised by them. By the institution of government the people

surrender the exercise of all these sovereign functions of government to agents chosen by themselves, who, at least theoretically, represent the supreme will of their constituents."

On page 30, Judge Cooley further says: "In the original States, and all others subsequently admitted to the Union, the power to amend or revise their constitutions resides in the great body of the people as an organized body politic, who, being vested with ultimate sovereignty, and the source of all State authority, have power to control and alter the law which they have made at their will. But the people in the legal sense must be understood to be those who, by the existing Constitution, are clothed with political rights, and who, while that instrument remains, will be the sole organs through which the will of the body politic can be expressed. But the will of the people to this end can only be expressed in the legitimate modes by which such a body politic can act, and which must either be prescribed by the Constitution whose revision or amendment is sought, or by an Act of the legislative department of the State, which alone would be authorized to speak for the people upon this subject, and to point out a mode for the expression of their will, in the absence of any provision for amendment or revision contained in the Constitution itself." . . . In *Collier* v. *Frierson*, 24 Ala. 108, it appears that the legislature had proposed eight different amendments to be submitted to the people at the same time. The people had approved them, and all the requisite proceedings to make them a part of the Constitution had been had, except that in the subsequent legislature the resolution for their ratification had by mistake omitted to recite one of them. On the question whether this one had been adopted, the court say: "The Constitution can be amended in but two ways; either by the people who originally framed it, or in the mode prescribed in the instrument itself. If the last mode is pursued, the amendments must be proposed by two thirds of each House of the General Assembly; they must be published in print at least three months before the next general election for representatives; it must appear from the returns made to the Secretary of State that a majority of those voting for representatives have voted in favor of the proposed amendments, and they must be ratified by two thirds of each House of the next General Assembly, after such election, voting by yeas and nays, the proposed amendments having been read at each session three times on three several days in each House. We entertain no doubt that to change the Constitution in any other mode than by a convention, every requisition which is demanded by the instrument itself must be observed, and the omission of any one is fatal to the amendment. We scarcely deem any argument necessary to enforce this proposition. The Constitution is the supreme and paramount law. The mode by which amendments are to be made under it is clearly defined. It has been said that certain acts are to be done, certain requisites are to be observed, before a change can be effected. But to what purpose are those acts required or those requisitions enjoined, if the legislature, or any department of

the government, can dispense with them? To do so would be to violate the instrument which they are sworn to support; and every principle of public law and sound constitutional policy requires the court to pronounce against any amendment which is not shown to have been made in accordance with the rules prescribed by the fundamental law." In this case counsel distinctly made the point that, "when the legislature has declared an act done, which it alone has the power to do, it does not become the judiciary to gainsay it." The court repudiated this doctrine and asserted its jurisdiction in the following terse and unambiguous language: "Every principle of public law and sound constitutional policy requires the courts to pronounce against every amendment which is shown not to have been made in accordance with the rules prescribed by the fundamental law."

The case of *State* v. *McBride*, 4 Mo. 303, involved a question as to the proper adoption of an amendment to the Constitution of the State of Missouri. The counsel on behalf of the State contended almost in the language of appellant's counsel in this case, "that this amendment having been passed and promulgated by the Eighth General Assembly, as a part of the Constitution, this court is bound to receive and give it the effect of a constitutional provision; it being an act done by the General Assembly, not in their capacity of ordinary legislation, but the exercise of sovereign authority in a conventional capacity." The language of the court in passing upon this position of counsel is so applicable to, and so entirely decisive of, the question now under consideration, that we quote in full. The court says: "The Constitution of this State requires that each officer, whether civil or military, shall, before entering on the duties of his office, take an oath or affirmation to support the Constitution of the United States and of this State, and to demean himself faithfully in office. In pursuance of the duty imposed by this oath, it has become quite a common business of the courts to examine the Acts of the legislative body, to see whether any of them infringe the Constitution, and to declare that such Acts, or parts of Acts, as are repugnant to the Constitution, are not the law of the land, and are, therefore, of no force. No educated man at this day denies this right to the courts. On the contrary it is considered a base abandonment of duty for a judge to hesitate, when it becomes his duty to examine the acts of the more powerful branches of the government. If, then, the Constitution be the supreme law of the land, it becomes the duty of the judge to look into and understand well this first law of the land. The General Assembly, acting itself under a power granted by the convention, can only change the Constitution in the manner presented to it. Is, then, this court, each member of which is sworn to support the Constitution, that first law of the land, to be told that they are not to inquire what that Constitution is? We are told that this is a matter which the people have confided to two successive General Assemblies, and that their declaration of what is done is to be to us evidence that the thing is done, they being sworn, as well

as ourselves, to support the Constitution. Yet we look into the Acts of each General Assembly, and if we find any of its Acts violating the Constitution, we declare such Act null and void. The General Assembly, or two General Assemblies in succession, are but public servants, and it is disrespectful to them to say that their acts will not bear inspection. If, then, they will bear inspection, and if, as we believe, they have left behind them evidence of what they have done, why need we, whose duty it is to observe the Constitution as the supreme law of the land, hesitate respectfully to approach and examine those proofs, and see if indeed the Constitution of 1820 has been changed, or if by neglecting to pursue the course pointed out by the 12th section of the Constitution, they have failed to give to their acts the validity of constitutional acts. To tell us that the people have reserved to themselves the sole right of looking into the matter, is to tell us that we are sworn to support a constitution which we are not permitted to know." Those two cases contain the calm adjudications of respectable courts, in times when there was no popular excitement, and upon constitutional amendments not arousing popular interest. They are, therefore, entitled to the highest consideration, as they were entirely uninfluenced by popular clamor.

It is not at all material that in *State* v. *McBride*, *supra*, the court finally concluded that the amendment under consideration had been properly adopted. The court had to determine its power to decide, before it could decide in favor of the amendment. As was well said by one of appellant's attorneys upon the argument: "The power to decide, involves the power to decide either way." In the *State* v. *Swift*, 69 Ind. 505, the jurisdiction of the court was exercised, and an amendment to the Constitution of the State of Indiana was held not to have been properly adopted. In the opinion the court say: "The people of a State may form an original constitution, or abrogate an old one or form a new one, at any time, without any political restriction except the Constitution of the United States; but if they undertake to add an amendment, by the authority of legislation, to a constitution already in existence, they can do it only by the method pointed out by the constitution to which the amendment is to be added. The power to amend a constitution by legislative action does not confer the power to break it, any more than it confers the power to legislate on any other subject contrary to its prohibitions."

In *Westinghausen* v. *The People*, 44 Mich. 265, the Supreme Court of Michigan entertained jurisdiction of a question as to the adoption of an amendment to the Constitution of that State. The *Prohibitory Amendment Cases*, 24 Kans. 700, in so far as they assume jurisdiction over the question involved, are in harmony with all the cases upon the subject. In *State* v. *Timme*, 11 N. W. Rep. 785, the Supreme Court of Wisconsin assumed jurisdiction of a question involving the validity of an amendment to the Constitution of that State. The same thing was done in *Trustees University of North Carolina* v. *McIver*, 72 N. C. 76.

It is true that in the last five cases the question of jurisdiction was not raised by counsel. But the courts could not have entered upon an examination of the cases without first determining in favor of their jurisdiction. If they entertained doubts respecting their jurisdiction, it was the duty of the courts to raise the question themselves. We have then seven States, Alabama, Missouri, Kansas, Michigan, North Carolina, Wisconsin, and Indiana, in which the jurisdiction of the courts over the adoption of an amendment to a constitution has been recognized and asserted. In no decision, either State or Federal, has this jurisdiction been denied. We may securely rest our jurisdiction upon the authority of these cases. He would be a bold jurist, indeed, who would ride rough-shod over such an unbroken current of judicial authority, so fortified in principle, sustained by reason, and so necessary to the peaceful administration of the government. . . . Abidingly and firmly convinced of the correctness of our former conclusion, recognizing no superior higher than the Constitution, acknowledging no fealty greater than loyalty to its principles, and fearing no consequences except those which would flow from a dereliction in duty, we adhere to and reaffirm the doctrines already announced.

The petition for rehearing is overruled. . . .

[The dissenting opinion of BECK, J., is omitted.][1]

[1] Compare Const. Prohib. Amend. 24 Kans. 700; Jameson, Const. Conv. (4th ed.), §§ 561, 574 *e*, 574 *f*, and ch. viii. *passim*. As regards the proper evidence of the *factum* of a statute, the right to consult the legislative journals, and the finally authentic quality of the enrolment, see Y. B. H. VI., 17, 8 (1455); *King* v. *Countess Dowager of Arundel*, Hob. 110 (1616), and the carefully considered case of *Field* v. *Clark*, 143 U. S. 649, with a note, *Ib.* 661, referring to the cases in the several States. — ED.

CHAPTER III.

THE JURISDICTION OF THE UNITED STATES.

In *Livingston and Fulton* v. *Van Ingen, et al.* 9 Johns. 507, (1812), it was held that statutes of New York granting to the plaintiffs the exclusive right of navigating the waters of that State in vessels propelled by steam, were not in violation of the Constitution of the United States[1] and the same doctrine was afterwards held in *Gibbons* v. *Ogden*, 17 Johns. 488 (1820). This doctrine was overruled by the Supreme Court of the United States, on error, in *Gibbons* v. *Ogden*, 9 Wheat. 1 (1824), so far as concerned vessels licensed under the statutes of the United States for regulating the coasting trade, and navigating between New York and other States; and in *North River Steamb. Co.* v. *Livingston*, 3 Cow. 713 (1825), as regards vessels similarly licensed and navigating merely the waters of New York.

In *Livingston* v. *Van Ingen*, *ubi supra*, p. 573, KENT, C. J., said: "The legislative power, in a single, independent government, extends to every proper object of power, and is limited only by its own constitutional provisions, or by the fundamental principles of all government, and the unalienable rights of mankind. In the present case, the grant to the appellants took away no vested right. It interfered with no man's property. It left every citizen to enjoy all the rights of navigation, and all the use of the waters of this State which he before enjoyed. There was, then, no injustice, no violation of first principles, in a grant to the appellants, for a limited time, of the exclusive benefit of their own hazardous and expensive experiments. The first impression upon every unprejudiced mind would be, that there was justice and policy in the grant. Clearly, then, it is valid, unless the power to make it be taken away by the Constitution of the United States.

"We are not called upon to say affirmatively what powers have been granted to the general government, or to what extent. Those powers, whether express or implied, may be plenary and sovereign, in reference to the specified objects of them. They may even be liberally construed in furtherance of the great and essential ends of the government. To this doctrine I willingly accede. But the question here is, not what powers are granted to that government, but what powers are retained by this, and, particularly, whether the States have absolutely parted with their original power of granting such an exclusive privilege as the one now before us. It does not follow, that because a given

[1] In 1811, it had been held in the same case that the Circuit Court of the United States (1 Paine, 45) had no jurisdiction.— ED.

power is granted to Congress, the States cannot exercise a similar power. We ought to bear in mind certain great rules or principles of construction peculiar to the case of a confederated government, and by attending to them in the examination of the subject, all our seeming difficulties will vanish.

"When the people create a single, entire government, they grant at once all the rights of sovereignty. The powers granted are indefinite, and incapable of enumeration. Everything is granted that is not expressly reserved in the constitutional charter, or necessarily retained as inherent in the people. But when a Federal government is erected with only a portion of the sovereign power, the rule of construction is directly the reverse, and every power is reserved to the members that is not, either in express terms, or by necessary implication, taken away from them, and vested exclusively in the Federal head. This rule has not only been acknowledged by the most intelligent friends to the Constitution, but is plainly declared by the instrument itself. Congress have power to lay and collect taxes, duties, and excises, but as these powers are not given exclusively, the States have a concurrent jurisdiction, and retain the same absolute powers of taxation which they possessed before the adoption of the Constitution, except the power of laying an impost, which is expressly taken away. This very exception proves that, without it, the States would have retained the power of laying an impost; and it further implies, that in cases not excepted, the authority of the States remains unimpaired.

"This principle might be illustrated by other instances of grants of power to Congress with a prohibition to the States from exercising the like powers; but it becomes unnecessary to enlarge upon so plain a proposition, as it is removed beyond all doubt by the tenth article of the amendments to the Constitution. That article declares that 'the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.' The ratification of the Constitution by the convention of this State, was made with the explanation and understanding, that 'every power, jurisdiction, and right, which was not clearly delegated to the general government, remained to the people of the several States, or to their respective State governments.' There was a similar provision in the Articles of Confederation,[1] and the principle results from the very nature of the Federal Government, which consists only of a defined portion of the undefined mass of sovereign power originally vested in the several members of the Union. There may be inconveniences, but generally there will be no serious difficulty, and there cannot well be any interruption of the public peace, in the concurrent exercise of those powers. The powers of the two governments are each supreme within their respective constitutional spheres. They

[1] The Articles (Art. II.) read: "Each State retains . . . every power . . . which is not by this confederation expressly delegated." . . . The Tenth Amendment omits the word "expressly." — ED.

may each operate with full effect upon different subjects, or they may, as in the case of taxation, operate upon different parts of the same object. The powers of the two governments cannot indeed be supreme over each other, for that would involve a contradiction. When those powers, therefore, come directly in contact, as when they are aimed at each other, or at one indivisible object, the power of the State is subordinate, and must yield. The legitimate exercise of the constitutional powers of the general government becomes the supreme law of the land, and the national judiciary is specially charged with the maintenance of that law, and this is the true and efficient power to preserve order, dependence, and harmony in our complicated system of government. We have, then, nothing to do in the ordinary course of legislation, with the possible contingency of a collision, nor are we to embarrass ourselves in the anticipation of theoretical difficulties, than which nothing could, in general, be more fallacious. Such a doctrine would be constantly taxing our sagacity, to see whether the law might not contravene some future regulation of commerce, or some moneyed or some military operation of the United States. Our most simple municipal provisions would be enacted with diffidence, for fear we might involve ourselves, our citizens and our consciences, in some case of usurpation. Fortunately for the peace and happiness of this country, we have a plainer path to follow. We do not handle a work of such hazardous consequence. We are not always walking *per ignes suppositos cineri doloso*. Our safe rule of construction and of action is this, that if any given power was originally vested in this State, if it has not been exclusively ceded to Congress, or if the exercise of it has not been prohibited to the States, we may then go on in the exercise of the power until it comes practically in collision with the actual exercise of some congressional power. When that happens to be the case, the State authority will so far be controlled, but it will still be good in all those respects in which it does not absolutely contravene the provision of the paramount law." [1]

PREVIOUS to the formation of the new Constitution, we were divided into independent States, united for some purposes, but, in most respects, sovereign. These States could exercise almost every legislative power, and, among others, that of passing bankrupt laws. When the American people created a national legislature, with certain enumerated powers, it was neither necessary nor proper to define the powers retained by the States. These powers proceed, not from the people of America, but from the people of the several States; and remain, after the adoption of the Constitution, what they were before, except so far as they may be abridged by that instrument. In some instances, as in making treaties, we find an express prohibition; and this shows the sense of the convention to have been, that the mere grant of a power to Con-

[1] See 1 Kent Com. (12th ed.) 391, 432, *et seq.* — ED.

gress did not imply a prohibition on the States to exercise the same power. But it has never been supposed, that this concurrent power of legislation extended to every possible case in which its exercise by the States has not been expressly prohibited. The confusion resulting from such a practice would be endless. The principle laid down by the counsel for the plaintiff, in this respect, is undoubtedly correct. Whenever the terms in which a power is granted to Congress, or the nature of the power, require that it should be exercised exclusively by Congress the subject is as completely taken from the State legislatures, as if they had been expressly forbidden to act on it.

Is the power to establish uniform laws on the subject of bankruptcies, throughout the United States, of this description? . . . MARSHALL, C. J. (for the court), in *Sturges* v. *Crowninshield*, 4 Wheat. 192–193 (1819).

As preliminary to the very able discussions of the Constitution which we have heard from the Bar, and as having some influence on its construction, reference has been made to the political situation of these States, anterior to its formation. It has been said that they were sovereign, were completely independent, and were connected with each other only by a league. This is true. But, when these allied sovereigns converted their league into a government, when they converted their congress of ambassadors, deputed to deliberate on their common concerns, and to recommend measures of general utility, into a legislature, empowered to enact laws on the most interesting subjects, the whole character in which the States appear underwent a change, the extent of which must be determined by a fair consideration of the instrument by which that change was effected.

This instrument contains an enumeration of powers expressly granted by the people to their government. It has been said that these powers ought to be construed strictly. But why ought they to be so construed? Is there one sentence in the Constitution which gives countenance to this rule? In the last of the enumerated powers, that which grants, expressly, the means for carrying all others into execution, Congress is authorized "to make all laws which shall be necessary and proper" for the purpose. But this limitation on the means which may be used, is not extended to the powers which are conferred; nor is there one sentence in the Constitution, which has been pointed out by the gentlemen of the Bar, or which we have been able to discern, that prescribes this rule. We do not, therefore, think ourselves justified in adopting it. What do gentlemen mean by a strict construction? If they contend only against that enlarged construction which would extend words beyond their natural and obvious import, we might question the application of the term, but should not controvert the principle. If they contend for that narrow construction which, in support of some theory not to be found in the Constitution, would deny to the government those powers which the words of the grant, as usually understood, im-

port, and which are consistent with the general views and objects of the instrument; for that narrow construction, which would cripple the government, and render it unequal to the objects for which it is declared to be instituted, and to which the powers given, as fairly understood, render it competent; then we cannot perceive the propriety of this strict construction, nor adopt it as the rule by which the Constitution is to be expounded. As men whose intentions require no concealment, generally employ the words which most directly and aptly express the ideas they intend to convey, the enlightened patriots who framed our Constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said. If, from the imperfection of human language, there should be serious doubts respecting the extent of any given power, it is a well-settled rule that the objects for which it was given, especially when those objects are expressed in the instrument itself, should have great influence in the construction. We know of no reason for excluding this rule from the present case. The grant does not convey power which might be beneficial to the grantor, if retained by himself, or which can enure solely to the benefit of the grantee; but is an investment of power for the general advantage, in the hands of agents selected for that purpose; which power can never be exercised by the people themselves, but must be placed in the hands of agents, or lie dormant. We know of no rule for construing the extent of such powers, other than is given by the language of the instrument which confers them, taken in connection with the purposes for which they were conferred. . . .

If, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several States, is vested in Congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States. The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied, to secure them from its abuse. They are the restraints on which the people must often rely solely, in all representative governments. . . . MARSHALL, C. J. (for the court), in *Gibbons* v. *Ogden*, 9 Wheat. 187–189 (1824).[1]

[1] In 1789, the Constitution of the United States, having been adopted by the required number of States . . . went into operation, and became the law of the land. This system was founded upon an entirely different principle from that of the confederation. Instead of a league among sovereign States, it was a government formed by the people, and to the extent of the enumerated subjects, the jurisdiction of which was confided to and vested in the general government, acting directly upon the people. "We the people," are the authors and constituents; and "in order to form a more perfect union" was the declared purpose of the constitution of a general government.

It was a bold, wise, and successful attempt to place the people under two distinct

M'CULLOCH v. THE STATE OF MARYLAND ET AL.

SUPREME COURT OF THE UNITED STATES. 1819.

[4 *Wheat.* 316; 4 *Curtis's Decisions*, 415.][1]

ERROR to the Court of Appeals of the State of Maryland.

This was an action of debt, brought by the defendant in error, John James, who sued as well for himself as for the State of Maryland, in the County Court of Baltimore County, in the said State, against the plaintiff in error, M'Culloch, to recover certain penalties under the Act of the Legislature of Maryland, hereafter mentioned. Judgment being rendered against the plaintiff in error, upon the following statement of facts, agreed and submitted to the court by the parties, was affirmed by the Court of Appeals of the State of Maryland, the highest court of law of said State, and the cause was brought, by writ of error, to this court.

In April, 1816, the Bank of the United States was incorporated by an Act of Congress, and in 1817 a branch of this bank was established

governments, each sovereign and independent within its own sphere of action, and dividing the jurisdiction between them, not by territorial limits, and not by the relation of superior and subordinate, but classifying the subjects of government and designating those over which each has entire and independent jurisdiction. This object the Constitution of the United States proposed to accomplish by a specific enumeration of those subjects of general concern, in which all have a general interest, and to the defence and protection of which the undivided force of all the States could be brought promptly and directly to bear.

Some of these were our relations with foreign powers — war and peace, treaties, foreign commerce and commerce amongst the several States, with others specifically enumerated; leaving to the several States their full jurisdiction over rights of person and property, and, in fact, over all other subjects of legislation, not thus vested in the general government. All powers of government, therefore, legislative, executive and judicial, necessary to the full and entire administration of government over these enumerated subjects, and all powers necessarily incident thereto, are vested in the general government; and all other powers, expressly as well as by implication, are reserved to the States.

This brief and comprehensive view of the nature and character of the government of the United States, we think, is not inappropriate to this discussion, because it follows as a necessary consequence that, so far as the government of the United States has jurisdiction over any subject, and acts thereon within the scope of its authority, it must necessarily be paramount, and must render nugatory all legislation by any State, which is repugnant to and inconsistent with it. There may perhaps in some few cases be a concurrent jurisdiction, as in case of direct taxation of the same person and property; but until it shall practically extend to a case where there may be an actual interference, by seizing the same property at the same time, the exercise of the powers by the one is not, in its necessary effect, exclusive of the exercise of a like power by the other; but in such case they are not repugnant. That one must be so paramount, to prevent constant collision, is obvious; and, accordingly, the Constitution expressly provides that the Constitution and all laws and treaties, made in pursuance of its authority, shall be the supreme law of the land. — *Opinion of the Justices*, 14 Gray, 615–617. Compare WAITE, C. J. (for the court), in *U. S.* v. *Cruikshank et al.*, 92 U. S. 549–551.

[1] The statement of facts is shortened. — ED.

at Baltimore in Maryland. In 1818, the Legislature of Maryland passed an Act to tax "all banks or branches thereof in the State of Maryland, not chartered by the legislature," by requiring that notes issued by them should be upon stamped paper. M'Culloch, the cashier, had violated this Act, by issuing notes upon unstamped paper. The facts were agreed.

The question submitted to the court for their decision in this case, is as to the validity of the said Act of the General Assembly of Maryland, on the ground of its being repugnant to the Constitution of the United States, and the Act of Congress aforesaid, or to one of them. Upon the foregoing statement of facts, and the pleadings in this cause (all errors in which are hereby agreed to be mutually released), if the court should be of opinion that the plaintiffs are entitled to recover, then judgment, it is agreed, shall be entered for the plaintiffs, for twenty-five hundred dollars, and costs of suit. But if the court should be of opinion that the plaintiffs are not entitled to recover upon the statement and pleadings aforesaid, then judgment of *non pros* shall be entered, with costs, to the defendant.

It is agreed that either party may appeal from the decision of the County Court to the Court of Appeals, and from the decision of the Court of Appeals to the Supreme Court of the United States, according to the modes and usages of law, and have the same benefit of this statement of facts, in the same manner as could be had if a jury had been sworn and impanelled in this cause, and a special verdict had been found, or these facts had appeared and been stated in an exception taken to the opinion of the court, and the court's direction to the jury thereon. . . .

Webster and *Pinkney*, for the plaintiff in error.

Hopkinson, *Jones*, and *Martin*, for the defendant.

The *Attorney-General* was also heard for the plaintiff, by reason of the interest of the United States.

MARSHALL, C. J., delivered the opinion of the court.

In the case now to be determined, the defendant, a sovereign State, denies the obligation of a law enacted by the legislature of the Union; and the plaintiff, on his part, contests the validity of an Act which has been passed by the legislature of that State. The Constitution of our country, in its most interesting and vital parts, is to be considered; the conflicting powers of the government of the Union and of its members, as marked in that Constitution, are to be discussed; and an opinion given, which may essentially influence the great operations of the government. No tribunal can approach such a question without a deep sense of its importance, and of the awful responsibility involved in its decision. But it must be decided peacefully, or remain a source of hostile legislation, perhaps of hostility of a still more serious nature; and if it is to be so decided, by this tribunal alone can the decision be made. On the Supreme Court of the United States has the Constitution of our country devolved this important duty.

question made in the cause is, has Congress a right to incorporate a bank?

It has been truly said, that this can scarcely be considered as a question, entirely unprejudiced by the former proceedings of the nation respecting it. The principle now contested was introduced at a very early period of our history, has been recognized by many successive legislatures, and has been acted upon by the judicial department, in cases of peculiar delicacy, as a law of undoubted obligation.

It will not be denied, that a bold and daring usurpation might be resisted, after an acquiescence still longer and more complete than this. But it is conceived that a doubtful question, one on which human reason may pause, and the human judgment be suspended, in the decision of which the great principles of liberty are not concerned, but the respective powers of those who are equally the representatives of the people, are to be adjusted, if not put at rest by the practice of the government, ought to receive a considerable impression from that practice. An exposition of the Constitution, deliberately established by legislative Acts, on the faith of which an immense property has been advanced, ought not to be lightly disregarded.

The power now contested was exercised by the first Congress elected under the present Constitution. The bill for incorporating the Bank of the United States did not steal upon an unsuspecting legislature, and pass unobserved. Its principle was completely understood, and was opposed with equal zeal and ability. After being resisted, first in the fair and open field of debate, and afterwards in the executive cabinet, with as much persevering talent as any measure has ever experienced, and being supported by arguments which convinced minds as pure and as intelligent as this country can boast, it became a law. The original Act was permitted to expire; but a short experience of the embarrassments to which the refusal to revive it exposed the government, convinced those who were most prejudiced against the measure of its necessity, and induced the passage of the present law. It would require no ordinary share of intrepidity to assert, that a measure adopted under these circumstances, was a bold and plain usurpation, to which the Constitution gave no countenance.

These observations belong to the cause; but they are not made under the impression that, were the question entirely new, the law would be found irreconcilable with the Constitution.

In discussing this question, the counsel for the State of Maryland have deemed it of some importance, in the construction of the Constitution, to consider that instrument not as emanating from the people, but as the act of sovereign and independent States. The powers of the general government, it has been said, are delegated by the States, who alone are truly sovereign; and must be exercised in subordination to the States, who alone possess supreme dominion.

It would be difficult to sustain this proposition. The convention which framed the Constitution was, indeed, elected by the State legis-

t the instrument, when it came from their hands, was a sal, without obligation, or pretensions to it. It was reported e the then existing Congress of the United States, with a request that ight "be submitted to a convention of delegates, chosen in each te, by the people thereof, under the recommendation of its legisla- e, for their assent and ratification." This mode of proceeding was opted; and by the convention, by Congress, and by the State legis- tures, the instrument was submitted to the people. They acted upon it, in the only manner in which they can act safely, effectively, and wisely, on such a subject, by assembling in convention. It is true, they assembled in their several States; and where else should they have assembled? No political dreamer was ever wild enough to think of breaking down the lines which separate the States, and of compounding the American people into one common mass. Of consequence, when they act, they act in their States. But the measures they adopt do not, on that account, cease to be the measures of the people themselves, or become the measures of the State governments.

From these conventions the Constitution derives its whole authority. The government proceeds directly from the people; is "ordained and established" in the name of the people; and is declared to be ordained, "in order to form a more perfect union, establish justice, insure domestic tranquillity, and secure the blessings of liberty to themselves and to their posterity." The assent of the States, in their sovereign capacity, is implied in calling a convention, and thus submitting that instrument to the people. But the people were at perfect liberty to accept or reject it; and their act was final. It required not the affirmance, and could not be negatived, by the State governments. The Constitution, when thus adopted, was of complete obligation, and bound the State sovereignties.

It has been said, that the people had already surrendered all their powers to the State sovereignties, and had nothing more to give. But, surely, the question whether they may resume and modify the powers granted to government, does not remain to be settled in this country. Much more might the legitimacy of the general government be doubted, had it been granted by the States. The powers delegated to the State sovereignties were to be exercised by themselves, not by a distinct and independent sovereignty, created by themselves. To the formation of a league, such as was the Confederation, the State sovereignties were certainly competent. But when, "in order to form a more perfect union," it was deemed necessary to change this alliance into an effective government, possessing great and sovereign powers, and acting directly on the people, the necessity of referring it to the people, and of deriving its powers directly from them, was felt and acknowledged by all.

The government of the Union, then (whatever may be the influence of this fact on the case), is emphatically and truly a government of the people. In form and in substance it emanates from them, its powers

are granted by them, and are to be exercised directly on them, and for their benefit.

This government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the powers granted to it, would seem too apparent to have required to be enforced by all those arguments which its enlightened friends, while it was depending before the people, found it necessary to urge. That principle is now universally admitted. But the question respecting the extent of the powers actually granted, is perpetually arising, and will probably continue to arise, as long as our system shall exist.

In discussing these questions, the conflicting powers of the general and State governments must be brought into view, and the supremacy of their respective laws, when they are in opposition, must be settled.

If any one proposition could command the universal assent of mankind, we might expect it would be this: that the government of the Union, though limited in its powers, is supreme within its sphere of action. This would seem to result necessarily from its nature. It is the government of all; its powers are delegated by all; it represents all, and acts for all. Though any one State may be willing to control its operations, no State is willing to allow others to control them. The nation, on those subjects on which it can act, must necessarily bind its component parts. But this question is not left to mere reason: the people have, in express terms, decided it, by saying, "this Constitution, and the laws of the United States, which shall be made in pursuance thereof," "shall be the supreme law of the land," and by requiring that the members of the State legislatures, and the officers of the executive and judicial departments of the States, shall take the oath of fidelity to it.

The government of the United States, then, though limited in its powers, is supreme; and its laws, when made in pursuance of the Constitution, form the supreme law of the land, "anything in the Constitution or laws of any State, to the contrary notwithstanding."

Among the enumerated powers, we do not find that of establishing a bank or creating a corporation. But there is no phrase in the instrument which, like the Articles of Confederation, excludes incidental or implied powers; and which requires that everything granted shall be expressly and minutely described. Even the 10th Amendment, which was framed for the purpose of quieting the excessive jealousies which had been excited, omits the word "expressly," and declares only that the powers "not delegated to the United States, nor prohibited to the States, are reserved to the States or to the people;" thus leaving the question, whether the particular power which may become the subject of contest, has been delegated to the one government, or prohibited to the other, to depend on a fair construction of the whole instrument. The men who drew and adopted this amendment, had experienced the embarrassments resulting from the insertion of this word in the Articles of Confederation, and probably omitted it to

avoid those embarrassments. A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves. That this idea was entertained by the framers of the American Constitution, is not only to be inferred from the nature of the instrument, but from the language. Why else were some of the limitations, found in the 9th section of the 1st article, introduced? It is also, in some degree, warranted by their having omitted to use any restrictive term which might prevent its receiving a fair and just interpretation. In considering this question, then, we must never forget, that it is a constitution we are expounding.

Although, among the enumerated powers of government, we do not find the word "bank," or "incorporation," we find the great powers to lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct a war; and to raise and support armies and navies. The sword and the purse, all the external relations, and no inconsiderable portion of the industry of the nation, are intrusted to its government. It can never be pretended that these vast powers draw after them others of inferior importance, merely because they are inferior. Such an idea can never be advanced. But it may, with great reason, be contended, that a government, intrusted with such ample powers, on the due execution of which the happiness and prosperity of the nation so vitally depends, must also be intrusted with ample means for their execution. The power being given, it is the interest of the nation to facilitate its execution. It can never be their interest, and cannot be presumed to have been their intention, to clog and embarrass its execution by withholding the most appropriate means. Throughout this vast republic, from the St. Croix to the Gulf of Mexico, from the Atlantic to the Pacific, revenue is to be collected and expended, armies are to be marched and supported. The exigencies of the nation may require, that the treasure raised in the North should be transported to the South, that raised in the East conveyed to the West, or that this order should be reversed. Is that construction of the Constitution to be preferred which would render these operations difficult, hazardous, and expensive? Can we adopt that construction (unless the words imperiously require it) which would impute to the framers of that instrument, when granting these powers for the public good, the intention of impeding their exercise by withholding a choice of means? If, indeed, such be the mandate of the Constitution, we have only to obey; but that instrument does not profess to enumerate the means by which the powers it confers may be executed; nor does it prohibit the creation of a corporation, if the existence of such a being be essential to the beneficial exercise of

those powers. It is, then, the subject of fair inquiry, how far such means may be employed.

It is not denied, that the powers given to the government imply the ordinary means of execution. That, for example, of raising revenue, and applying it to national purposes, is admitted to imply the power of conveying money from place to place, as the exigencies of the nation may require, and of employing the usual means of conveyance. But it is denied that the government has its choice of means; or, that it may employ the most convenient means, if, to employ them, it be necessary to erect a corporation.

On what foundation does this argument rest? On this alone: The power of creating a corporation, is one appertaining to sovereignty, and is not expressly conferred on Congress. This is true. But all legislative powers appertain to sovereignty. The original power of giving the law on any subject whatever, is a sovereign power; and if the government of the Union is restrained from creating a corporation, as a means for performing its functions, on the single reason that the creation of a corporation is an act of sovereignty; if the sufficiency of this reason be acknowledged, there would be some difficulty in sustaining the authority of Congress to pass other laws for the accomplishment of the same objects.

The government which has a right to do an act, and has imposed on it the duty of performing that act, must, according to the dictates of reason, be allowed to select the means; and those who contend that it may not select any appropriate means, that one particular mode of effecting the object is excepted, take upon themselves the burden of establishing that exception.

The creation of a corporation, it is said, appertains to sovereignty. This is admitted. But to what portion of sovereignty does it appertain? Does it belong to one more than to another? In America, the powers of sovereignty are divided between the government of the Union, and those of the States. They are each sovereign, with respect to the objects committed to it, and neither sovereign with respect to the objects committed to the other. We cannot comprehend that train of reasoning which would maintain, that the extent of power granted by the people is to be ascertained, not by the nature and terms of the grant, but by its date. Some State constitutions were formed before, some since that of the United States. We cannot believe that their relation to each other is in any degree dependent upon this circumstance. Their respective powers must, we think, be precisely the same as if they had been formed at the same time. Had they been formed at the same time, and had the people conferred on the general government the power contained in the Constitution, and on the States the whole residuum of power, would it have been asserted that the government of the Union was not sovereign with respect to those objects which were intrusted to it, in relation to which its laws were declared to be supreme? If this could not have been asserted, we cannot well comprehend the

process of reasoning which maintains, that a power appertaining to sovereignty cannot be connected with that vast portion of it which is granted to the general government, so far as it is calculated to subserve the legitimate objects of that government. The power of creating a corporation, though appertaining to sovereignty, is not, like the power of making war, or levying taxes, or of regulating commerce, a great substantive and independent power, which cannot be implied as incidental to other powers, or used as a means of executing them. It is never the end for which other powers are exercised, but a means by which other objects are accomplished. No contributions are made to charity for the sake of an incorporation, but a corporation is created to administer the charity; no seminary of learning is instituted in order to be incorporated, but the corporate character is conferred to subserve the purposes of education. No city was ever built with the sole object of being incorporated, but is incorporated as affording the best means of being well governed. The power of creating a corporation is never used for its own sake, but for the purpose of effecting something else. No sufficient reason is, therefore, perceived, why it may not pass as incidental to those powers which are expressly given, if it be a direct mode of executing them.

But the Constitution of the United States has not left the right of Congress to employ the necessary means, for the execution of the powers conferred on the government, to general reasoning. To its enumeration of powers is added that of making "all laws which shall be necessary and proper, for carrying into execution the foregoing powers, and all other powers vested by this Constitution, in the government of the United States, or in any department thereof."

The counsel for the State of Maryland have urged various arguments, to prove that this clause, though in terms a grant of power, is not so in effect; but is really restrictive of the general right, which might otherwise be implied, of selecting means for executing the enumerated powers.

In support of this proposition, they have found it necessary to contend, that this clause was inserted for the purpose of conferring on Congress the power of making laws. That, without it, doubts might be entertained, whether Congress could exercise its powers in the form of legislation.

But could this be the object for which it was inserted? A government is created by the people, having legislative, executive, and judicial powers. Its legislative powers are vested in a Congress, which is to consist of a Senate and House of Representatives. Each House may determine the rule of its proceedings; and it is declared that every bill which shall have passed both Houses, shall, before it becomes a law, be presented to the President of the United States. The 7th section describes the course of proceedings, by which a bill shall become a law: and, then, the 8th section enumerates the powers of Congress. Could it be necessary to say, that a legislature should exercise legisla-

tive powers, in the shape of legislation? After allowing each House to prescribe its own course of proceeding, after describing the manner in which a bill should become a law, would it have entered into the mind of a single member of the convention, that an express power to make laws was necessary to enable the legislature to make them? That a legislature, endowed with legislative powers, can legislate, is a proposition too self-evident to have been questioned.

But the argument on which most reliance is placed, is drawn from the peculiar language of this clause. Congress is not empowered by it to make all laws, which may have relation to the powers conferred on the government, but such only as may be "necessary and proper" for carrying them into execution. The word "necessary" is considered as controlling the whole sentence, and as limiting the right to pass laws for the execution of the granted powers, to such as are indispensable, and without which the power would be nugatory. That it excludes the choice of means, and leaves to Congress, in each case, that only which is most direct and simple.

Is it true, that this is the sense in which the word "necessary" is always used? Does it always import an absolute physical necessity, so strong, that one thing, to which another may be termed necessary, cannot exist without that other? We think it does not. If reference be had to its use, in the common affairs of the world, or in approved authors, we find that it frequently imports no more than that one thing is convenient, or useful, or essential to another. To employ the means necessary to an end, is generally understood as employing any means calculated to produce the end, and not as being confined to those single means, without which the end would be entirely unattainable. Such is the character of human language, that no word conveys to the mind, in all situations, one single definite idea; and nothing is more common than to use words in a figurative sense. Almost all compositions contain words, which, taken in their rigorous sense, would convey a meaning different from that which is obviously intended. It is essential to just construction, that many words which import something excessive, should be understood in a more mitigated sense — in that sense which common usage justifies. The word "necessary" is of this description. It has not a fixed character peculiar to itself. It admits of all degrees of comparison; and is often connected with other words, which increase or diminish the impression the mind receives of the urgency it imports. A thing may be necessary, very necessary, absolutely or indispensably necessary. To no mind would the same idea be conveyed, by these several phrases. This comment on the word is well illustrated, by the passage cited at the Bar, from the 10th section of the 1st article of the Constitution. It is, we think, impossible to compare the sentence which prohibits a State from laying "imposts, or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws," with that which authorizes Congress "to make all laws which shall be necessary and proper for carrying into execution"

the powers of the general government, without feeling a conviction that the convention understood itself to change materially the meaning of the word "necessary" by prefixing the word "absolutely." This word, then, like others, is used in various senses; and, in its construction, the subject, the context, the intention of the person using them, are all to be taken into view.

Let this be done in the case under consideration. The subject is the execution of those great powers on which the welfare of a nation essentially depends. It must have been the intention of those who gave these powers, to insure, as far as human prudence could insure, their beneficial execution. This could not be done by confining the choice of means to such narrow limits as not to leave it in the power of Congress to adopt any which might be appropriate, and which were conducive to the end. This provision is made in a constitution intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs. To have prescribed the means by which government should, in all future time, execute its powers, would have been to change, entirely, the character of the instrument, and give it the properties of a legal code. It would have been an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur. To have declared that the best means shall not be used, but those alone without which the power given would be nugatory, would have been to deprive the legislature of the capacity to avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances. If we apply this principle of construction to any of the powers of the government, we shall find it so pernicious in its operation that we shall be compelled to discard it. The powers vested in Congress may certainly be carried into execution, without prescribing an oath of office. The power to exact this security for the faithful performance of duty, is not given, nor is it indispensably necessary. The different departments may be established; taxes may be imposed and collected; armies and navies may be raised and maintained; and money may be borrowed, without requiring an oath of office. It might be argued, with as much plausibility as other incidental powers have been assailed, that the convention was not unmindful of this subject. The oath which might be exacted — that of fidelity to the Constitution — is prescribed, and no other can be required. Yet, he would be charged with insanity who should contend, that the legislature might not superadd to the oath directed by the Constitution, such other oath of office as its wisdom might suggest.

So, with respect to the whole penal code of the United States. Whence arises the power to punish in cases not prescribed by the Constitution? All admit that the government may, legitimately, punish any violation of its laws; and yet, this is not among the enumerated powers of Congress. The right to enforce the observance of law, by punishing its infraction, might be denied with the more plausibility,

because it is expressly given in some cases. Congress is empowered "to provide for the punishment of counterfeiting the securities and current coin of the United States," and "to define and punish piracies and felonies committed on the high seas, and offences against the law of nations." The several powers of Congress may exist, in a very imperfect state to be sure, but they may exist and be carried into execution, although no punishment should be inflicted in cases where the right to punish is not expressly given.

Take, for example, the power "to establish post-offices and post-roads." This power is executed by the single act of making the establishment. But from this has been inferred the power and duty of carrying the mail along the post-road, from one post-office to another. And, from this implied power, has again been inferred the right to punish those who steal letters from the post-office, or rob the mail. It may be said, with some plausibility, that the right to carry the mail, and to punish those who rob it, is not indispensably necessary to the establishment of a post-office and post-road. This right is, indeed, essential to the beneficial exercise of the power, but not indispensably necessary to its existence. So, of the punishment of the crimes of stealing or falsifying a record or process of a court of the United States, or of perjury in such court. To punish these offences is certainly conducive to the due administration of justice. But courts may exist, and may decide the causes brought before them, though such crimes escape punishment.

The baneful influence of this narrow construction on all the operations of the government, and the absolute impracticability of maintaining it without rendering the government incompetent to its great objects, might be illustrated by numerous examples drawn from the Constitution, and from our laws. The good sense of the public has pronounced, without hesitation, that the power of punishment appertains to sovereignty, and may be exercised whenever the sovereign has a right to act, as incidental to his constitutional powers. It is a means for carrying into execution all sovereign powers, and may be used, although not indispensably necessary. It is a right incidental to the power, and conducive to its beneficial exercise.

If this limited construction of the word "necessary" must be abandoned in order to punish, whence is derived the rule which would reinstate it, when the government would carry its powers into execution by means not vindictive in their nature? If the word "necessary" means "needful," "requisite," "essential," "conducive to," in order to let in the power of punishment for the infraction of law, why is it not equally comprehensive when required to authorize the use of means which facilitate the execution of the powers of government without the infliction of punishment?

In ascertaining the sense in which the word "necessary" is used in this clause of the Constitution, we may derive some aid from that with which it is associated. Congress shall have power "to make all laws which shall be necessary and proper to carry into execution" the pow-

ers of the government. If the word "necessary" was used in that strict and rigorous sense for which the counsel for the State of Maryland contend, it would be an extraordinary departure from the usual course of the human mind, as exhibited in composition, to add a word, the only possible effect of which is to qualify that strict and rigorous meaning; to present to the mind the idea of some choice of means of legislation not straitened and compressed within the narrow limits for which gentlemen contend.

But the argument which most conclusively demonstrates the error of the construction contended for by the counsel for the State of Maryland, is founded on the intention of the convention, as manifested in the whole clause. To waste time and argument in proving that, without it, Congress might carry its powers into execution, would be not much less idle than to hold a lighted taper to the sun. As little can it be required to prove, that in the absence of this clause, Congress would have some choice of means. That it might employ those which, in its judgment, would most advantageously effect the object to be accomplished. That any means adapted to the end, any means which tended directly to the execution of the constitutional powers of the government, were in themselves constitutional. This clause, as construed by the State of Maryland, would abridge and almost annihilate this useful and necessary right of the legislature to select its means. That this could not be intended, is, we should think, had it not been already controverted, too apparent for controversy. We think so for the following reasons: —

1. The clause is placed among the powers of Congress, not among the limitations on those powers.

2. Its terms purport to enlarge, not to diminish the powers vested in the government. It purports to be an additional power, not a restriction on those already granted. No reason has been or can be assigned, for thus concealing an intention to narrow the discretion of the national legislature, under words which purport to enlarge it. The framers of the Constitution wished its adoption, and well knew that it would be endangered by its strength, not by its weakness. Had they been capable of using language which would convey to the eye one idea, and after deep reflection, impress on the mind another, they would rather have disguised the grant of power, than its limitation. If then, their intention had been, by this clause, to restrain the free use of means which might otherwise have been implied, that intention would have been inserted in another place, and would have been expressed in terms resembling these: "In carrying into execution the foregoing powers, and all others," &c., "no laws shall be passed but such as are necessary and proper." Had the intention been to make this clause restrictive, it would unquestionably have been so in form as well as in effect.

The result of the most careful and attentive consideration bestowed upon this clause is, that if it does not enlarge, it cannot be construed

to restrain the powers of Congress, or to impair the right of the legislature to exercise its best judgment in the selection of measures, to carry into execution the constitutional powers of the government. If no other motive for its insertion can be suggested, a sufficient one is found in the desire to remove all doubts respecting the right to legislate on that vast mass of incidental powers which must be involved in the Constitution, if that instrument be not a splendid bawble.

We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the Constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional.

That a corporation must be considered as a means not less usual, not of higher dignity, not more requiring a particular specification than other means, has been sufficiently proved. If we look to the origin of corporations, to the manner in which they have been framed in that government, from which we have derived most of our legal principles and ideas, or to the uses to which they have been applied, we find no reason to suppose that a constitution, omitting, and wisely omitting, to enumerate all the means for carrying into execution the great powers vested in government, ought to have specified this. Had it been intended to grant this power as one which should be distinct and independent, to be exercised in any case whatever, it would have found a place among the enumerated powers of the government. But being considered merely as a means, to be employed only for the purpose of carrying into execution the given powers, there could be no motive for particularly mentioning it.

The propriety of this remark would seem to be generally acknowledged by the universal acquiescence in the construction which has been uniformly put on the 3d section of the 4th article of the Constitution. The power to "make all needful rules and regulations respecting the territory or other property belonging to the United States," is not more comprehensive, than the power "to make all laws which shall be necessary and proper for carrying into execution" the powers of the government. Yet all admit the constitutionality of a territorial government, which is a corporate body.

If a corporation may be employed indiscriminately with other means to carry into execution the powers of the government, no particular reason can be assigned for excluding the use of a bank, if required for its fiscal operations. To use one, must be within the discretion of Congress, if it be an appropriate mode of executing the powers of government, that it is a convenient, a useful, and essential instrument in

the prosecution of its fiscal operations, is not now a subject of controversy. All those who have been concerned in the administration of our finances, have concurred in representing its importance and necessity; and so strongly have they been felt, that statesmen of the first class, whose previous opinions against it had been confirmed by every circumstance which can fix the human judgment, have yielded those opinions to the exigencies of the nation. Under the confederation, Congress justifying the measure by its necessity, transcended, perhaps, its powers to obtain the advantage of a bank; and our own legislation attests the universal conviction of the utility of this measure. The time has passed away when it can be necessary to enter into any discussion in order to prove the importance of this instrument, as a means to effect the legitimate objects of the government.

But were its necessity less apparent, none can deny its being an appropriate measure; and if it is, the degree of its necessity, as has been very justly observed, is to be discussed in another place. Should Congress, in the execution of its powers, adopt measures which are prohibited by the Constitution; or should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the government, it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an Act was not the law of the land. But where the law is not prohibited, and is really calculated to effect any of the objects intrusted to the government, to undertake here to inquire into the degree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground. This court disclaims all pretensions to such a power.

After this declaration, it can scarcely be necessary to say, that the existence of State banks can have no possible influence on the question. No trace is to be found in the Constitution of an intention to create a dependence of the government of the Union on those of the States, for the execution of the great powers assigned to it. Its means are adequate to its ends; and on those means alone was it expected to rely for the accomplishment of its ends. To impose on it the necessity of resorting to means which it cannot control, which another government may furnish or withhold, would render its course precarious, the result of its measures uncertain, and create a dependence on other governments, which might disappoint its most important designs, and is incompatible with the language of the Constitution. But were it otherwise, the choice of means implies a right to choose a national bank in preference to State banks, and Congress alone can make the election.

After the most deliberate consideration, it is the unanimous and decided opinion of this court, that the Act to incorporate the Bank of the United States is a law made in pursuance of the Constitution, and is a part of the supreme law of the land.

The branches, proceeding from the same stock, and being conducive to the complete accomplishment of the object, are equally constitutional. It

would have been unwise to locate them in the charter, and it would be unnecessarily inconvenient to employ the legislative power in making those subordinate arrangements. The great duties of the bank are prescribed; those duties require branches, and the bank itself may, we think, be safely trusted with the selection of places where those branches shall be fixed; reserving always to the government the right to require that a branch shall be located where it may be deemed necessary.

It being the opinion of the court that the act incorporating the bank is constitutional; and that the power of establishing a branch in the State of Maryland might be properly exercised by the bank itself, we proceed to inquire: —

2. Whether the State of Maryland may, without violating the Constitution, tax that branch? . . .

We are unanimously of opinion, that the law passed by the Legislature of Maryland, imposing a tax on the Bank of the United States, is unconstitutional and void. . . .

COHENS *v.* THE STATE OF VIRGINIA.

SUPREME COURT OF THE UNITED STATES. 1821.

[6 *Wheat.* 264; 5 *Curtis's Decisions*, 82.]

Barbour and *Smyth*, for defendant in error; *D. B. Ogden* and *Pinkney, contra.*

MARSHALL, C. J., delivered the opinion of the court.

This is a writ of error to a judgment rendered in the Court of Hustings, for the borough of Norfolk, on an information for selling lottery tickets, contrary to an Act of the Legislature of Virginia. In the State court, the defendant claimed the protection of an Act of Congress. A case was agreed between the parties, which states the Act of Assembly on which the prosecution was founded, and the Act of Congress on which the defendant relied, and concludes in these words: "If upon this case the court shall be of opinion that the Acts of Congress before mentioned were valid, and, on the true construction of those Acts, the lottery tickets sold by the defendants as aforesaid, might lawfully be sold within the State of Virginia, notwithstanding the Act or statute of the General Assembly of Virginia prohibiting such sale, then judgment to be entered for the defendants. And if the court should be of opinion that the statute or Act of the General Assembly of the State of Virginia, prohibiting such sale, is valid, notwithstanding the said Acts of Congress, then judgment to be entered that the defendants are guilty, and that the Commonwealth recover against them one hundred dollars and costs."

Judgment was rendered against the defendants; and the court in which it was rendered being the highest court of the State in which the cause was cognizable, the record has been brought into this court by writ of error.

The defendant in error moves to dismiss this writ, for want of jurisdiction.

In support of this motion, three points have been made, and argued with the ability which the importance of the question merits. These points are: —

1. That a State is a defendant.

2. That no writ of error lies from this court to a State court.

3. The third point has been presented in different forms by the gentlemen who have argued it. The counsel who opened the cause said that the want of jurisdiction was shown by the subject-matter of the case. The counsel who followed him said that jurisdiction was not given by the Judiciary Act. The court has bestowed all its attention on the arguments of both gentlemen, and supposes that their tendency is to show that this court has no jurisdiction of the case, or, in other words, has no right to review the judgment of the State court, because neither the Constitution nor any law of the United States has been violated by that judgment.

The questions presented to the court by the first two points made at the Bar are of great magnitude, and may be truly said vitally to affect the Union. They exclude the inquiry whether the Constitution and laws of the United States have been violated by the judgment which the plaintiffs in error seek to review; and maintain that, admitting such violation, it is not in the power of the government to apply a corrective. They maintain that the nation does not possess a department capable of restraining peaceably, and by authority of law, any attempts which may be made, by a part, against the legitimate powers of the whole; and that the government is reduced to the alternative of submitting to such attempts, or of resisting them by force. They maintain that the Constitution of the United States has provided no tribunal for the final construction of itself, or of the laws or treaties of the nation; but that this power may be exercised in the last resort by the courts of every State in the Union. That the Constitution, laws, and treaties, may receive as many constructions as there are States; and that this is not a mischief, or, if a mischief, is irremediable. These abstract propositions are to be determined; for he who demands decision without permitting inquiry, affirms that the decision he asks does not depend on inquiry.

If such be the Constitution, it is the duty of the court to bow with respectful submission to its provisions. If such be not the Constitution, it is equally the duty of this court to say so; and to perform that task which the American people have assigned to the judicial department.

1. The first question to be considered is, whether the jurisdiction of

this court is excluded by the character of the parties, one of them being a State, and the other a citizen of that State?

The second section of the third article of the Constitution defines the extent of the judicial power of the United States. Jurisdiction is given to the courts of the Union in two classes of cases. In the first, their jurisdiction depends on the character of the cause, whoever may be the parties. This class comprehends "all cases in law and equity arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority." This clause extends the jurisdiction of the court to all the cases described, without making in its terms any exception whatever, and without any regard to the condition of the party. If there be any exception, it is to be implied against the express words of the article.

In the second class, the jurisdiction depends entirely on the character of the parties. In this are comprehended "controversies between two or more States, between a State and citizens of another State," "and between a State and foreign States, citizens, or subjects." If these be the parties, it is entirely unimportant what may be the subject of controversy. Be it what it may, these parties have a constitutional right to come into the courts of the Union.

The counsel for the defendant in error have stated that the cases which arise under the Constitution must grow out of those provisions which are capable of self-execution; examples of which are to be found in the second section of the fourth article, and in the tenth section of the first article.

A case which arises under a law of the United States must, we are likewise told, be a right given by some Act which becomes necessary to execute the powers given in the Constitution, of which the law of naturalization is mentioned as an example.

The use intended to be made of this exposition of the first part of the section, defining the extent of the judicial power, is not clearly understood. If the intention be merely to distinguish cases arising under the Constitution, from those arising under a law, for the sake of precision in the application of this argument, these propositions will not be controverted. If it be to maintain that a case arising under the Constitution, or a law, must be one in which a party comes into court to demand something conferred on him by the Constitution or a law, we think the construction too narrow. A case in law or equity consists of the right of the one party, as well as of the other, and may truly be said to arise under the Constitution or a law of the United States, whenever its correct decision depends on the construction of either. Congress seems to have intended to give its own construction of this part of the Constitution, in the twenty-fifth section of the Judiciary Act; and we perceive no reason to depart from that construction.

The jurisdiction of the court, then, being extended by the letter of the Constitution to all cases arising under it, or under the laws of the United States, it follows that those who would withdraw any case of

this description from that jurisdiction, must sustain the exemption they claim on the spirit and true meaning of the Constitution, which spirit and true meaning must be so apparent as to overrule the words which its framers have employed.

The counsel for the defendant in error have undertaken to do this; and have laid down the general proposition, that a sovereign independent State is not suable, except by its own consent.

This general proposition will not be controverted. But its consent is not requisite in each particular case. It may be given in a general law. And if a State has surrendered any portion of its sovereignty, the question whether a liability to suit be a part of this portion, depends on the instrument by which the surrender is made. If upon a just construction of that instrument, it shall appear that the State has submitted to be sued, then it has parted with this sovereign right of judging in every case on the justice of its own pretensions, and has intrusted that power to a tribunal in whose impartiality it confides.

The American States, as well as the American people, have believed a close and firm Union to be essential to their liberty and to their happiness. They have been taught by experience, that this Union cannot exist without a government for the whole; and they have been taught by the same experience that this government would be a mere shadow, that must disappoint all their hopes, unless invested with large portions of that sovereignty which belongs to independent States. Under the influence of this opinion, and thus instructed by experience, the American people, in the conventions of their respective States, adopted the present Constitution.

If it could be doubted whether, from its nature, it were not supreme in all cases where it is empowered to act, that doubt would be removed by the declaration that "this Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."

This is the authoritative language of the American people; and, if gentlemen please, of the American States. It marks with lines too strong to be mistaken, the characteristic distinction between the government of the Union and those of the States. The general government, though limited as to its objects, is supreme with respect to those objects. This principle is a part of the Constitution; and if there be any who deny its necessity, none can deny its authority.

To this supreme government ample powers are confided; and if it were possible to doubt the great purposes for which they were so confided, the people of the United States have declared that they are given "in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty to themselves and their posterity."

With the ample powers confided to this supreme government, for these interesting purposes, are connected many express and important limitations on the sovereignty of the States, which are made for the same purposes. The powers of the Union on the great subjects of war, peace, and commerce, and on many others, are in themselves limitations of the sovereignty of the States; but in addition to these, the sovereignty of the States is surrendered in many instances where the surrender can only operate to the benefit of the people, and where, perhaps, no other power is conferred on Congress than a conservative power to maintain the principles established in the Constitution. The maintenance of these principles in their purity is certainly among the great duties of the government. One of the instruments by which this duty may be peaceably performed is the judicial department. It is authorized to decide all cases, of every description, arising under the Constitution or laws of the United States. From this general grant of jurisdiction, no exception is made of those cases in which a State may be a party. When we consider the situation of the government of the Union and of a State, in relation to each other; the nature of our Constitution, the subordination of the State governments to that Constitution; the great purpose for which jurisdiction over all cases arising under the Constitution and laws of the United States, is confided to the judicial department, are we at liberty to insert in this general grant, an exception of those cases in which a State may be a party? Will the spirit of the Constitution justify this attempt to control its words? We think it will not. We think a case arising under the Constitution or laws of the United States, is cognizable in the courts of the Union, whoever may be the parties to that case. . . .

We think, then, that as the Constitution originally stood, the appellate jurisdiction of this court, in all cases arising under the Constitution, laws, or treaties of the United States, was not arrested by the circumstance that a State was a party.

This leads to a consideration of the Eleventh Amendment.

It is in these words: "The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States, by citizens of another State, or by citizens or subjects of any foreign State."

It is a part of our history, that, at the adoption of the Constitution, all the States were greatly indebted; and the apprehension that these debts might be prosecuted in the Federal courts, formed a very serious objection to that instrument. Suits were instituted; and the court maintained its jurisdiction. The alarm was general; and, to quiet the apprehensions that were so extensively entertained, this amendment was proposed in Congress, and adopted by the State legislatures. That its motive was not to maintain the sovereignty of a State from the degradation supposed to attend a compulsory appearance before the tribunal of the nation, may be inferred from the terms of the amendment. It does not comprehend controversies between two or more States, or be-

tween a State and a foreign State. The jurisdiction of the court still extends to these cases; and in these a State may still be sued. We must ascribe the amendment, then, to some other cause than the dignity of a State. There is no difficulty in finding this cause. Those who were inhibited from commencing a suit against a State, or from prosecuting one which might be commenced before the adoption of the amendment, were persons who might probably be its creditors. There was not much reason to fear that foreign or sister States would be creditors to any considerable amount, and there was reason to retain the jurisdiction of the court in those cases, because it might be essential to the preservation of peace. The amendment, therefore, extended to suits commenced or prosecuted by individuals, but not to those brought by States.

The first impression made on the mind by this amendment is, that it was intended for those cases, and for those only, in which some demand against a State is made by an individual in the courts of the Union. If we consider the causes to which it is to be traced, we are conducted to the same conclusion. A general interest might well be felt in leaving to a State the full power of consulting its convenience in the adjustment of its debts, or of other claims upon it; but no interest could be felt in so changing the relations between the whole and its parts, as to strip the government of the means of protecting, by the instrumentality of its courts, the Constitution and laws from active violation. . . . Where, then, a State obtains a judgment against an individual, and the court rendering such judgment overrules a defence set up under the Constitution or laws of the United States, the transfer of this record into the Supreme Court for the sole purpose of inquiring whether the judgment violates the Constitution of the United States, can, with no propriety, we think, be denominated a suit commenced or prosecuted against the State whose judgment is so far re-examined. Nothing is demanded from the State. No claim against it of any description is asserted or prosecuted. The party is not to be restored to the possession of anything. . . . He only asserts the constitutional right to have his defence examined by that tribunal whose province it is to construe the Constitution and laws of the Union. . . . The point of view in which this writ of error, with its citation, has been considered uniformly in the courts of the Union, has been well illustrated by a reference to the course of this court in suits instituted by the United States. The universally received opinion is that no suit can be commenced or prosecuted against the United States; that the Judiciary Act does not authorize such suits. Yet writs of error, accompanied with citations, have uniformly issued for the removal of judgments in favor of the United States into a superior court. . . . It has never been suggested that such writ of error was a suit against the United States, and, therefore, not within the jurisdiction of the appellate court. . . .

2. The second objection to the jurisdiction of the court is, that its appellate power cannot be exercised, in any case, over the judgment of a State court.

This objection is sustained chiefly by arguments drawn from the supposed total separation of the judiciary of a State from that of the Union, and their entire independence of each other. The argument considers the Federal judiciary as completely foreign to that of a State; and as being no more connected with it, in any respect whatever, than the court of a foreign State. If this hypothesis be just, the argument founded on it is equally so; but if the hypothesis be not supported by the Constitution, the argument fails with it.

This hypothesis is not founded on any words in the Constitution, which might seem to countenance it, but on the unreasonableness of giving a contrary construction to words which seem to require it; and on the incompatibility of the application of the appellate jurisdiction to the judgments of State courts, with that constitutional relation which subsists between the government of the Union and the governments of those States which compose it.

Let this unreasonableness, this total incompatibility, be examined.

That the United States form, for many, and for most important purposes, a single nation, has not yet been denied. In war, we are one people. In making peace, we are one people. In all commercial regulations, we are one and the same people. In many other respects, the American people are one; and the government which is alone capable of controlling and managing their interests, in all these respects, is the government of the Union. It is their government, and in that character they have no other. America has chosen to be, in many respects, and to many purposes, a nation; and for all these purposes her government is complete; to all these objects, it is competent. The people have declared, that in the exercise of all powers given for these objects, it is supreme. It can, then, in effecting these objects, legitimately control all individuals or governments within the American territory. The Constitution and laws of a State, so far as they are repugnant to the Constitution and laws of the United States, are absolutely void. These States are constituent parts of the United States. They are members of one great empire, — for some purposes sovereign, for some purposes subordinate.

In a government so constituted, is it unreasonable that the judicial power should be competent to give efficacy to the constitutional laws of the legislature? That department can decide on the validity of the Constitution or law of a State, if it be repugnant to the Constitution or to a law of the United States. Is it unreasonable that it should also be empowered to decide on the judgment of a State tribunal enforcing such unconstitutional law? Is it so very unreasonable as to furnish a justification for controlling the words of the Constitution?

We think it is not. We think that in a government acknowledgedly supreme, with respect to objects of vital interest to the nation, there is nothing inconsistent with sound reason, nothing incompatible with the nature of government, in making all its departments supreme, so far as respects those objects, and so far as is necessary to their attainment.

The exercise of the appellate power over those judgments of the State tribunals which may contravene the Constitution or laws of the United States, is, we believe, essential to the attainment of those objects.

The propriety of intrusting the construction of the Constitution, and laws made in pursuance thereof, to the judiciary of the Union, has not, we believe, as yet, been drawn into question. It seems to be a corollary from this political axiom, that the Federal courts should either possess exclusive jurisdiction in such cases, or a power to revise the judgment rendered in them by the State tribunals. If the Federal and State courts have concurrent jurisdiction in all cases arising under the Constitution, laws, and treaties of the United States; and if a case of this description brought in a State court cannot be removed before judgment, nor revised after judgment, then the construction of the Constitution, laws, and treaties of the United States is not confided particularly to their judicial department, but is confided equally to that department and to the State courts, however they may be constituted. "Thirteen independent courts," says a very celebrated statesman (and we have now more than twenty such courts), "of final jurisdiction over the same causes, arising upon the same laws, is a hydra in government, from which nothing but contradiction and confusion can proceed."

Dismissing the unpleasant suggestion, that any motives which may not be fairly avowed, or which ought not to exist, can ever influence a State or its courts, the necessity of uniformity, as well as correctness in expounding the Constitution and laws of the United States, would itself suggest the propriety of vesting in some single tribunal the power of deciding, in the last resort, all cases in which they are involved.

We are not restrained, then, by the political relations between the general and State governments, from construing the words of the Constitution, defining the judicial power, in their true sense. We are not bound to construe them more restrictively than they naturally import.

They give to the Supreme Court appellate jurisdiction in all cases arising under the Constitution, laws, and treaties of the United States. The words are broad enough to comprehend all cases of this description, in whatever court they may be decided. . . . *Motion denied.*

The cause was thereupon argued on the merits. *D. B. Ogden*, for the plaintiffs in error. *Webster contra.* The *Attorney-General*, for the plaintiffs in error, in reply. [The judgment below was affirmed.]

HANS v. LOUISIANA.

SUPREME COURT OF THE UNITED STATES. 1889.

[134 *U. S.* 1.]

THIS was an action brought in the Circuit Court of the United States, in December, 1884, against the State of Louisiana by Hans, a citizen of that State, to recover the amount of certain coupons annexed to bonds of the State, issued under the provisions of an Act of the Legislature approved January 24, 1874. . . .

A citation being issued, directed to the State, and served upon the Governor thereof, the Attorney-General of the State filed an exception, of which the following is a copy, to wit:

"Now comes defendant, by the Attorney-General, and excepts to plaintiff's suit on the ground that this court is without jurisdiction *ratione personæ*. Plaintiff cannot sue the State without its permission; the Constitution and laws do not give this honorable court jurisdiction of a suit against the State, and its jurisdiction is respectfully declined.

"Wherefore, respondent prays to be hence dismissed, with costs and for general relief."

By the judgment of the court this exception was sustained, and the suit was dismissed. See *Hans* v. *Louisiana*, 24 Fed. Rep. 55. To this judgment the present writ of error was brought.

Mr. J. D. Rouse (*Mr. William Grant* was also on the brief) for plaintiff in error.

Mr. Walter H. Rogers, Attorney-General of the State of Louisiana, *Mr. M. J. Cunningham*, *Mr. B. J. Sage*, and *Mr. Alexander Porter Morse*, for defendant in error, submitted on their briefs.

MR. JUSTICE BRADLEY, after stating the case as above, delivered the opinion of the court.

The question is presented, whether a State can be sued in a Circuit Court of the United States by one of its own citizens upon a suggestion that the case is one that arises under the Constitution or laws of the United States.

The ground taken is, that under the Constitution, as well as under the Act of Congress passed to carry it into effect, a case is within the jurisdiction of the Federal courts, without regard to the character of the parties, if it arises under the Constitution or laws of the United States, or, which is the same thing, if it necessarily involves a question under said Constitution or laws. The language relied on is that clause of the 3d article of the Constitution, which declares that "the judicial power of the United States shall extend to all cases in law and equity arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;" and the corresponding clause of the Act conferring jurisdiction upon

the Circuit Court, which, as found in the Act of March 3, 1875, 18 Stat. 470, c. 137, § 1, is as follows, to wit: "That the Circuit Courts of the United States shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity, . . . arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority." It is said that these jurisdictional clauses make no exception arising from the character of the parties, and, therefore, that a State can claim no exemption from suit, if the case is really one arising under the Constitution, laws, or treaties of the United States. It is conceded that where the jurisdiction depends alone upon the character of the parties, a controversy between a State and its own citizens is not embraced within it; but it is contended that though jurisdiction does not exist on that ground, it nevertheless does exist if the case itself is one which necessarily involves a Federal question; and with regard to ordinary parties this is undoubtedly true. The question now to be decided is, whether it is true where one of the parties is a State, and is sued as a defendant by one of its own citizens.

That a State cannot be sued by a citizen of another State, or of a foreign State, on the mere ground that the case is one arising under the Constitution or laws of the United States, is clearly established by the decisions of this court in several recent cases. *Louisiana* v. *Jumel*, 107 U. S. 711; *Hagood* v. *Southern*, 117 U. S. 52; *In re Ayers*, 123 U. S. 443. Those were cases arising under the Constitution of the United States, upon laws complained of as impairing the obligation of contracts, one of which was the constitutional amendment of Louisiana complained of in the present case. Relief was sought against State officers who professed to act in obedience to those laws. This court held that the suits were virtually against the States themselves and were consequently violative of the Eleventh Amendment of the Constitution, and could not be maintained. It was not denied that they presented cases arising under the Constitution; but, notwithstanding that, they were held to be prohibited by the amendment referred to.

In the present case the plaintiff in error contends that he, being a citizen of Louisiana, is not embarrassed by the obstacle of the Eleventh Amendment, inasmuch as that amendment only prohibits suits against a State which are brought by the citizens of another State, or by citizens or subjects of a foreign State. It is true, the amendment does so read: and if there were no other reason or ground for abating his suit, it might be maintainable; and then we should have this anomalous result, that in cases arising under the Constitution or laws of the United States, a State may be sued in the Federal courts by its own citizens, though it cannot be sued for a like cause of action by the citizens of other States, or of a foreign State; and may be thus sued in the Federal courts, although not allowing itself to be sued in its

own courts. If this is the necessary consequence of the language of the Constitution and the law, the result is no less startling and unexpected than was the original decision of this court, that under the language of the Constitution and of the Judiciary Act of 1789, a State was liable to be sued by a citizen of another State, or of a foreign country. That decision was made in the case of *Chisholm* v. *Georgia*, 2 Dall. 419, and created such a shock of surprise throughout the country that, at the first meeting of Congress thereafter, the Eleventh Amendment to the Constitution was almost unanimously proposed, and was in due course adopted by the legislatures of the States. This amendment, expressing the will of the ultimate sovereignty of the whole country, superior to all legislatures and all courts, actually reversed the decision of the Supreme Court. It did not in terms prohibit suits by individuals against the States, but declared that the Constitution should not be construed to import any power to authorize the bringing of such suits. The language of the amendment is that "the judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State or by citizens or subjects of any foreign State." The Supreme Court had construed the judicial power as extending to such a suit, and its decision was thus overruled. The court itself so understood the effect of the amendment, for, after its adoption, Attorney-General Lee, in the case of *Hollingsworth* v. *Virginia*, 3 Dall. 378, submitted this question to the court, "whether the amendment did, or did not, supersede all suits depending, as well as prevent the institution of new suits, against any one of the United States, by citizens of another State?" *Tilghman* and *Rawle* argued in the negative, contending that the jurisdiction of the court was unimpaired in relation to all suits instituted previously to the adoption of the amendment. But, on the succeeding day, the court delivered a unanimous opinion, "that the amendment being constitutionally adopted, there could not be exercised any jurisdiction, in any case, past or future, in which a State was sued by the citizens of another State, or by citizens or subjects of any foreign State."

This view of the force and meaning of the amendment is important. It shows that, on this question of the suability of the States by individuals, the highest authority of this country was in accord rather with the minority than with the majority of the court in the decision of the case of *Chisholm* v. *Georgia;* and this fact lends additional interest to the able opinion of Mr. Justice Iredell on that occasion. The other justices were more swayed by a close observance of the letter of the Constitution, without regard to former experience and usage; and because the letter said that the judicial power shall extend to controversies "between a State and citizens of another State;" and "between a State and foreign States, citizens, or subjects," they felt constrained to see in this language a power to enable the individual citizens of one State, or of a foreign State, to sue another State of the Union in the

Federal courts. Justice Iredell, on the contrary, contended that it was not the intention to create new and unheard of remedies, by subjecting sovereign States to actions at the suit of individuals (which he conclusively showed was never done before), but only, by proper legislation, to invest the Federal courts with jurisdiction to hear and determine controversies and cases, between the parties designated, that were properly susceptible of litigation in courts.

Looking back from our present standpoint at the decision in *Chisholm* v. *Georgia*, we do not greatly wonder at the effect which it had upon the country. Any such power as that of authorizing the Federal judiciary to entertain suits by individuals against the States had been expressly disclaimed, and even resented, by the great defenders of the Constitution whilst it was on its trial before the American people. As some of their utterances are directly pertinent to the question now under consideration, we deem it proper to quote them.

The eighty-first number of the Federalist, written by Hamilton, has the following profound remarks:

"It has been suggested that an assignment of the public securities of one State to the citizens of another, would enable them to prosecute that State in the Federal courts for the amount of those securities; a suggestion which the following considerations prove to be without foundation:

"It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent. This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union. Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the States, and the danger intimated must be merely ideal. The circumstances which are necessary to produce an alienation of State sovereignty were discussed in considering the article of taxation, and need not be repeated here. A recurrence to the principles there established will satisfy us, that there is no color to pretend that the State governments would, by the adoption of that plan, be divested of the privilege of paying their own debts in their own way, free from every constraint but that which flows from the obligations of good faith. The contracts between a nation and individuals are only binding on the conscience of the sovereign, and have no pretension to a compulsive force. They confer no right of action independent of the sovereign will. To what purpose would it be to authorize suits against States for the debts they owe? How could recoveries be enforced? It is evident that it could not be done without waging war against the contracting State; and to ascribe to the Federal courts by mere implication, and in destruction of a pre-existing right of the State governments, a power which would involve such a consequence, would be altogether forced and unwarrantable."

The obnoxious clause to which Hamilton's argument was directed,

and which was the ground of the objections which he so forcibly met, was that which declared that "the judicial power shall extend to all . . . controversies between a State and citizens of another State, . . . and between a State and foreign States, citizens, or subjects." It was argued by the opponents of the Constitution that this clause would authorize jurisdiction to be given to the Federal courts to entertain suits against a State, brought by the citizens of another State, or of a foreign State. Adhering to the mere letter, it might be so; and so, in fact, the Supreme Court held in *Chisholm* v. *Georgia;* but looking at the subject as Hamilton did, and as Mr. Justice Iredell did, in the light of history and experience and the established order of things, the views of the latter were clearly right, — as the people of the United States in their sovereign capacity subsequently decided.

But Hamilton was not alone in protesting against the construction put upon the Constitution by its opponents. In the Virginia Convention the same objections were raised by George Mason and Patrick Henry, and were met by Madison and Marshall as follows. Madison said: "Its jurisdiction [the Federal jurisdiction] in controversies between a State and citizens of another State is much objected to, and perhaps without reason. It is not in the power of individuals to call any State into court. The only operation it can have is that, if a State should wish to bring a suit against a citizen, it must be brought before the Federal Court. This will give satisfaction to individuals, as it will prevent citizens on whom a State may have a claim being dissatisfied with the State courts. . . . It appears to me that this [clause] can have no operation but this — to give a citizen a right to be heard in the Federal courts; and if a State should condescend to be a party, this court may take cognizance of it." 3 Elliott's Debates, 2d ed. 533. Marshall, in answer to the same objection, said: "With respect to disputes between a State and the citizens of another State, its jurisdiction has been decried with unusual vehemence. I hope that no gentleman will think that a State will be called at the Bar of the Federal court. . . . It is not rational to suppose that the sovereign power should be dragged before a court. The intent is to enable States to recover claims of individuals residing in other States. . . . But, say they, there will be partiality in it if a State cannot be defendant — if an individual cannot proceed to obtain judgment against a State, though he may be sued by a State. It is necessary to be so, and cannot be avoided. I see a difficulty in making a State defendant which does not prevent its being plaintiff." *Ib.* 555.

It seems to us that these views of those great advocates and defenders of the Constitution were most sensible and just; and they apply equally to the present case as to that then under discussion. The letter is appealed to now, as it was then, as a ground for sustaining a suit brought by an individual against a State. The reason against it is as strong in this case as it was in that. It is an attempt to strain the Constitution and the law to a construction never imagined or

dreamed of. Can we suppose that, when the Eleventh Amendment was adopted, it was understood to be left open for citizens of a State to sue their own State in the Federal courts, whilst the idea of suits by citizens of other States, or of foreign States, was indignantly repelled? Suppose that Congress, when proposing the Eleventh Amendment, had appended to it a proviso that nothing therein contained should prevent a State from being sued by its own citizens in cases arising under the Constitution or laws of the United States: can we imagine that it would have been adopted by the States? The supposition that it would is almost an absurdity on its face.

The truth is, that the cognizance of suits and actions unknown to the law, and forbidden by the law, was not contemplated by the Constitution when establishing the judicial power of the United States. Some things, undoubtedly, were made justiciable which were not known as such at the common law; such, for example, as controversies between States as to boundary lines, and other questions admitting of judicial solution. And yet the case of *Penn* v. *Lord Baltimore*, 1 Ves. Sen. 444, shows that some of these unusual subjects of litigation were not unknown to the courts even in colonial times; and several cases of the same general character arose under the Articles of Confederation, and were brought before the tribunal provided for that purpose in those articles. 131 U. S. App. 1. The establishment of this new branch of jurisdiction seemed to be necessary from the extinguishment of diplomatic relations between the States. Of other controversies between a State and another State or its citizens, which, on the settled principles of public law, are not subjects of judicial cognizance, this court has often declined to take jurisdiction. See *Wisconsin* v. *Pelican Ins. Co.*, 127 U. S. 265, 288, 289, and cases there cited.

The suability of a State without its consent was a thing unknown to the law. This has been so often laid down and acknowledged by courts and jurists that it is hardly necessary to be formally asserted. It was fully shown by an exhaustive examination of the old law by Mr. Justice Iredell in his opinion in *Chisholm* v. *Georgia*; and it has been conceded in every case since, where the question has, in any way, been presented, even in the cases which have gone farthest in sustaining suits against the officers or agents of States. *Osborn* v. *Bank of United States*, 9 Wheat. 738; *Davis* v. *Gray*, 16 Wall. 203; *Board of Liquidation* v. *McComb*, 92 U. S. 531; *United States* v. *Lee*, 106 U. S. 196; *Poindexter* v. *Greenhow*, 109 U. S. 63; *Virginia Coupon Cases*, 114 U. S. 269. In all these cases the effort was to show, and the court held, that the suits were not against the State or the United States, but against the individuals; conceding that if they had been against either the State or the United States, they could not be maintained.

Mr. Webster stated the law with precision in his letter to Baring Brothers & Co., of October 16, 1839. Works, vol. vi., 537, 539.

"The security for State loans," he said, "is the plighted faith of the State as a political community. It rests on the same basis as other contracts with established governments, the same basis, for example, as loans made by the United States under the authority of Congress; that is to say, the good faith of the government making the loan, and its ability to fulfil its engagements."

In *Briscoe* v. *Bank of Kentucky*, 11 Pet. 257, 321, Mr. Justice McLean, delivering the opinion of the court, said: "What means of enforcing payment from the State had the holder of a bill of credit? It is said by the counsel for the plaintiffs, that he could have sued the State. But was a State liable to be sued? . . . No sovereign State is liable to be sued without her consent. Under the Articles of Confederation, a State could be sued only in cases of boundary. It is believed that there is no case where a suit has been brought, at any time, on bills of credit against a State; and it is certain that no suit could have been maintained on this ground prior to the Constitution."

"It may be accepted as a point of departure unquestioned," said Mr. Justice Miller, in *Cunningham* v. *Macon & Brunswick Railroad*, 109 U. S. 446, 451, "that neither a State nor the United States can be sued as defendant in any court in this country without their consent, except in the limited class of cases in which a State may be made a party in the Supreme Court of the United States by virtue of the original jurisdiction conferred on this court by the Constitution."

Undoubtedly a State may be sued by its own consent, as was the case in *Curran* v. *Arkansas, et al.*, 15 How. 304, 309, and in *Clark* v. *Barnard*, 108 U. S. 436, 447. The suit in the former case was prosecuted by virtue of a State law which the legislature passed in conformity to the Constitution of that State. But this court decided, in *Beers et al.* v. *Arkansas*, 20 How. 527, 529, that the State could repeal that law at any time; that it was not a contract within the terms of the Constitution prohibiting the passage of State laws impairing the obligation of a contract. In that case the law allowing the State to be sued was modified, pending certain suits against the State on its bonds, so as to require the bonds to be filed in court, which was objected to as an unconstitutional change of the law. Chief Justice Taney, delivering the opinion of the court, said: "It is an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts, or in any other, without its consent and permission; but it may, if it thinks proper, waive this privilege and permit itself to be made a defendant in a suit by individuals or by another State. And as this permission is altogether voluntary on the part of the sovereignty, it follows that it may prescribe the terms and conditions on which it consents to be sued, and the manner in which the suit shall be conducted, and may withdraw its consent whenever it may suppose that justice to the public requires it. . . . The prior law was not a contract. It was an ordinary Act of legislation, prescribing the conditions upon which the State

consented to waive the privilege of sovereignty. It contained no stipulation that these regulations should not be modified afterwards if, upon experience, it was found that further provisions were necessary to protect the public interest; and no such contract can be implied from the law, nor can this court inquire whether the law operated hardly or unjustly upon the parties whose suits were then pending. That was a question for the consideration of the legislature. They might have repealed the prior law altogether, and put an end to the jurisdiction of their courts in suits against the State, if they had thought proper to do so, or prescribe new conditions upon which the suits might still be allowed to proceed. In exercising this power the State violated no contract with the parties." The same doctrine was held in *Railroad Company* v. *Tennessee*, 101 U. S. 337, 339; *Railroad Company* v. *Alabama*, 101 U. S. 832; and *In re Ayers*, 123 U. S. 443, 505.

But besides the presumption that no anomalous and unheard of proceedings or suits were intended to be raised up by the Constitution — anomalous and unheard of when the Constitution was adopted — an additional reason why the jurisdiction claimed for the Circuit Court does not exist, is the language of the Act of Congress by which its jurisdiction is conferred. The words are these: "The Circuit Courts of the United States shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity, . . . arising under the Constitution or laws of the United States, or treaties," etc. — "Concurrent with the courts of the several States." Does not this qualification show that Congress, in legislating to carry the Constitution into effect, did not intend to invest its courts with any new and strange jurisdictions? The State courts have no power to entertain suits by individuals against a State without its consent. Then how does the Circuit Court, having only concurrent jurisdiction, acquire any such power? It is true that the same qualification existed in the Judiciary Act of 1789, which was before the court in *Chisholm* v. *Georgia*, and the majority of the court did not think that it was sufficient to limit the jurisdiction of the Circuit Court. Justice Iredell thought differently. In view of the manner in which that decision was received by the country, the adoption of the Eleventh Amendment, the light of history and the reason of the thing, we think we are at liberty to prefer Justice Iredell's views in this regard.

Some reliance is placed by the plaintiff upon the observations of Chief Justice Marshall, in *Cohens* v. *Virginia*, 6 Wheat. 264, 410. The Chief Justice was there considering the power of review exercisable by this court over the judgments of a State court, wherein it might be necessary to make the State itself a defendant in error. He showed that this power was absolutely necessary in order to enable the judiciary of the United States to take cognizance of all cases arising under the Constitution and laws of the United States. He also showed that making a State a defendant in error was entirely different from suing

a State in an original action in prosecution of a demand against it, and was not within the meaning of the Eleventh Amendment; that the prosecution of a writ of error against a State was not the prosecution of a suit in the sense of that amendment, which had reference to the prosecution, by suit, of claims against a State. [Here follows a quotation from the opinion in *Cohens* v. *Virginia*, which is found on p. 290, *ante*, beginning "Where, then, a State," &c.]

After thus showing by incontestable argument that a writ of error to a judgment recovered by a State, in which the State is necessarily the defendant in error, is not a suit commenced or prosecuted against a State in the sense of the amendment, he added, that if the court were mistaken in this, its error did not affect that case, because the writ of error therein was not prosecuted by "a citizen of another State" or "of any foreign State," and so was not affected by the amendment; but was governed by the general grant of judicial power, as extending "to all cases arising under the Constitution or laws of the United States, without respect to parties." p. 412.

It must be conceded that the last observation of the Chief Justice does favor the argument of the plaintiff. But the observation was unnecessary to the decision, and in that sense *extra-judicial*, and though made by one who seldom used words without due reflection, ought not to outweigh the important considerations referred to which lead to a different conclusion. With regard to the question then before the court, it may be observed, that writs of error to judgments in favor of the Crown, or of the State, had been known to the law from time immemorial; and had never been considered as exceptions to the rule, that an action does not lie against the sovereign.

To avoid misapprehension it may be proper to add that, although the obligations of a State rest for their performance upon its honor and good faith, and cannot be made the subjects of judicial cognizance unless the State consents to be sued, or comes itself into court; yet where property or rights are enjoyed under a grant or contract made by a State, they cannot wantonly be invaded. Whilst the State cannot be compelled by suit to perform its contracts, any attempt on its part to violate property or rights acquired under its contracts, may be judicially resisted; and any law impairing the obligation of contracts under which such property or rights are held is void and powerless to affect their enjoyment.

It is not necessary that we should enter upon an examination of the reason or expediency of the rule which exempts a sovereign State from prosecution in a court of justice at the suit of individuals. This is fully discussed by writers on public law. It is enough for us to declare its existence. The legislative department of a State represents its polity and its will; and is called upon by the highest demands of natural and political law to preserve justice and judgment, and to hold inviolate the public obligations. Any departure from this rule, except for reasons most cogent (of which the legislature, and not the courts,

is the judge), never fails in the end to incur the odium of the world, and to bring lasting injury upon the State itself. But to deprive the legislature of the power of judging what the honor and safety of the State may require, even at the expense of a temporary failure to discharge the public debts, would be attended with greater evils than such failure can cause.

The judgment of the Circuit Court is *Affirmed.*

MR. JUSTICE HARLAN concurring. I concur with the court in holding that a suit directly against a State by one of its own citizens is not one to which the judicial power of the United States extends, unless the State itself consents to be sued. Upon this ground alone I assent to the judgment. But I cannot give my assent to many things said in the opinion. The comments made upon the decision in *Chisholm* v. *Georgia* do not meet my approval. They are not necessary to the determination of the present case. Besides, I am of opinion that the decision in that case was based upon a sound interpretation of the Constitution as that instrument then was.[1]

STATE OF TEXAS *v.* WHITE.

SUPREME COURT OF THE UNITED STATES. 1868.

[7 *Wall,* 700.]

. . . THE case was argued by *Messrs. Paschal* and *Merrick,* in behalf of Texas; and *contra,* by *Mr. Phillips,* for White; *Mr. Pike,* for Chiles; *Mr. Carlisle,* for Hardenberg; and *Mr. Moore,* for Birch, Murray, & Co.

THE CHIEF JUSTICE delivered the opinion of the court.

This is an original suit in this court, in which the State of Texas, claiming certain bonds of the United States as her property, asks an injunction to restrain the defendants from receiving payment from the National Government, and to compel the surrender of the bonds to the State.

It appears from the bill, answers, and proofs, that the United States, by Act of September 9, 1850, offered to the State of Texas, in compensation for her claims connected with the settlement of her boundary, $10,000,000 in five per cent bonds, each for the sum of $1,000; and that this offer was accepted by Texas. One half of these bonds were retained for certain purposes in the National Treasury, and the other half were delivered to the State. The bonds thus delivered were dated January 1, 1851, and were all made payable to the State of Texas, or

[1] See *N. H.* v. *La. et al.,* 108 U. S. 76; and with that compare 2 Life B. R. Curtis, 93, 146, and 12 Am. Law Rev. 625. — ED.

bearer, and redeemable after the 31st day of December, 1864. They were received in behalf of the State by the comptroller of public accounts, under authority of an Act of the Legislature, which, besides giving that authority, provided that no bond should be available in the hands of any holder until after indorsement by the Governor of the State.

After the breaking out of the rebellion, the insurgent Legislature of Texas, on the 11th of January, 1862, repealed the Act requiring the indorsement of the Governor (Acts of Texas, 1862, 45), and on the same day provided for the organization of a military board, composed of the Governor, comptroller, and treasurer; and authorized a majority of that board to provide for the defence of the State by means of any bonds in the treasury, upon any account, to the extent of $1,000,000. Texas Laws, 55. The defence contemplated by the Act was to be made against the United States by war. Under this authority the military board entered into an agreement with George W. White and John Chiles, two of the defendants, for the sale to them of one hundred and thirty-five of these bonds, then in the treasury of the State, and seventy-six more, then deposited with Droege & Co., in England; in payment for which they engaged to deliver to the board a large quantity of cotton cards and medicines. This agreement was made on the 12th of January, 1865. On the 12th of March, 1865, White and Chiles received from the military board one hundred and thirty-five of these bonds, none of which were indorsed by any governor of Texas. Afterward, in the course of the years 1865 and 1866, some of the same bonds came into the possession of others of the defendants, by purchase, or as security for advances of money.

Such is a brief outline of the case. It will be necessary hereafter to refer more in detail to some particular circumstances of it.

The first inquiries to which our attention was directed by counsel, arose upon the allegations of the answer of Chiles (1) that no sufficient authority is shown for the prosecution of the suit in the name and on the behalf of the State of Texas; and (2) that the State, having severed her relations with a majority of the States of the Union, and having by her ordinance of secession attempted to throw off her allegiance to the Constitution and government of the United States, has so far changed her status as to be disabled from prosecuting suits in the national courts.

The first of these allegations is disproved by the evidence. A letter of authority, the authenticity of which is not disputed, has been produced, in which J. W. Throckmorton, elected governor under the Constitution adopted in 1866, and proceeding under an Act of the State Legislature relating to these bonds, expressly ratifies and confirms the action of the solicitors who filed the bill, and empowers them to prosecute this suit; and it is further proved by the affidavit of Mr. Paschal, counsel for the complainant, that he was duly appointed by Andrew J. Hamilton, while provisional governor of Texas, to represent the State

of Texas in reference to the bonds in controversy, and that his appointment has been renewed by E. M. Pease, the actual Governor. If Texas was a State of the Union at the time of these Acts, and these persons, or either of them, were competent to represent the State, this proof leaves no doubt upon the question of authority.

The other allegation presents a question of jurisdiction. . . .

The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States. When, therefore, Texas became one of the United States, she entered into an indissoluble relation. All the obligations of perpetual union and all the guarantees of republican government in the Union, attached at once to the State. The Act which consummated her admission into the Union was something more than a compact; it was the incorporation of a new member into the political body. And it was final. The union between Texas and the other States was as complete, as perpetual, and as indissoluble as the union between the original States. There was no place for reconsideration, or revocation, except through revolution, or through consent of the States.

Considered therefore as transactions under the Constitution, the ordinance of secession, adopted by the convention and ratified by a majority of the citizens of Texas, and all the Acts of her Legislature intended to give effect to that ordinance, were absolutely null. They were utterly without operation in law. The obligations of the State, as a member of the Union, and of every citizen of the State, as a citizen of the United States, remained perfect and unimpaired. It certainly follows that the State did not cease to be a State, nor her citizens to be citizens of the Union. If this were otherwise, the State must have become foreign, and her citizens foreigners. The war must have ceased to be a war for the suppression of rebellion, and must have become a war for conquest and subjugation.

Our conclusion therefore is, that Texas continued to be a State, and a State of the Union, notwithstanding the transactions to which we have referred. And this conclusion, in our judgment, is not in conflict with any Act or declaration of any department of the national government, but entirely in accordance with the whole series of such Acts and declarations since the first outbreak of the rebellion.

But in order to the exercise, by a State, of the right to sue in this court, there needs to be a State government, competent to represent the State in its relations with the national government, so far at least as the institution and prosecution of a suit is concerned.

And it is by no means a logical conclusion, from the premises which we have endeavored to establish, that the governmental relations of Texas to the Union remained unaltered. Obligations often remain unimpaired, while relations are greatly changed. The obligations of allegiance to the State, and of obedience to her laws, subject to the Constitution of the United States, are binding upon all citizens, whether faithful or unfaithful to them; but the relations which subsist

while these obligations are performed, are essentially different from those which arise when they are disregarded and set at nought. And the same must necessarily be true of the obligations and relations of States and citizens to the Union. No one has been bold enough to contend that, while Texas was controlled by a government hostile to the United States, and in affiliation with a hostile confederation, waging war upon the United States, senators chosen by her legislature, or representatives elected by her citizens, were entitled to seats in Congress; or that any suit, instituted in her name, could be entertained in this court. All admit that, during this condition of civil war, the rights of the State as a member, and of her people as citizens of the Union, were suspended. The government and the citizens of the State, refusing to recognize their constitutional obligations, assumed the character of enemies, and incurred the consequences of rebellion.

These new relations imposed new duties upon the United States. The first was that of suppressing the rebellion. The next was that of re-establishing the broken relations of the State with the Union. The first of these duties having been performed, the next necessarily engaged the attention of the national government.

The authority for the performance of the first had been found in the power to suppress insurrection and carry on war; for the performance of the second, authority was derived from the obligation of the United States to guarantee to every State in the Union a republican form of government. The latter, indeed, in the case of a rebellion which involves the government of a State, and for the time excludes the national authority from its limits, seems to be a necessary complement to the former.

Of this, the case of Texas furnishes a striking illustration. When the war closed there was no government in the State except that which had been organized for the purpose of waging war against the United States. That government immediately disappeared. The chief functionaries left the State. Many of the subordinate officials followed their example. Legal responsibilities were annulled or greatly impaired. It was inevitable that great confusion should prevail. If order was maintained, it was where the good sense and virtue of the citizens gave support to local acting magistrates, or supplied more directly the needful restraints.

A great social change increased the difficulty of the situation. Slaves, in the insurgent States, with certain local exceptions, had been declared free by the Proclamation of Emancipation; and whatever questions might be made as to the effect of that act, under the Constitution, it was clear, from the beginning, that its practical operation, in connection with legislative Acts of like tendency, must be complete enfranchisement. Wherever the national forces obtained control, the slaves became freemen. Support to the Acts of Congress and the proclamation of the President, concerning slaves, was made a condition of amnesty (13 Stat. at Large, 737) by President Lincoln, in December, 1863, and

by President Johnson, in May, 1865. *Ib.* 758. And emancipation was confirmed, rather than ordained, in the insurgent States, by the amendment to the Constitution prohibiting slavery throughout the Union, which was proposed by Congress in February, 1865, and ratified, before the close of the following autumn, by the requisite three fourths of the States. *Ib.* 774–775.

The new freemen necessarily became part of the people, and the people still constituted the State; for States, like individuals, retain their identity, though changed to some extent in their constituent elements. And it was the State, thus constituted, which was now entitled to the benefit of the constitutional guarantee.

There being then no government in Texas in constitutional relations with the Union, it became the duty of the United States to provide for the restoration of such a government. But the restoration of the government which existed before the rebellion, without a new election of officers, was obviously impossible; and before any such election could be properly held, it was necessary that the old Constitution should receive such amendments as would conform its provisions to the new conditions created by emancipation, and afford adequate security to the people of the State.

In the exercise of the power conferred by the guarantee clause, as in the exercise of every other constitutional power, a discretion in the choice of means is necessarily allowed. It is essential only that the means must be necessary and proper for carrying into execution the power conferred, through the restoration of the State to its constitutional relations, under a republican form of government, and that no acts be done, and no authority exerted, which is either prohibited or unsanctioned by the Constitution.

It is not important to review, at length, the measures which have been taken, under this power, by the executive and legislative departments of the national government. It is proper, however, to observe that almost immediately after the cessation of organized hostilities, and while the war yet smouldered in Texas, the President of the United States issued his proclamation appointing a provisional governor for the State, and providing for the assembling of a convention, with a view to the re-establishment of a republican government, under an amended constitution, and to the restoration of the State to her proper Constitutional relations. A convention was accordingly assembled, the Constitution amended, elections held, and a State government, acknowledging its obligations to the Union, established.

Whether the action then taken was, in all respects, warranted by the Constitution, it is not now necessary to determine. The power exercised by the President was supposed, doubtless, to be derived from his constitutional functions, as commander-in-chief; and, so long as the war continued, it cannot be denied that he might institute temporary government within insurgent distri s, occupied by the national forces, or take measures, in any State, for th restoration of State government

faithful to the Union, employing, however, in such efforts, only such means and agents as were authorized by constitutional laws.

But the power to carry into effect the clause of guarantee is primarily a legislative power, and resides in Congress. "Under the fourth article of the Constitution, it rests with Congress to decide what government is the established one in a State. For, as the United States guarantee to each State a republican government, Congress must necessarily decide what government is established in the State, before it can determine whether it is republican or not."

This is the language of the late Chief Justice, speaking for this court, in a case from Rhode Island (*Luther* v. *Borden*, 7 Howard, 42), arising from the organization of opposing governments in that State. And we think that the principle sanctioned by it may be applied, with even more propriety, to the case of a State deprived of all rightful government, by revolutionary violence; though necessarily limited to cases where the rightful government is thus subverted, or in imminent danger of being overthrown by an opposing government, set up by force within the State.

The action of the President must, therefore, be considered as provisional, and, in that light, it seems to have been regarded by Congress. It was taken after the term of the 38th Congress had expired. The 39th Congress, which assembled in December, 1865, followed by the 40th Congress, which met in March, 1867, proceeded, after long deliberation, to adopt various measures for reorganization and restoration. These measures were embodied in proposed amendments to the Constitution, and in the Acts known as the Reconstruction Acts, which have been so far carried into effect, that a majority of the States which were engaged in the rebellion have been restored to their constitutional relations, under forms of government, adjudged to be republican by Congress, through the admission of their "Senators and Representatives into the councils of the Union."

Nothing in the case before us requires the court to pronounce judgment upon the constitutionality of any particular provision of these Acts.

But it is important to observe that these Acts themselves show that the governments, which had been established and had been in actual operation under executive direction, were recognized by Congress as provisional, as existing, and as capable of continuance.

By the Act of March 2, 1867 (14 Stat. at Large, 428), the first of the series, these governments were, indeed, pronounced illegal and were subjected to military control, and were declared to be provisional only; and by the supplementary Act of July 19, 1867, the third of the series, it was further declared that it was the true intent and meaning of the Act of March 2, that the governments then existing were not legal State governments, and if continued, were to be continued subject to the military commanders of the respective districts and to the paramount authority of Congress. We do not inquire here into the consti-

tutionality of this legislation so far as it relates to military authority, or to the paramount authority of Congress. It suffices to say, that the terms of the Acts necessarily imply recognition of actually existing governments; and that in point of fact, the governments thus recognized, in some important respects, still exist.

What has thus been said generally describes, with sufficient accuracy, the situation of Texas. A provisional governor of the State was appointed by the President in 1865; in 1866 a governor was elected by the people under the Constitution of that year; at a subsequent date a governor was appointed by the commander of the district. Each of the three exercised executive functions and actually represented the State in the executive department.

In the case before us each has given his sanction to the prosecution of the suit, and we find no difficulty, without investigating the legal title of either to the executive office, in holding that the sanction thus given sufficiently warranted the action of the solicitor and counsel in behalf of the State. The necessary conclusion is that the suit was instituted and is prosecuted by competent authority.

The question of jurisdiction being thus disposed of, we proceed to the consideration of the merits as presented by the pleadings and the evidence. . . .

On the whole case, therefore, our conclusion is that the State of Texas is entitled to the relief sought by her bill, and a decree must be made accordingly.

MR. JUSTICE GRIER, dissenting. I regret that I am compelled to dissent from the opinion of the majority of the court on all the points raised and decided in this case.

The first question in order is the jurisdiction of the court to entertain this bill in behalf of the State of Texas.

The original jurisdiction of this court can be invoked only by one of the United States. The Territories have no such right conferred on them by the Constitution, nor have the Indian tribes who are under the protection of the military authorities of the government.

Is Texas one of these United States? Or was she such at the time this bill was filed, or since?

This is to be decided as a political fact, not as a legal fiction. This court is bound to know and notice the public history of the nation.

If I regard the truth of history for the last eight years, I cannot discover the State of Texas as one of these United States. I do not think it necessary to notice any of the very astute arguments which have been advanced by the learned counsel in this case, to find the definition of a State, when we have the subject treated in a clear and common-sense manner by Chief Justice Marshall, in the case of *Hepburn & Dundass* v. *Ellzey*, 2 Cranch, 452. As the case is short, I hope to be excused for a full report of it, as stated and decided by the court.[1]

[1] For this case, see *post*, p. 348. — ED.

He says: . . . "These clauses show that the word 'State' is used in the Constitution as designating a member of the Union, and excludes from the term the signification attached to it by writers on the law of nations."

Now we have here a clear and well-defined test by which we may arrive at a conclusion with regard to the questions of fact now to be decided.

Is Texas a State, now represented by members chosen by the people of that State and received on the floor of Congress? Has she two senators to represent her as a State in the Senate of the United States? Has her voice been heard in the late election of President? Is she not now held and governed as a conquered province by military force? The Act of Congress of March 2d, 1867, declares Texas to be a "rebel State," and provides for its government until a legal and republican State government could be legally established. It constituted Louisiana and Texas the fifth military district, and made it subject, not to the civil authority, but to the "military authorities of the United States."

It is true that no organized rebellion now exists there, and the courts of the United States now exercise jurisdiction over the people of that province. But this is no test of the State's being in the Union; Dakota is no State, and yet the United States administer justice there as they do in Texas. The Indian tribes, who are governed by military force, cannot claim to be States of the Union. Wherein does the condition of Texas differ from theirs?

Now, by assuming or admitting as a fact the present status of Texas as a State not in the Union politically, I beg leave to protest against any charge of inconsistency as to judicial opinions heretofore expressed as a member of this court, or silently assented to. I do not consider myself bound to express any opinion judicially as to the constitutional right of Texas to exercise the rights and privileges of a State of this Union, or the power of Congress to govern her as a conquered province, to subject her to military domination, and keep her in pupilage. I can only submit to the fact as decided by the political position of the government; and I am not disposed to join in any essay to prove Texas to be a State of the Union, when Congress have decided that she is not. It is a question of fact, I repeat, and of fact only. Politically, Texas is not a State in this Union. Whether rightfully out of it or not is a question not before the court. . . .

MR. JUSTICE SWAYNE: I concur with my brother Grier as to the incapacity of the State of Texas, in her present condition, to maintain an original suit in this court. The question, in my judgment, is one in relation to which this court is bound by the action of the legislative department of the government.

Upon the merits of the case, I agree with the majority of my brethren.

I am authorized to say that my brother MILLER unites with me in these views.

UNITED STATES v. THE STATE OF TEXAS.

SUPREME COURT OF THE UNITED STATES. 1891.

[143 *U. S.* 621.][1]

Mr. A. H. Garland for the State of Texas, in support of the demurrer. *Mr. John Hancock*, *Mr. George Clark*, *Mr. C. A. Culberson*, and *Mr. H. J. May* were with him on the brief.

Mr. Edgar Allan (with whom was *Mr. Attorney-General* on the brief) for the United States, opposing.

MR. JUSTICE HARLAN delivered the opinion of the court.

This suit was brought by original bill in this court pursuant to the Act of May 2, 1890, providing a temporary government for the Territory of Oklahoma. The 25th section recites the existence of a controversy between the United States and the State of Texas as to the ownership of what is designated on the map of Texas as Greer County, and provides that the Act shall not be construed to apply to that county until the title to the same has been adjudicated and determined to be in the United States. In order that there might be a speedy and final judicial determination of this controversy the Attorney-General of the United States was authorized and directed to commence and prosecute on behalf of the United States a proper suit in equity in this court against the State of Texas, setting forth the title of the United States to the country lying between the North and South Forks of the Red River where the Indian Territory and the State of Texas adjoin, east of the one hundredth degree of longitude, and claimed by the State of Texas as within its boundary. 26 Stat. 81, 92, c. 182, § 25.

The State of Texas appeared and filed a demurrer, and, also, an answer denying the material allegations of the bill. The case is now before the court only upon the demurrer, the principal grounds of which are: That the question presented is political in its nature and character, and not susceptible of judicial determination by this court in the exercise of its jurisdiction as conferred by the Constitution and laws of the United States; that it is not competent for the general government to bring suit against a State of the Union in one of its own courts, especially when the right to be maintained is mutually asserted by the United States and the State, namely, the ownership of certain designated territory; and that the plaintiff's cause of action, being a suit to recover real property, is legal and not equitable, and, consequently, so much of the Act of May 2, 1890, as authorizes and directs the prosecution of a suit in equity to determine the rights of the United States to the territory in question is unconstitutional and void. . . .

The bill alleges that the State of Texas, without right, claims, has taken possession of, and endeavors to extend its laws and jurisdiction

[1] The statement of facts is omitted. — ED.

over, the disputed territory, in violation of the treaty rights of the United States; that, during the year 1887, it gave public notice of its purpose to survey and place upon the market for sale, and otherwise dispose of, that territory; and that, in consequence of its proceeding to eject *bona fide* settlers from certain portions thereof, President Cleveland, by proclamation issued December 30, 1887, warned all persons, whether claiming to act as officers of the county of Greer, or otherwise, against selling or disposing of, or attempting to sell or dispose of, any of said lands, or from exercising or attempting to exercise any authority over them, and "against purchasing any part of said territory from any person or persons whatever." 25 Stat. 1483.

The relief asked is a decree determining the true line between the United States and the State of Texas, and whether the land constituting what is called "Greer County" is within the boundary and jurisdiction of the United States or of the State of Texas. The government prays that its rights, as asserted in the bill, be established, and that it have such other relief as the nature of the case may require.

In support of the contention that the ascertainment of the boundary between a Territory of the United States and one of the States of the Union is political in its nature and character, and not susceptible of judicial determination, the defendant cites *Foster* v. *Neilson*, 2 Pet. 253, 307, 309; *Cherokee Nation* v. *Georgia*, 5 Pet. 1, 21; *United States* v. *Arredondo*, 6 Pet. 691, 711; and *García* v. *Lee*, 12 Pet. 511, 517. . . .

These authorities do not control the present case. They relate to questions of boundary between independent nations, and have no application to a question of that character arising between the general government and one of the States composing the Union, or between two States of the Union. By the Articles of Confederation, Congress was made "the last resort on appeal in all disputes and differences" then subsisting or which thereafter might arise "between two or more States concerning boundary, jurisdiction, or any other cause whatever;" the authority so conferred to be exercised by a special tribunal to be organized in the mode prescribed in those Articles, and its judgment to be final and conclusive. Art. 9. At the time of the adoption of the Constitution, there existed, as this court said in *Rhode Island* v. *Massachusetts*, 12 Pet. 657, 723, 724, controversies between eleven States, in respect to boundaries, which had continued from the first settlement of the colonies. The necessity for the creation of some tribunal for the settlement of these and like controversies that might arise, under the new government to be formed, must, therefore, have been perceived by the framers of the Constitution, and, consequently, among the controversies to which the judicial power of the United States was extended by the Constitution, we find those between two or more States. And that a controversy between two or more States, in respect to boundary, is one to which, under the Constitution, such judicial power extends, is no longer an open question in this court.

The cases of *Rhode Island* v. *Massachusetts*, 12 Pet. 657; *New Jersey* v. *New York*, 5 Pet. 284, 290; *Missouri* v. *Iowa*, 7 How. 660; *Florida* v. *Georgia*, 17 How. 478; *Alabama* v. *Georgia*, 23 How. 505; *Virginia* v. *West Virginia*, 11 Wall. 39, 55; *Missouri* v. *Kentucky*, 11 Wall. 395; *Indiana* v. *Kentucky*, 136 U. S. 479; and *Nebraska* v. *Iowa*, *ante*, 359, were all original suits, in this court, for the judicial determination of disputed boundary lines between States. In *New Jersey* v. *New York*, 5 Pet. 284, 290, Chief Justice Marshall said: "It has then been settled by our predecessors, on great deliberation, that this court may exercise its original jurisdiction in suits against a State, under the authority conferred by the Constitution and existing Acts of Congress." And in *Virginia* v. *West Virginia*, it was said by Mr. Justice Miller to be the established doctrine of this court, "that it has jurisdiction of questions of boundary between two States of this Union, and that this jurisdiction is not defeated, because in deciding that question it becomes necessary to examine into and construe compacts or agreements between those States, or because the decree which the court may render, affects the territorial limits of the political jurisdiction and sovereignty of the States which are parties to the proceeding." So, in *Wisconsin* v. *Pelican Ins. Co.*, 127 U. S. 265, 287, 288; "By the Constitution, therefore, this court has original jurisdiction of suits brought by a State against citizens of another State, as well as of controversies between two States. . . . As to 'controversies between two or more States.' The most numerous class of which this court has entertained jurisdiction is that of controversies between two States as to the boundaries of their territory, such as were determined before the revolution by the king in council, and under the Articles of Confederation (while there was no national judiciary) by committees or commissioners appointed by Congress."

In view of these cases, it cannot, with propriety, be said that a question of boundary between a Territory of the United States and one of the States of the Union is of a political nature, and not susceptible of judicial determination by a court having jurisdiction of such a controversy. The important question therefore is, whether this court can, under the Constitution, take cognizance of an original suit brought by the United States against a State to determine the boundary between one of the Territories and such State. Texas insists that no such jurisdiction has been conferred upon this court, and that the only mode in which the present dispute can be peaceably settled is by agreement, in some form, between the United States and that State. Of course, if no such agreement can be reached — and it seems that one is not probable — and if neither party will surrender its claim of authority and jurisdiction over the disputed territory, the result, according to the defendant's theory of the Constitution, must be that the United States, in order to effect a settlement of this vexed question of boundary, must bring its suit in one of the courts of Texas — that State consenting that its courts may be open for the assertion of claims against it by the United

States — or that, in the end, there must be a trial of physical strength between the government of the Union and Texas. The first alternative is unwarranted both by the letter and spirit of the Constitution. Mr. Justice Story has well said: "It scarcely seems possible to raise a reasonable doubt as to the propriety of giving to the national courts jurisdiction of cases in which the United States are a party. It would be a perfect novelty in the history of national jurisprudence, as well as of public law, that a sovereign had no authority to sue in his own courts. Unless this power were given to the United States, the enforcement of all their rights, powers, contracts and privileges in their sovereign capacity would be at the mercy of the States. They must be enforced, if at all, in the State tribunals." Story Const. § 1674. The second alternative, above mentioned, has no place in our constitutional system, and cannot be contemplated by any patriot except with feelings of deep concern.

The cases in this court show that the framers of the Constitution did provide, by that instrument, for the judicial determination of all cases in law and equity between two or more States, including those involving questions of boundary. Did they omit to provide for the judicial determination of controversies arising between the United States and one or more of the States of the Union? This question is in effect answered by *United States* v. *North Carolina*, 136 U. S. 211. That was an action of debt brought in this court by the United States against the State of North Carolina, upon certain bonds issued by that State. The State appeared, the case was determined here upon its merits, and judgment was rendered for the State. It is true that no question was made as to the jurisdiction of this court, and nothing was therefore said in the opinion upon that subject. But it did not escape the attention of the court, and the judgment would not have been rendered except upon the theory that this court has original jurisdiction of a suit by the United States against a State. As, however, the question of jurisdiction is vital in this case, and is distinctly raised, it is proper to consider it upon its merits. . . .

It is apparent upon the face of these clauses [Const. U. S. art. 3, § 2, and the Eleventh Amendment] that in one class of cases the jurisdiction of the courts of the Union depends "on the character of the cause, whoever may be the parties," and, in the other, on the character of the parties, whatever may be the subject of controversy. *Cohens* v. *Virginia*, 6 Wheat. 264, 378, 393. The present suit falls in each class, for it is, plainly, one arising under the Constitution, laws and treaties of the United States, and, also, one in which the United States is a party. It is, therefore, one to which, by the express words of the Constitution, the judicial power of the United States extends. That a Circuit Court of the United States has not jurisdiction, under existing statutes, of a suit by the United States against a State, is clear; for by the Revised Statutes it is declared — as was done by the Judiciary Act of 1789 — that "the Supreme Court shall have exclusive jurisdic-

tion of all controversies of a civil nature where a State is a party, except between a State and its citizens, or between a State and citizens of other States or aliens, in which latter cases it shall have original, but not exclusive, jurisdiction." Rev. Stat. § 687; Act of September 24, 1789, c. 20, § 13; 1 Stat. 80. Such exclusive jurisdiction was given to this court, because it best comported with the dignity of a State, that a case in which it was a party should be determined in the highest, rather than in a subordinate judicial tribunal of the nation. Why then may not this court take original cognizance of the present suit involving a question of boundary between a Territory of the United States and a State?

The words, in the Constitution, "in all cases . . . in which a State shall be party, the Supreme Court shall have original jurisdiction," necessarily refer to all cases mentioned in the preceding clause in which a State may be made, of right, a party defendant, or in which a State may, of right, be a party plaintiff. It is admitted that these words do not refer to suits brought against a State by its own citizens or by citizens of other States, or by citizens or subjects of foreign States, even where such suits arise under the Constitution, laws and treaties of the United States, because the judicial power of the United States does not extend to suits of *individuals* against States. *Hans* v. *Louisiana*, 134 U. S. 1, and authorities there cited; *North Carolina* v. *Temple*, 134 U. S. 22, 30. It is, however, said that the words last quoted refer only to suits in which a State is a party, and in which, also, the opposite party is another State of the Union or a foreign State. This cannot be correct, for it must be conceded that a State can bring an original suit in this court against a citizen of another State. *Wisconsin* v. *Pelican Ins. Co.*, 127 U. S. 265, 287. Besides, unless a State is exempt altogether from suit by the United States, we do not perceive upon what sound rule of construction suits brought by the United States in this court — especially if they be suits the correct decision of which depends upon the Constitution, laws or treaties of the United States — are to be excluded from its original jurisdiction as defined in the Constitution. That instrument extends the judicial power of the United States "to *all* cases," in law and equity, arising under the Constitution, laws and treaties of the United States, and to controversies in which the United States shall be a party, and confers upon this court original jurisdiction "in *all* cases" "in which a State shall be party," that is, in all cases mentioned in the preceding clause in which a State may, of right, be made a party defendant, as well as in all cases in which a State may, of right, institute a suit in a court of the United States. The present case is of the former class. We cannot assume that the framers of the Constitution, while extending the judicial power of the United States to controversies between two or more States of the Union, and between a State of the Union and foreign States, intended to exempt a State altogether from suit by the general government. They could not have overlooked the possibility

that controversies, capable of judicial solution, might arise between the United States and some of the States, and that the permanence of the Union might be endangered if to some tribunal was not intrusted the power to determine them according to the recognized principles of law. And to what tribunal could a trust so momentous be more appropriately committed than to that which the people of the United States, in order to form a more perfect Union, establish justice and insure domestic tranquillity, have constituted with authority to speak for all the people and all the States, upon questions before it to which the judicial power of the nation extends? It would be difficult to suggest any reason why this court should have jurisdiction to determine questions of boundary between two or more States, but not jurisdiction of controversies of like character between the United States and a State. . . .

That case [*Hans* v. *La.*, 134 U. S. 1] and others in this court relating to the suability of States, proceeded upon the broad ground that "it is inherent in the nature of sovereignty not to be amenable to the suit of an *individual* without its consent."

The question as to the suability of one government by another government rests upon wholly different grounds. Texas is not called to the bar of this court at the suit of an individual, but at the suit of the government established for the common and equal benefit of the people of all the States. The submission to judicial solution of controversies arising between these two governments, "each sovereign, with respect to the objects committed to it, and neither sovereign with respect to the objects committed to the other," *McCulloch* v. *State of Maryland*, 4 Wheat. 316, 400, 410, but both subject to the supreme law of the land, does no violence to the inherent nature of sovereignty. The States of the Union have agreed, in the Constitution, that the judicial power of the United States shall extend to *all* cases arising under the Constitution, laws and treaties of the United States, without regard to the character of the parties (excluding, of course, suits against a State by its own citizens or by citizens of other States, or by citizens or subjects of foreign States), and equally to controversies to which the United States shall be a party, without regard to the subject of such controversies, and that this court may exercise original jurisdiction in all such cases, "in which a State shall be party," without excluding those in which the United States may be the opposite party. The exercise, therefore, by this court, of such original jurisdiction in a suit brought by one State against another to determine the boundary line between them, or in a suit brought by the United States against a State to determine the boundary between a Territory of the United States and that State, so far from infringing, in either case, upon the sovereignty, is with the consent of the State sued. Such consent was given by Texas when admitted into the Union upon an equal footing in all respects with the other States.

We are of opinion that this court has jurisdiction to determine

the disputed question of boundary between the United States and Texas. . . .

It is not a suit simply to determine the legal title to, and the ownership of, the lands constituting Greer County. It involves the larger question of governmental authority and jurisdiction over that territory. The United States, in effect, asks the specific execution of the terms of the treaty of 1819, to the end that the disorder and public mischiefs that will ensue from a continuance of the present condition of things may be prevented. The agreement, embodied in the treaty, to fix the lines with precision, and to place landmarks to designate the limits of the two contracting nations, could not well be enforced by an action at law. The bill and amended bill make a case for the interposition of a court of equity. *Demurrer overruled.*

MR. CHIEF JUSTICE FULLER, with whom concurred MR. JUSTICE LAMAR, dissenting.

MR. JUSTICE LAMAR and myself are unable to concur in the decision just announced.

This court has original jurisdiction of two classes of cases only, those affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party.

The judicial power extends to "controversies between two or more States;" "between a State and citizens of another State;" and "between a State or the citizens thereof, and foreign States, citizens or subjects." Our original jurisdiction, which depends solely upon the character of the parties, is confined to the cases enumerated, in which a State may be a party, and this is not one of them.

The judicial power also extends to controversies to which the United States shall be a party, but such controversies are not included in the grant of original jurisdiction. To the controversy here the United States is a party.

We are of opinion, therefore, that this case is not within the original jurisdiction of the court.

THE STATE OF TENNESSEE *v.* DAVIS.

SUPREME COURT OF THE UNITED STATES. 1879.

[100 *U. S.* 257.]

CERTIFICATE of division in opinion between the judges of the Circuit Court of the United States for the Middle District of Tennessee. . . .

The record having been returned, in compliance with the writ, a motion was made to remand the case to the State court; and, on the hearing of the motion, the judges were divided in opinion upon the following questions, which are certified here: —

First, Whether an indictment of a revenue officer (of the United States) for murder, found in a State court, under the facts alleged in the petition for removal in this case, is removable to the Circuit Court of the United States, under sect. 643 of the Revised Statutes.

Second, Whether, if removable from the State court, there is any mode and manner of procedure in the trial prescribed by the Act of Congress.

Third, Whether, if not, a trial of the guilt or innocence of the defendant can be had in the United States Circuit Court.

Mr. Benjamin J. Lea, Attorney-General of Tennessee, and *Mr. James G. Field*, for the plaintiff in error.

Mr. Attorney-General Devens and *Mr. Assistant Attorney-General Smith*, *contra*.

Mr. Justice Strong delivered the opinion of the court.

The first of the questions certified is one of great importance, bringing as it does into consideration the relation of the general government to the government of the States, and bringing also into view not merely the construction of an Act of Congress, but its constitutionality. That in this case the defendant's petition for removal of the cause was in the form prescribed by the Act of Congress admits of no doubt. It represented that he had been indicted for murder in the Circuit Court of Grundy County, and that the indictment and criminal prosecution were still pending. It represented further, that no murder was committed, but that, on the other hand, the killing was committed in the petitioner's own necessary self-defence, to save his own life; that at the time when the alleged act for which he was indicted was committed he was, and still is, an officer of the United States, to wit, a deputy collector of internal revenue, and that the act for which he was indicted was performed in his own necessary self-defence while engaged in the discharge of his duties as deputy collector; that he was acting by and under the authority of the internal revenue laws of the United States; that what he did was done under and by right of his office, to wit, as deputy collector of internal revenue; that it was his duty to seize illicit distilleries and the apparatus that is used for the illicit and unlawful distillation of spirits; and that while so attempting to enforce the revenue laws of the United States, as deputy collector as aforesaid, he was assaulted and fired upon by a number of armed men, and that in defence of his life he returned the fire. The petition was verified by oath, and the certificate required by the Act of Congress to be given by the petitioner's legal counsel was appended thereto. There is, therefore, no room for reasonable doubt that a case was made for the removal of the indictment into the Circuit Court of the United States, if sect. 643 of the Revised Statutes embraces criminal prosecutions in a State court, and makes them removable, and if that Act of Congress was not unauthorized by the Constitution. The language of the statute (so far as it is necessary at present to refer to it) is as follows: "When any civil suit or criminal prosecution is commenced in any court of a State

against any officer appointed under, or acting by authority of, any revenue law of the United States, now or hereafter enacted, or against any person acting by or under authority of any such officer, on account of any act done under color of his office, or of any such law, or on account of any right, title, or authority claimed by such officer or other person under any such law," the case may be removed into the Federal Court. Now, certainly the petition for the removal represented that the act for which the defendant was indicted was done not merely under color of his office as a revenue collector, or under color of the revenue laws, not merely while he was engaged in performing his duties as a revenue officer, but that it was done under and by right of his office, and while he was resisted by an armed force in his attempts to discharge his official duty. This is more than a claim of right and authority under the law of the United States for the act for which he has been indicted. It is a positive assertion of the existence of such authority. But the Act of Congress authorizes the removal of any cause, when the acts of the defendant complained of were done, or claimed to have been done, in the discharge of his duty as a Federal officer. It makes such a claim a basis for the assumption of Federal jurisdiction of the case, and for retaining it, at least until the claim proves unfounded.

That the Act of Congress does provide for the removal of criminal prosecutions for offences against the State laws, when there arises in them the claim of the Federal right or authority, is too plain to admit of denial. Such is its positive language, and it is not to be argued away by presenting the supposed incongruity of administering State criminal laws by other courts than those established by the State. It has been strenuously urged that murder within a State is not made a crime by any Act of Congress, and that it is an offence against the peace and dignity of the State alone. Hence it is inferred that its trial and punishment can be conducted only in State tribunals, and it is argued that the Act of Congress cannot mean what it says, but that it must intend only such prosecutions in State courts as are for offences against the United States — offences against the revenue laws. But there can be no criminal prosecution initiated in any State court for that which is merely an offence against the general government. If, therefore, the statute is to be allowed any meaning, when it speaks of criminal prosecutions in State courts, it must intend those that are instituted for alleged violations of State laws, in which defences are set up or claimed under United States laws or authority.

We come, then, to the inquiry, most discussed during the argument, whether sect. 643 is a constitutional exercise of the power vested in Congress. Has the Constitution conferred upon Congress the power to authorize the removal, from a State court to a Federal court, of an indictment against a revenue officer for an alleged crime against the State, and to order its removal before trial, when it appears that a Federal question or a claim to a Federal right is raised in the case, and must be decided

therein? A more important question can hardly be imagined. Upon its answer may depend the possibility of the general government's preserving its own existence. As was said in *Martin* v. *Hunter*, 1 Wheat. 363, "The general government must cease to exist whenever it loses the power of protecting itself in the exercise of its constitutional powers." It can act only through its officers and agents, and they must act within the States. If, when thus acting, and within the scope of their authority, those officers can be arrested and brought to trial in a State court, for an alleged offence against the law of the State, yet warranted by the Federal authority they possess, and if the general government is powerless to interfere at once for their protection, — if their protection must be left to the action of the State court, — the operations of the general government may at any time be arrested at the will of one of its members. The legislation of a State may be unfriendly. It may affix penalties to acts done under the immediate direction of the national government, and in obedience to its laws. It may deny the authority conferred by those laws. The State court may administer not only the laws of the State, but equally Federal law, in such a manner as to paralyze the operations of the government. And even if, after trial and final judgment in the State court, the case can be brought into the United States Court for review, the officer is withdrawn from the discharge of his duty during the pendency of the prosecution, and the exercise of acknowledged Federal power arrested.

We do not think such an element of weakness is to be found in the Constitution. The United States is a government with authority extending over the whole territory of the Union, acting upon the States and upon the people of the States. While it is limited in the number of its powers, so far as its sovereignty extends it is supreme. No State government can exclude it from the exercise of any authority conferred upon it by the Constitution, obstruct its authorized officers against its will, or withhold from it, for a moment, the cognizance of any subject which that instrument has committed to it.

By the last clause of the eighth section of the first article of the Constitution, Congress is invested with power to make all laws necessary and proper for carrying into execution not only all the powers previously specified, but also all other powers vested by the Constitution in the government of the United States, or in any department or officer thereof. Among these is the judicial power of the government. That is declared by the second section of the third article to "extend to all cases in law and equity arising under the Constitution, the laws of the United States, and treaties made or which shall be made under their authority," &c. This provision embraces alike civil and criminal cases arising under the Constitution and laws. *Cohens* v. *Virginia*, 6 Wheat. 264. Both are equally within the domain of the judicial powers of the United States, and there is nothing in the grant to justify an assertion that whatever power may be exerted over a civil case may not be exerted as fully over a criminal one. And a

case arising under the Constitution and laws of the United States may as well arise in a criminal prosecution as in a civil suit. What constitutes a case thus arising was early defined in the case cited from 6 Wheaton. It is not merely one where a party comes into court to demand something conferred upon him by the Constitution or by a law or treaty. A case consists of the right of one party as well as the other, and may truly be said to arise under the Constitution or a law or a treaty of the United States whenever its correct decision depends upon the construction of either. Cases arising under the laws of the United States are such as grow out of the legislation of Congress, whether they constitute the right or privilege, or claim or protection, or defence of the party, in whole or in part, by whom they are asserted. Story on the Constitution, sect. 1647; 6 Wheat. 379. It was said in *Osborne* v. *The Bank of the United States*, 9 Wheat. 738, "When a question to which the judicial power of the Union is extended by the Constitution forms an ingredient of the original cause, it is in the power of Congress to give the circuit courts jurisdiction of that cause, although other questions of fact or of law may be involved in it." And a case arises under the laws of the United States, when it arises out of the implication of the law. Mr. Chief Justice Marshall said, in the case last cited: "It is not unusual for a legislative act to involve consequences which are not expressed. An officer, for example, is ordered to arrest an individual. It is not necessary, nor is it usual, to say that he shall not be punished for obeying this order. His security is implied in the order itself. It is no unusual thing for an Act of Congress to imply, without expressing, this very exemption from State control. . . . The collectors of the revenue, the carriers of the mail, the mint establishment, and all those institutions which are public in their nature, are examples in point. It has never been doubted that all who are employed in them are protected while in the line of their duty; and yet this protection is not expressed in any Act of Congress. It is incidental to, and is implied in, the several Acts by which those institutions are created; and is secured to the individuals employed in them by the judicial power alone; that is, the judicial power is the instrument employed by the government in administering this security."

The constitutional right of Congress to authorize the removal before trial of civil cases arising under the laws of the United States has long since passed beyond doubt. It was exercised almost contemporaneously with the adoption of the Constitution, and the power has been in constant use ever since. The Judiciary Act of Sept. 24, 1789, was passed by the first Congress, many members of which had assisted in framing the Constitution; and though some doubts were soon after suggested whether cases could be removed from State courts before trial, those doubts soon disappeared. Whether removal from a State to a Federal court is an exercise of appellate jurisdiction, as laid down in Story's Commentaries on the Constitution, sect. 1745, or an indirect mode of exercising original jurisdiction, as intimated in *Railway Company* v.

Whitton, 13 Wall. 270, we need not now inquire. Be it one or the other, it was ruled in the case last cited to be constitutional. But if there is power in Congress to direct a removal before trial of a civil case arising under the Constitution or laws of the United States, and direct its removal because such a case has arisen, it is impossible to see why the same power may not order the removal of a criminal prosecution, when a similar case has arisen in it. The judicial power is declared to extend to all cases of the character described, making no distinction between civil and criminal, and the reasons for conferring upon the courts of the national government superior jurisdiction over cases involving authority and rights under the laws of the United States are equally applicable to both. As we have already said, such a jurisdiction is necessary for the preservation of the acknowledged powers of the government. It is essential, also, to a uniform and consistent administration of national laws. It is required for the preservation of that supremacy which the Constitution gives to the general government by declaring that the Constitution and laws of the United States made in pursuance thereof, and the treaties made or which shall be made under the authority of the United States, shall be the supreme laws of the land, and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding." The founders of the Constitution could never have intended to leave to the possibly varying decisions of the State courts what the laws of the government it established are, what rights they confer, and what protection shall be extended to those who execute them. If they did, where is the supremacy over those questions vested in the government by the Constitution? If, whenever and wherever a case arises under the Constitution and laws or treaties of the United States, the national government cannot take control of it, whether it be civil or criminal, in any stage of its progress, its judicial power is, at least, temporarily silenced, instead of being at all times supreme. In criminal as well as in civil proceedings in State courts, cases under the Constitution and laws of the United States might have been expected to arise, as, in fact, they do. Indeed, the powers of the general government and the lawfulness of authority exercised or claimed under it, are quite as frequently in question in criminal cases in State courts as they are in civil cases, in proportion to their number.

The argument so much pressed upon us, that it is an invasion of the sovereignty of a State to withdraw from its courts into the courts of the general government the trial of prosecutions for alleged offences against the criminal laws of a State, even though the defence presents a case arising out of an Act of Congress, ignores entirely the dual character of our government. It assumes that the States are completely and in all respects sovereign. But when the national government was formed, some of the attributes of State sovereignty were partially, and others wholly, surrendered and vested in the United States. Over the subjects thus surrendered the sovereignty of the

States ceased to extend. Before the adoption of the Constitution each State had complete and exclusive authority to administer by its courts all the law, civil and criminal, which existed within its borders. Its judicial power extended over every legal question that could arise. But when the Constitution was adopted, a portion of that judicial power became vested in the new government created, and so far as thus vested it was withdrawn from the sovereignty of the State. Now the execution and enforcement of the laws of the United States, and the judicial determination of questions arising under them, are confided to another sovereign, and to that extent the sovereignty of the State is restricted. The removal of cases arising under those laws, from State into Federal courts, is, therefore, no invasion of State domain. On the contrary, a denial of the right of the general government to remove them, to take charge of and try any case arising under the Constitution or laws of the United States, is a denial of the conceded sovereignty of that government over a subject expressly committed to it.

It is true, the Act of 1789 authorized the removal of civil cases only. It did not attempt to confer upon the Federal courts all the judicial power vested in the government. Additional grants have from time to time been made. Congress has authorized more and more fully, as occasion has required, the removal of civil cases from State courts into the circuit courts of the United States, and the constitutionality of such authorization has met with general acquiescence. It has been sustained by the decisions of this court.

Nor has the removal of civil cases alone been authorized. On the 4th of February, 1815, an Act was passed (3 Stat. 198) providing that if any suit or prosecution should be commenced in any State court against any collector, naval officer, surveyor, inspector, or any other officer, civil or military, or any other person aiding or assisting, agreeably to the provisions of the Act, or under color thereof, for any act done or omitted to be done as an officer of the customs, or for anything done by virtue of the Act or under color thereof, it might be removed before trial into the Circuit Court of the United States, provided the Act should not apply to any offences involving corporal punishment. This Act expressly applied to a criminal action or prosecution. It was intended to be of short duration, but it was extended by the Act of March 3, 1815 (3 Stat. p. 233, sect. 6), and re-enacted in 1817 for a period of four years.

So, in 1833, by the Act of March 2 (4 *Ib.* c. 57, sect. 3), it was enacted that in any case where suit or prosecution should be commenced in a State court of any State, against any officer of the United States, or other person, for or on account of any act done under the revenue laws of the United States, or under color thereof, or for or on account of any right, authority, or title set up or claimed by such officer, or other person, under any such law of the United States, the suit or prosecution might be removed, before trial, into the Federal Circuit Court of the proper district. The history of this Act is well

laws. It was passed in consequence of an attempt by one of the States of the Union to make penal the collection by United States officers within the State of duties under the tariff laws. It was recommended by President Jackson in a special message, and passed in the Senate by a vote of 32 to 1, and in the House by a majority of 92. It undoubtedly embraced both civil and criminal cases. It was so understood and intended when it was passed. The chairman of the Judiciary Committee which introduced the bill said: "It gives the right to remove at any time before trial, but not after judgment has been given, and thus affects in no way the dignity of the State tribunals. Whether in criminal or civil cases, it gives this right of removal. Has Congress power in criminal cases? He would answer the question in the affirmative. Congress had the power to give the right in criminal as well as in civil cases, because the second section of the third article of the Constitution speaks of all cases in law and equity, and these comprehensive terms cover all. . . . It was more necessary that this jurisdiction should be extended over criminal than over civil cases. If it were not admitted that the Federal judiciary had jurisdiction of criminal cases, then was nullification ratified and sealed forever; for a State would have nothing more to do than to declare an act a felony or misdemeanor, to nullify all the laws of the Union."

The provisions of the Act of July 13, 1866 (14 Stat. 171, sect. 67), relative to the removal of suits or prosecutions in State courts against internal revenue officers, provisions re-enacted in sect. 643 of the Revised Statutes, are almost identical with those of the Act of 1833, the only noticeable difference being, that in the latter Act the adjective "criminal" is inserted before the word "prosecution." This made no change in the meaning. The well-understood legal signification of the word "prosecution" is a criminal proceeding at the suit of the government. Thus it appears that all along our history the legislative understanding of the Constitution has been that it authorizes the removal from State courts to the circuit courts of the United States, alike civil and criminal cases, arising under the laws, the Constitution, or treaties.

The subject has more than once been before this court, and it has been fully considered. In *Martin* v. *Hunter*, 1 Wheat. 304, it was admitted in argument by Messrs. Tucker and Dexter that there might be a removal before judgment, though it was contended there could not be after; but the contention was overruled, and it was declared that Congress might authorize a removal either before or after judgment; that the time, the process, and the manner must be subject to its absolute legislative control. In that case, also, it was said that the remedy of the removal of suits would be utterly inadequate to the purposes of the Constitution, if it could act only upon the parties, and not upon the State courts. Judge Story, who delivered the opinion, adding: "In respect to criminal prosecutions, the difficulty seems admitted to be insurmountable, and, in respect to civil suits, there would in many cases be rights without corresponding remedies. . . . In respect to criminal prosecutions there would at once be an end of all control, and

the State decisions would be paramount to the Constitution." The expression that the difficulty in the way of the removal of criminal prosecutions seems admitted to be insurmountable has been laid hold of here, in argument, as a declaration of the court that criminal prosecutions cannot be removed. It is a very shortsighted and unwarranted inference. What the court said was, that the remedy in such cases seems to be insurmountable, if it could not act upon State courts as well as parties; and it was ruled that it does thus act. The expression must be read in its connection. In *Martin* v. *Hunter* the removal was by writ of error after final judgment in the State court; which certainly seems more an invasion of State jurisdiction than a removal before trial. The case was followed by *Cohens* v. *Virginia*, 6 *Ib.* 264, a criminal case, in which the defendant set up against a criminal prosecution an authority under an Act of Congress. There it was decided that cases might be removed in which a State was a party. This also was a writ of error after a final judgment; but it, as well as the former case, recognized the right of Congress to authorize removals either before or after trial, and neither case made any distinction between civil and criminal proceedings.

In *The Mayor* v. *Cooper*, 6 Wall. 247, the validity of the removal Acts of 1863, March 3, sect. 5 of c. 81 (12 Stat. 756), and its amendment of May 11, 1866 (14 id. 1866), which embraced not only civil cases but criminal prosecutions, and authorized their removal before trial, came under consideration, and it was sustained. This court then said: The constitutional power is given in general terms. "No limitation is imposed. The broadest language is used. 'All cases' so arising are embraced. How jurisdiction shall be acquired by the inferior court" (of the United States), "whether it shall be original or appellate, or original in part and appellate in part, and the manner of procedure in its exercise after it has been acquired, is not prescribed. This Constitution is silent upon these subjects. They are remitted without check or limitation to the wisdom of the legislature." "Jurisdiction, original or appellate, alike comprehensive in either case, may be given. The constitutional boundary line of both is the same. Every variety and form of appellate jurisdiction within the sphere of the power, extending as well to the courts of the States as to those of the nation, is permitted. There is no distinction in this respect between civil and criminal cases. Both are within its scope. Nor is it any objection that questions are involved which are not at all of a Federal character. If one of the latter exist, if there be a single such ingredient in the mass, it is sufficient." The court added: "We entertain no doubt of the constitutionality of the jurisdiction given by the Act under which this case has arisen." See also *Com.* v. *Ashman*, 3 Grant Cas. 436; *Ib.* 416–418; *State* v. *Hoskins*, 77 N. C. 530, decided in 1877, where the constitutionality of sect. 643 of the Revised Statutes was affirmed after a full and instructive discussion.

It ought, therefore, to be considered as settled that the constitutional powers of Congress to authorize the removal of criminal cases for

alleged offences against State laws from State courts to the circuit courts of the United States, when there arises a Federal question in them, is as ample as its power to authorize the removal of a civil case. Many of the cases referred to, and others, set out with great force the indispensability of such a power to the enforcement of Federal law.

It follows that the first question certified to us from the Circuit Court of Tennessee must be answered in the affirmative.

The second question is, "Whether, if the case be removable from the State court, there is any mode and manner of procedure in the trial prescribed by the Act of Congress."

Whether there is or not is totally immaterial to the inquiry whether the case is removable; and this question can hardly have arisen on the motion to remand the case. The imaginary difficulties and incongruities supposed to be in the way of trying in the Circuit Court an indictment for an alleged offence against the peace and dignity of a State, if they were real, would be for the consideration of Congress. But they are unreal. While it is true there is neither in sect. 643, nor in the Act of which it is a re-enactment, any mode of procedure in the trial of a removed case prescribed, except that it is ordered the cause when removed shall proceed as a cause originally commenced in that court, yet the mode of trial is sufficiently obvious. The circuit courts of the United States have all the appliances which are needed for the trial of any criminal case. They adopt and apply the laws of the State in civil cases, and there is no more difficulty in administering the State's criminal law. They are not foreign courts. The Constitution has made them courts within the States to administer the laws of the States in certain cases; and, so long as they keep within the jurisdiction assigned to them, their general powers are adequate to the trial of any case. The supposed anomaly of prosecuting offenders against the peace and dignity of a State, in tribunals of the general government, grows entirely out of the division of powers between that government and the government of a State; that is, a division of sovereignty over certain matters. When this is understood (and it is time it should be), it will not appear strange that, even in cases of criminal prosecutions for alleged offences against a State, in which arises a defence under United States law, the general government should take cognizance of the case and try it in its own courts, according to its own forms of proceeding.

The third question certified has been sufficiently answered in what we have said respecting the second. It must be answered in the affirmative.

The first question will be answered in the affirmative, and the second is answered as in the opinion.

[The dissenting opinion of Mr. JUSTICE CLIFFORD, with whom Mr. JUSTICE FIELD concurred, is omitted.][1]

[1] Compare *U. S.* v. *Reese*, 92 U. S. 214; *Strauder* v. *West Virginia*, 100 U. S. 303; *Virginia* v. *Reeves*, *Ib.* 313. — ED.

Ex Parte SIEBOLD.

SUPREME COURT OF THE UNITED STATES. 1879.

[100 *U. S.* 371.]

PETITION for writ of *habeas corpus*.

The facts are stated in the opinion of the court.

Mr. Bradley T. Johnson, for the petitioners.

The *Attorney-General*, *contra*.

MR. JUSTICE BRADLEY delivered the opinion of the court.

The petitioners in this case, Albert Siebold, Walter Tucker, Martin C. Burns, Lewis Coleman, and Henry Bowers, were judges of election at different voting precincts in the city of Baltimore, at the election held in that city, and in the State of Maryland, on the fifth day of November, 1878, at which representatives to the Forty-sixth Congress were voted for.

At the November Term of the Circuit Court of the United States for the District of Maryland, an indictment against each of the petitioners was found in said court, for offences alleged to have been committed by them respectively at their respective precincts whilst being such judges of election; upon which indictments they were severally tried, convicted, and sentenced by said court to fine and imprisonment. They now apply to this court for a writ of *habeas corpus* to be relieved from imprisonment. . . .

These indictments were framed partly under sect. 5515 and partly under sect. 5522 of the Revised Statutes of the United States; and the principal questions raised by the application are, whether those sections, and certain sections of the title of the Revised Statutes relating to the elective franchise, which they are intended to enforce, are within the constitutional power of Congress to enact. If they are not, then it is contended that the Circuit Court has no jurisdiction of the cases, and that the convictions and sentences of imprisonment of the several petitioners were illegal and void. . . .

The State may make regulations on the subject; Congress may make regulations on the same subject, or may alter or add to those already made. The paramount character of those made by Congress has the effect to supersede those made by the State, so far as the two are inconsistent, and no farther. There is no such conflict between them as to prevent their forming a harmonious system perfectly capable of being administered and carried out as such.

As to the supposed conflict that may arise between the officers appointed by the State and national governments for superintending the election, no more insuperable difficulty need arise than in the application of the regulations adopted by each respectively. The regulations of Congress being constitutionally paramount, the duties imposed thereby upon the officers of the United States, so far as they

have respect to the same matters, must necessarily be paramount to those to be performed by the officers of the State. If both cannot be performed, the latter are *pro tanto* superseded and cease to be duties. If the power of Congress over the subject is supervisory and paramount, as we have seen it to be, and if officers or agents are created for carrying out its regulations, it follows as a necessary consequence that such officers and agents must have the requisite authority to act without obstruction or interference from the officers of the State. No greater subordination, in kind or degree, exists in this case than in any other. It exists to the same extent between the different officers appointed by the State, when the State alone regulates the election. One officer cannot interfere with the duties of another. or obstruct or hinder him in the performance of them. Where there is a disposition to act harmoniously, there is no danger of disturbance between those who have different duties to perform. When the rightful authority of the general government is once conceded and acquiesced in, the apprehended difficulties will disappear. Let a spirit of national as well as local patriotism once prevail, let unfounded jealousies cease, and we shall hear no more about the impossibility of harmonious action between the national and State governments in a matter in which they have a mutual interest.

As to the supposed incompatibility of independent sanctions and punishments imposed by the two governments, for the enforcement of the duties required of the officers of election, and for their protection in the performance of those duties, the same considerations apply. While the State will retain the power of enforcing such of its own regulations as are not superseded by those adopted by Congress, it cannot be disputed that if Congress has power to make regulations it must have the power to enforce them, not only by punishing the delinquency of officers appointed by the United States, but by restraining and punishing those who attempt to interfere with them in the performance of their duties; and if, as we have shown, Congress may revise existing regulations, and add to or alter the same as far as it deems expedient, there can be as little question that it may impose additional penalties for the prevention of frauds committed by the State officers in the elections, or for their violation of any duty relating thereto, whether arising from the common law or from any other law, State or national. Why not? Penalties for fraud and delinquency are part of the regulations belonging to the subject. If Congress, by its power to make or alter the regulations, has a general supervisory power over the whole subject, what is there to preclude it from imposing additional sanctions and penalties to prevent such fraud and delinquency?

It is objected that Congress has no power to enforce State laws or to punish State officers, and especially has no power to punish them for violating the laws of their own State. As a general proposition, this is undoubtedly true; but when, in the performance of their func-

tions, State officers are called upon to fulfil duties which they owe to the United States as well as to the State, has the former no means of compelling such fulfilment? Yet that is the case here. It is the duty of the States to elect representatives to Congress. The due and fair election of these representatives is of vital importance to the United States. The government of the United States is no less concerned in the transaction than the State government is. It certainly is not bound to stand by as a passive spectator, when duties are violated and outrageous frauds are committed. It is directly interested in the faithful performance, by the officers of election, of their respective duties. Those duties are owed as well to the United States as to the State. This necessarily follows from the mixed character of the transaction, State and national. A violation of duty is an offence against the United States, for which the offender is justly amenable to that government. No official position can shelter him from this responsibility. In view of the fact that Congress has plenary and paramount jurisdiction over the whole subject, it seems almost absurd to say that an officer who receives or has custody of the ballots given for a representative owes no duty to the national government which Congress can enforce; or that an officer who stuffs the ballot-box cannot be made amenable to the United States. If Congress has not, prior to the passage of the present laws, imposed any penalties to prevent and punish frauds and violations of duty committed by officers of election, it has been because the exigency has not been deemed sufficient to require it, and not because Congress had not the requisite power.

The objection that the laws and regulations, the violation of which is made punishable by the Acts of Congress, are State laws, and have not been adopted by Congress, is no sufficient answer to the power of Congress to impose punishment. It is true that Congress has not deemed it necessary to interfere with the duties of the ordinary officers of election, but has been content to leave them as prescribed by State laws. It has only created additional sanctions for their performance, and provided means of supervision in order more effectually to secure such performance. The imposition of punishment implies a prohibition of the act punished. The State laws which Congress sees no occasion to alter, but which it allows to stand, are in effect adopted by Congress. It simply demands their fulfilment. Content to leave the laws as they are, it is not content with the means provided for their enforcement. It provides additional means for that purpose; and we think it is entirely within its constitutional power to do so. It is simply the exercise of the power to make additional regulations.

That the duties devolved on the officers of election are duties which they owe to the United States as well as to the State, is further evinced by the fact that they have always been so regarded by the House of Representatives itself. In most cases of contested elections, the conduct of these officers is examined and scrutinized by that body as a

matter of right; and their failure to perform their duties is often made the ground of decision. Their conduct is justly regarded as subject to the fullest exposure; and the right to examine them personally, and to inspect all their proceedings and papers, has always been maintained. This could not be done, if the officers were amenable only to the supervision of the State government which appointed them.

Another objection made is, that, if Congress can impose penalties for violation of State laws, the officer will be made liable to double punishment for delinquency, — at the suit of the State, and at the suit of the United States. But the answer to this is, that each government punishes for violation of duty to itself only. Where a person owes a duty to two sovereigns, he is amenable to both for its performance; and either may call him to account. Whether punishment inflicted by one can be pleaded in bar to a charge by the other for the same identical act, need not now be decided; although considerable discussion bearing upon the subject has taken place in this court, tending to the conclusion that such a plea cannot be sustained.

In reference to a conviction under a State law for passing counterfeit coin, which was sought to be reversed on the ground that Congress had jurisdiction over that subject, and might inflict punishment for the same offence, Mr. Justice Daniel, speaking for the court, said: "It is almost certain that, in the benignant spirit in which the institutions both of the State and Federal systems are administered, an offender who should have suffered the penalties denounced by the one would not be subjected a second time to punishment by the other for acts essentially the same, — unless, indeed, this might occur in instances of peculiar enormity, or where the public safety demanded extraordinary rigor. But, were a contrary course of policy or action either probable or usual, this would by no means justify the conclusion that offences falling within the competency of different authorities to restrain or punish them would not properly be subjected to the consequences which those authorities might ordain and affix to their perpetration." *Fox* v. *The State of Ohio*, 5 How. 410. The same judge, delivering the opinion of the court in the case of *United States* v. *Marigold* (9 How. 569) where a conviction was had under an Act of Congress for bringing counterfeit coin into the country, said, in reference to *Fox's Case*: "With the view of avoiding conflict between the State and Federal jurisdictions, this court, in the case of *Fox* v. *State of Ohio*, have taken care to point out that the same act might, as to its character and tendencies, and the consequences it involved, constitute an offence against both the State and Federal governments, and might draw to its commission the penalties denounced by either, as appropriate to its character in reference to each. We hold this distinction sound;" and the conviction was sustained. The subject came up again for discussion in the case of *Moore* v. *State of Illinois* (14 *Ib.* 13), in which the plaintiff in error had been convicted under a State law for harboring and secreting a negro slave, which was contended to be properly an offence

against the United States under the fugitive-slave law of 1793, and not an offence against the State. The objection of double punishment was again raised. Mr. Justice Grier, for the court, said: "Every citizen of the United States is also a citizen of a State or Territory. He may be said to owe allegiance to two sovereigns, and may be liable to punishment for an infraction of the laws of either. The same act may be an offence or transgression of the laws of both." Substantially the same views are expressed in *United States* v. *Cruikshank* (92 U. S. 542), referring to these cases; and we do not well see how the doctrine they contain can be controverted. A variety of instances may be readily suggested, in which it would be necessary or proper to apply it. Suppose, for example, a State judge having power under the naturalization laws to admit aliens to citizenship should utter false certificates of naturalization, can it be doubted that he could be indicted under the Act of Congress providing penalties for that offence, even though he might also, under the State laws, be indictable for forgery, as well as liable to impeachment? So, if Congress, as it might, should pass a law fixing the standard of weights and measures, and imposing a penalty for sealing false weights and false measures, but leaving to the States the matter of inspecting and sealing those used by the people, would not an offender, filling the office of sealer under a State law, be amenable to the United States as well as to the State?

If the officers of election, in elections for representatives, owe a duty to the United States, and are amenable to that government as well as to the State, — as we think they are, — then, according to the cases just cited, there is no reason why each should not establish sanctions for the performance of the duty owed to itself, though referring to the same act.

To maintain the contrary proposition, the case of *Commonwealth of Kentucky* v. *Dennison* (24 How. 66) is confidently relied on by the petitioners' counsel. But there, Congress had imposed a duty upon the Governor of the State which it had no authority to impose. The enforcement of the clause in the Constitution requiring the delivery of fugitives from service was held to belong to the government of the United States, to be effected by its own agents; and Congress had no authority to require the Governor of a State to execute this duty.

We have thus gone over the principal reasons of a special character relied on by the petitioners for maintaining the general proposition for which they contend; namely, that in the regulation of elections for representatives the national and State governments cannot co-operate, but must act exclusively of each other; so that, if Congress assumes to regulate the subject at all, it must assume exclusive control of the whole subject. The more general reason assigned, to wit, that the nature of sovereignty is such as to preclude the joint co-operation of two sovereigns, even in a matter in which they are mutually concerned, is not, in our judgment, of sufficient force to prevent concurrent and

harmonious action on the part of the national and State governments in the election of representatives. It is at most an argument *ab inconvenienti*. There is nothing in the Constitution to forbid such co-operation in this case. On the contrary, as already said, we think it clear that the clause of the Constitution relating to the regulation of such elections contemplates such co-operation whenever Congress deems it expedient to interfere merely to alter or add to existing regulations of the State. If the two governments had an entire equality of jurisdiction, there might be an intrinsic difficulty in such co-operation. Then the adoption by the State government of a system of regulations might exclude the action of Congress. By first taking jurisdiction of the subject, the State would acquire exclusive jurisdiction in virtue of a well-known principle applicable to courts having co-ordinate jurisdiction over the same matter. But no such equality exists in the present case. The power of Congress, as we have seen, is paramount, and may be exercised at any time, and to any extent which it deems expedient; and so far as it is exercised, and no farther, the regulations effected supersede those of the State which are inconsistent therewith.

As a general rule, it is no doubt expedient and wise that the operations of the State and national governments should, as far as practicable, be conducted separately, in order to avoid undue jealousies and jars and conflicts of jurisdiction and power. But there is no reason for laying this down as a rule of universal application. It should never be made to override the plain and manifest dictates of the Constitution itself. We cannot yield to such a transcendental view of State sovereignty. The Constitution and laws of the United States are the supreme law of the land, and to these every citizen of every State owes obedience, whether in his individual or official capacity. There are very few subjects, it is true, in which our system of government, complicated as it is, requires or gives room for conjoint action between the State and national sovereignties. Generally, the powers given by the Constitution to the government of the United States are given over distinct branches of sovereignty from which the State governments, either expressly or by necessary implication, are excluded. But in this case, expressly, and in some others, by implication, as we have seen in the case of pilotage, a concurrent jurisdiction is contemplated, that of the State, however, being subordinate to that of the United States, whereby all question of precedency is eliminated.

In what we have said, it must be remembered that we are dealing only with the subject of elections of representatives to Congress. If for its own convenience a State sees fit to elect State and county officers at the same time and in conjunction with the election of representatives, Congress will not be thereby deprived of the right to make regulations in reference to the latter. We do not mean to say, however, that for any acts of the officers of election, having exclusive reference to the election of State or county officers, they will be amenable to Federal jurisdiction; nor do we understand that the

enactments of Congress now under consideration have any application to such acts.

It must also be remembered that we are dealing with the question of power, not of the expediency of any regulations which Congress has made. That is not within the pale of our jurisdiction. In exercising the power, however, we are bound to presume that Congress has done so in a judicious manner; that it has endeavored to guard as far as possible against any unnecessary interference with State laws and regulations, with the duties of State officers, or with local prejudices. It could not act at all so as to accomplish any beneficial object in preventing frauds and violence, and securing the faithful performance of duty at the elections, without providing for the presence of officers and agents to carry its regulations into effect. It is also difficult to see how it could attain these objects without imposing proper sanctions and penalties against offenders.

The views we have expressed seem to us to be founded on such plain and practical principles as hardly to need any labored argument in their support. We may mystify anything. But if we take a plain view of the words of the Constitution, and give to them a fair and obvious interpretation, we cannot fail in most cases of coming to a clear understanding of its meaning. We shall not have far to seek. We shall find it on the surface, and not in the profound depths of speculation.

The greatest difficulty in coming to a just conclusion arises from mistaken notions with regard to the relations which subsist between the State and national governments. It seems to be often overlooked that a national constitution has been adopted in this country, establishing a real government therein, operating upon persons and territory and things; and which, moreover, is, or should be, as dear to every American citizen as his State government is. Whenever the true conception of the nature of this government is once conceded, no real difficulty will arise in the just interpretation of its powers. But if we allow ourselves to regard it as a hostile organization, opposed to the proper sovereignty and dignity of the State governments, we shall continue to be vexed with difficulties as to its jurisdiction and authority. No greater jealousy is required to be exercised towards this government in reference to the preservation of our liberties, than is proper to be exercised towards the State governments. Its powers are limited in number, and clearly defined; and its action within the scope of those powers is restrained by a sufficiently rigid bill of rights for the protection of its citizens from oppression. The true interest of the people of this country requires that both the national and State governments should be allowed, without jealous interference on either side, to exercise all the powers which respectively belong to them according to a fair and practical construction of the Constitution. State rights and the rights of the United States should be equally respected. Both are essential to the preservation of our liberties and the perpetuity of our

institutions. But in endeavoring to vindicate the one, we should not allow our zeal to nullify or impair the other.

Several other questions bearing upon the present controversy have been raised by the counsel of the petitioners. Somewhat akin to the argument which has been considered is the objection that the deputy marshals authorized by the Act of Congress to be created and to attend the elections are authorized to keep the peace; and that this is a duty which belongs to the State authorities alone. It is argued that the preservation of peace and good order in society is not within the powers confided to the government of the United States, but belongs exclusively to the States. Here again we are met with the theory that the government of the United States does not rest upon the soil and territory of the country. We think that this theory is founded on an entire misconception of the nature and powers of that government. We hold it to be an incontrovertible principle, that the government of the United States may, by means of physical force, exercised through its official agents, execute on every foot of American soil the powers and functions that belong to it. This necessarily involves the power to command obedience to its laws, and hence the power to keep the peace to that extent.

This power to enforce its laws and to execute its functions in all places does not derogate from the power of the State to execute its laws at the same time and in the same places. The one does not exclude the other, except where both cannot be executed at the same time. In that case, the words of the Constitution itself show which is to yield. "This Constitution, and all laws which shall be made in pursuance thereof, . . . shall be the supreme law of the land."

This concurrent jurisdiction which the national government necessarily possesses to exercise its powers of sovereignty in all parts of the United States is distinct from that exclusive power which, by the First Article of the Constitution, it is authorized to exercise over the District of Columbia, and over those places within a State which are purchased by consent of the legislature thereof, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings. There its jurisdiction is absolutely exclusive of that of the State, unless, as is sometimes stipulated, power is given to the latter to serve the ordinary process of its courts in the precinct acquired.

Without the concurrent sovereignty referred to, the national government would be nothing but an advisory government. Its executive power would be absolutely nullified.

Why do we have marshals at all, if they cannot physically lay their hands on persons and things in the performance of their proper duties? What functions can they perform, if they cannot use force? In executing the processes of the courts, must they call on the nearest constable for protection? Must they rely on him to use the requisite compulsion, and to keep the peace whilst they are soliciting and entreating the parties and bystanders to allow the law to take its course?

This is the necessary consequence of the positions that are assumed. If we indulge in such impracticable views as these, and keep on refining and re-refining, we shall drive the national government out of the United States, and relegate it to the District of Columbia, or perhaps to some foreign soil. We shall bring it back to a condition of greater helplessness than that of the old Confederation.

The argument is based on a strained and impracticable view of the nature and powers of the national government. It must execute its powers, or it is no government. It must execute them on the land as well as on the sea, on things as well as on persons. And, to do this, it must necessarily have power to command obedience, preserve order, and keep the peace; and no person or power in this land has the right to resist or question its authority, so long as it keeps within the bounds of its jurisdiction. Without specifying other instances in which this power to preserve order and keep the peace unquestionably exists, take the very case in hand. The counsel for the petitioners concede that Congress may, if it sees fit, assume the entire control and regulation of the election of representatives. This would necessarily involve the appointment of the places for holding the polls, the times of voting, and the officers for holding the election; it would require the regulation of the duties to be performed, the custody of the ballots, the mode of ascertaining the result, and every other matter relating to the subject. Is it possible that Congress could not, in that case, provide for keeping the peace at such elections, and for arresting and punishing those guilty of breaking it? If it could not, its power would be but a shadow and a name. But, if Congress can do this, where is the difference in principle in its making provision for securing the preservation of the peace, so as to give to every citizen his free right to vote without molestation or injury, when it assumes only to supervise the regulations made by the State, and not to supersede them entirely? In our judgment, there is no difference; and, if the power exists in the one case, it exists in the other.

The next point raised is, that the Act of Congress proposes to operate on officers or persons authorized by State laws to perform certain duties under them, and to require them to disobey and disregard State laws when they come in conflict with the Act of Congress; that it thereby of necessity produces collision, and is therefore void. This point has been already fully considered. We have shown, as we think, that, where the regulations of Congress conflict with those of the State, it is the latter which are void, and not the regulations of Congress; and that the laws of the State, in so far as they are inconsistent with the laws of Congress on the same subject, cease to have effect as laws. . . . *Application denied.*

MR. JUSTICE CLIFFORD and MR. JUSTICE FIELD dissented.

IN RE NEAGLE.

SUPREME COURT OF THE UNITED STATES. 1889.

[135 *U. S.* 1.]

MR. JUSTICE MILLER, on behalf of the court, stated the case as follows: —

This was an appeal by Cunningham, sheriff of the county of San Joaquin, in the State of California, from a judgment of the Circuit Court of the United States for the Northern District of California, discharging David Neagle from the custody of said sheriff, who held him a prisoner on a charge of murder.

On the 16th day of August, 1889, there was presented to Judge Sawyer, the Circuit Judge of the United States for the Ninth Circuit, embracing the Northern District of California, a petition signed David Neagle, deputy United States marshal, by A. L. Farrish on his behalf. This petition represented that the said Farrish was a deputy marshal duly appointed for the Northern District of California by J. C. Franks, who was the marshal of that district. It further alleged that David Neagle was, at the time of the occurrences recited in the petition and at the time of filing it, a duly appointed and acting deputy United States marshal for the same district. It then proceeded to state that said Neagle was imprisoned, confined, and restrained of his liberty in the county jail in San Joaquin County, in the State of California, by Thomas Cunningham, sheriff of said county, upon a charge of murder, under a warrant of arrest, a copy of which was annexed to the petition. The warrant was as follows: —

"In the Justice's Court of Stockton Township.

"STATE OF CALIFORNIA, }
County of San Joaquin, } *ss.:*

"The People of the State of California to any sheriff, constable, marshal, or policeman of said State or of the county of San Joaquin:

"Information on oath having been this day laid before me by Sarah A. Terry that the crime of murder, a felony, has been committed within said county of San Joaquin on the 14th day of August, A.D. 1889, in this, that one David S. Terry, a human being then and there being, was wilfully, unlawfully, feloniously, and with malice aforethought shot, killed, and murdered, and accusing Stephen J. Field and David Neagle thereof: You are therefore commanded forthwith to arrest the above-named Stephen J. Field [1] and David Neagle and bring them before me,

[1] The Governor of California, on learning that a warrant had been issued for the arrest of Mr. Justice Field, promptly wrote to the Attorney-General of the State, urging "the propriety of at once instructing the District Attorney of San Joaquin County to dismiss the unwarranted proceeding against him," as his arrest "would

at my office, in the city of Stockton, or, in case of my absence or inability to act, before the nearest and most accessible magistrate in the county.

"Dated at Stockton this 14th day of August, A.D. 1889.

"H. V. J. SWAIN,
"*Justice of the Peace.*

"The defendant, David Neagle, having been brought before me on this warrant, is committed for examination to the sheriff of San Joaquin County, California.

"Dated August 15, 1889. H. V. J. SWAIN,
"*Justice of the Peace.*"

The petition then recited the circumstances of a *rencontre* between said Neagle and David S. Terry, in which the latter was instantly killed by two shots from a revolver in the hands of the former. The circumstances of this encounter and of what led to it will be considered with more particularity hereafter. The main allegation of this petition was that Neagle, as United States deputy marshal, acting under the orders of Marshal Franks, and in pursuance of instructions from the Attorney-General of the United States, had, in consequence of an anticipated attempt at violence on the part of Terry against the Honorable Stephen J. Field, a justice of the Supreme Court of the United States, been in attendance upon said justice, and was sitting by his side at a breakfast table when a murderous assault was made by Terry on Judge Field, and in defence of the life of the judge the homicide was committed for which Neagle was held by Cunningham. The allegation was very distinct that Justice Field was engaged in the discharge of his duties as circuit justice of the United States for that circuit, having held court at Los Angeles, one of the places at which the court is by law held, and, having left that court, was on his way to San Francisco for the purpose of holding the Circuit Court at that place. The allegation was also very full that Neagle was directed by Marshal Franks to accompany him for the purpose of protecting him, and that these orders of Franks were given in anticipation of the assault which actually occurred. It was also stated, in more general terms, that Marshal Neagle, in killing Terry under the circumstances, was in the discharge of his duty as an officer of the United States, and was not, therefore, guilty of a murder, and that his imprisonment under the warrant held by Sheriff Cunningham was in violation of the laws and Constitution of the United States, and that he was in custody for an act done in pursuance of the laws of the United States. This petition being sworn to by Farrish, and presented to Judge Sawyer, he made the following order: —

be a burning disgrace to the State unless disavowed." The Attorney-General as promptly responded by advising the District Attorney that there was "no evidence to implicate Justice Field in said shooting," and that "public justice demands that the charge against him be dismissed;" which was accordingly done.

"Let a writ of *habeas corpus* issue in pursuance of the prayer of the within petition, returnable before the United States Circuit Court for the Northern District of California.

"SAWYER, *Circuit Judge.*"

The writ was accordingly issued and delivered to Cunningham, who made the following return: —

"COUNTY OF SAN JOAQUIN, *State of California,*
"SHERIFF'S OFFICE.

"To the honorable Circuit Court of the United States for the Northern District of California:

"I hereby certify and return that before the coming to me of the annexed writ of *habeas corpus* the said David Neagle was committed to my custody, and is detained by me by virtue of a warrant issued out of the justice's court of Stockton township, State of California, county of San Joaquin, and by the indorsement made upon said warrant. Copy of said warrant and indorsement is annexed hereto and made a part of this return. Nevertheless, I have the body of the said David Neagle before the honorable court, as I am in the said writ commanded.

"August 17, 1889. THOMAS CUNNINGHAM,
"*Sheriff San Joaquin County, California.*"

Various pleadings and amended pleadings were made which do not tend much to the elucidation of the matter before us. Cunningham filed a demurrer to the petition for the writ of *habeas corpus*, and Neagle filed a traverse to the return of the sheriff, which was accompanied by exhibits, the substance of which will be hereafter considered when the case comes to be examined upon its facts.

The hearing in the Circuit Court was had before Circuit Judge Sawyer and District Judge Sabin. The sheriff, Cunningham, was represented by G. A. Johnson, Attorney-General of the State of California, and other counsel. A large body of testimony, documentary and otherwise, was submitted to the court, on which, after a full consideration of the subject, the court made the following order:

"In the Matter of David Neagle, on *habeas corpus*.

"In the above-entitled matter, the court having heard the testimony introduced on behalf of the petitioner, none having been offered for the respondent, and also the arguments of the counsel for petitioner and respondent, and it appearing to the court that the allegations of the petitioner in his amended answer or traverse to the return of the sheriff of San Joaquin County, respondent herein, are true, and that the prisoner is in custody for an act done in pursuance of a law of the United States, and in custody in violation of the Constitution and laws of the United States, it is therefore ordered that petitioner be, and he is hereby, discharged from custody."

From that order an appeal was allowed which brought the case to this court, accompanied by a voluminous record of all the matters which were before the court on the hearing.

Z. Montgomery, *G. A. Johnson*, Attorney-General of the State of California, *Samuel Shellabarger*, and *Jeremiah M. Wilson*, for the appellant. *Attorney-General Miller*, and *Joseph H. Choate* (with whom was *James C. Carter* on the brief), for the appellee.

MR. JUSTICE MILLER, after stating the case as above, delivered the opinion of the court.

If it be true, as stated in the order of the court discharging the prisoner, that he was held "in custody for an act done in pursuance of a law of the United States, and in custody in violation of the Constitution and laws of the United States," there does not seem to be any doubt that, under the statute on that subject, he was properly discharged by the Circuit Court. . . .

These are the material circumstances produced in evidence before the Circuit Court on the hearing of this *habeas corpus* case. It is but a short sketch of a history which is given in over five hundred pages in the record, but we think it is sufficient to enable us to apply the law of the case to the question before us. Without a more minute discussion of this testimony, it produces upon us the conviction of a settled purpose on the part of Terry and his wife, amounting to a conspiracy, to murder Justice Field. And we are quite sure that if Neagle had been merely a brother or a friend of Judge Field, travelling with him, and aware of all the previous relations of Terry to the judge, — as he was, — of his bitter animosity, his declared purpose to have revenge even to the point of killing him, he would have been justified in what he did in defence of Mr. Justice Field's life, and possibly of his own.

But such a justification would be a proper subject for consideration on a trial of the case for murder in the courts of the State of California, and there exists no authority in the courts of the United States to discharge the prisoner while held in custody by the State authorities for this offence, unless there be found in aid of the defence of the prisoner some element of power and authority asserted under the government of the United States. . . .

We have no doubt that Mr. Justice Field when attacked by Terry was engaged in the discharge of his duties as Circuit Justice of the Ninth Circuit, and was entitled to all the protection under those circumstances which the law could give him.

It is urged, however, that there exists no statute authorizing any such protection as that which Neagle was instructed to give Judge Field in the present case, and indeed no protection whatever against a vindictive or malicious assault growing out of the faithful discharge of his official duties, and that the language of section 753 of the Revised Statutes, that the party seeking the benefit of the writ of *habeas corpus* must in this connection show that he is "in custody for an act done or omitted in pursuance of a law of the United States," makes it

necessary that upon this occasion it should be shown that the act for which Neagle is imprisoned was done by virtue of an Act of Congress. It is not supposed that any special Act of Congress exists which authorizes the marshals or deputy marshals of the United States in express terms to accompany the judges of the Supreme Court through their circuits, and act as a body-guard to them, to defend them against malicious assaults against their persons. But we are of opinion that this view of the statute is an unwarranted restriction of the meaning of a law designed to extend in a liberal manner the benefit of the writ of *habeas corpus* to persons imprisoned for the performance of their duty. And we are satisfied that if it was the duty of Neagle, under the circumstances, a duty which could only arise under the laws of the United States, to defend Mr. Justice Field from a murderous attack upon him, he brings himself within the meaning of the section we have recited. This view of the subject is confirmed by the alternative provision, that he must be in custody "for an act done or omitted in pursuance of a law of the United States or of an order, process, or decree of a court or judge thereof, or is in custody in violation of the Constitution or of a law or treaty of the United States."

In the view we take of the Constitution of the United States, any obligation fairly and properly inferrible from that instrument, or any duty of the marshal to be derived from the general scope of his duties under the laws of the United States, is "a law" within the meaning of this phrase. It would be a great reproach to the system of government of the United States, declared to be within its sphere sovereign and supreme, if there is to be found within the domain of its powers no means of protecting the judges, in the conscientious and faithful discharge of their duties, from the malice and hatred of those upon whom their judgments may operate unfavorably.

It has in modern times become apparent that the physical health of the community is more efficiently promoted by hygienic and preventive means, than by the skill which is applied to the cure of disease after it has become fully developed. So also the law, which is intended to prevent crime, in its general spread among the community, by regulations, police organization, and otherwise, which are adapted for the protection of the lives and property of citizens, for the dispersion of mobs, for the arrest of thieves and assassins, for the watch which is kept over the community, as well as over this class of people, is more efficient than punishment of crimes after they have been committed.

If a person in the situation of Judge Field could have no other guarantee of his personal safety, while engaged in the conscientious discharge of a disagreeable duty, than the fact that if he was murdered his murderer would be subject to the laws of a State and by those laws could be punished, the security would be very insufficient. The plan which Terry and wife had in mind of insulting him and assaulting him and drawing him into a defensive physical contest, in the course of which they would slay him, shows the little value of such remedies.

We do not believe that the government of the United States is thus inefficient, or that its Constitution and laws have left the high officers of the government so defenceless and unprotected. . . .

Where, then, are we to look for the protection which we have shown Judge Field was entitled to when engaged in the discharge of his official duties? Not to the courts of the United States; because, as has been more than once said in this court, in the division of the powers of government between the three great departments, executive, legislative and judicial, the judicial is the weakest for the purposes of self-protection and for the enforcement of the powers which it exercises. The ministerial officers through whom its commands must be executed are marshals of the United States, and belong emphatically to the executive department of the government. They are appointed by the President, with the advice and consent of the Senate. They are removable from office at his pleasure. They are subjected by Act of Congress to the supervision and control of the Department of Justice, in the hands of one of the cabinet officers of the President, and their compensation is provided by Acts of Congress. The same may be said of the district attorneys of the United States, who prosecute and defend the claims of the government in the courts.

The legislative branch of the government can only protect the judicial officers by the enactment of laws for that purpose, and the argument we are now combating assumes that no such law has been passed by Congress.

If we turn to the executive department of the government, we find a very different condition of affairs. The Constitution, section 3, Article 2, declares that the President "shall take care that the laws be faithfully executed," and he is provided with the means of fulfilling this obligation by his authority to commission all the officers of the United States, and, by and with the advice and consent of the Senate, to appoint the most important of them and to fill vacancies. He is declared to be commander-in-chief of the army and navy of the United States. The duties which are thus imposed upon him he is further enabled to perform by the recognition in the Constitution, and the creation by Acts of Congress, of executive departments, which have varied in number from four or five to seven or eight, the heads of which are familiarly called cabinet ministers. These aid him in the performance of the great duties of his office, and represent him in a thousand acts to which it can hardly be supposed his personal attention is called, and thus he is enabled to fulfil the duty of his great department, expressed in the phrase that "he shall take care that the laws be faithfully executed."

Is this duty limited to the enforcement of Acts of Congress or of treaties of the United States according to their express terms, or does it include the rights, duties and obligations growing out of the Constitution itself, our international relations, and all the protection implied by the nature of the government under the Constitution?

One of the most remarkable episodes in the history of our foreign

relations, and which has become an attractive historical incident, is the case of Martin Koszta, a native of Hungary, who, though not fully a naturalized citizen of the United States, had in due form of law made his declaration of intention to become a citizen. While in Smyrna he was seized by command of the Austrian consul-general at that place, and carried on board the Hussar, an Austrian vessel, where he was held in close confinement. Captain Ingraham, in command of the American sloop-of-war St. Louis, arriving in port at that critical period, and ascertaining that Koszta had with him his naturalization papers, demanded his surrender to him, and was compelled to train his guns upon the Austrian vessel before his demands were complied with. It was, however, to prevent bloodshed, agreed that Koszta should be placed in the hands of the French consul subject to the result of diplomatic negotiations between Austria and the United States. The celebrated correspondence between Mr. Marcy, Secretary of State, and Chevalier Hülsemann, the Austrian minister at Washington, which arose out of this affair and resulted in the release and restoration to liberty of Koszta, attracted a great deal of public attention, and the position assumed by Mr. Marcy met the approval of the country and of Congress, who voted a gold medal to Captain Ingraham for his conduct in the affair. Upon what Act of Congress then existing can any one lay his finger in support of the action of our government in this matter?

So, if the President or the Postmaster-General is advised that the mails of the United States, possibly carrying treasure, are liable to be robbed and the mail carriers assaulted and murdered in any particular region of country, who can doubt the authority of the President or of one of the executive departments under him to make an order for the protection of the mail and of the persons and lives of its carriers, by doing exactly what was done in the case of Mr. Justice Field, namely, providing a sufficient guard, whether it be by soldiers of the army or by marshals of the United States, with a *posse comitatus* properly armed and equipped, to secure the safe performance of the duty of carrying the mail wherever it may be intended to go?

The United States is the owner of millions of acres of valuable public land, and has been the owner of much more which it has sold. Some of these lands owe a large part of their value to the forests which grow upon them. These forests are liable to depredations by people living in the neighborhood, known as timber thieves, who make a living by cutting and selling such timber, and who are trespassers. But until quite recently, even if there be one now, there was no statute authorizing any preventive measures for the protection of this valuable public property. Has the President no authority to place guards upon the public territory to protect its timber? No authority to seize the timber when cut and found upon the ground? Has he no power to take any measures to protect this vast domain? Fortunately we find this question answered by this court in the case of *Wells* v. *Nickles*, 104 U. S. 444. That was a case in which a class of men appointed by

local land officers, under instructions from the Secretary of the Interior, having found a large quantity of this timber cut down from the forests of the United States and lying where it was cut, seized it. The question of the title to this property coming in controversy between Wells and Nickles, it became essential to inquire into the authority of these timber agents of the government thus to seize the timber cut by trespassers on its lands. The court said: "The effort we have made to ascertain and fix the authority of these timber agents by any positive provision of law has been unsuccessful." But the court, notwithstanding there was no special statute for it, held that the Department of the Interior, acting under the idea of protecting from depredation timber on the lands of the government, had gradually come to assert the right to seize what is cut and taken away from them wherever it can be traced, and in aid of this the registers and receivers of the Land Office had, by instructions from the Secretary of the Interior, been constituted agents of the United States for these purposes, with power to appoint special agents under themselves. And the court upheld the authority of the Secretary of the Interior to make these rules and regulations for the protection of the public lands. . . .

We cannot doubt the power of the President to take measures for the protection of a judge of one of the courts of the United States, who, while in the discharge of the duties of his office, is threatened with a personal attack which may probably result in his death, and we think it clear that where this protection is to be afforded through the civil power, the Department of Justice is the proper one to set in motion the necessary means of protection. The correspondence already recited in this opinion between the marshal of the Northern District of California, and the Attorney-General, and the district attorney of the United States for that district, although prescribing no very specific mode of affording this protection by the Attorney-General, is sufficient, we think, to warrant the marshal in taking the steps which he did take, in making the provisions which he did make, for the protection and defence of Mr. Justice Field.

But there is positive law investing the marshals and their deputies with powers which not only justify what Marshal Neagle did in this matter, but which imposed it upon him as a duty. . . .

That there is a peace of the United States; that a man assaulting a judge of the United States while in the discharge of his duties violates that peace; that in such case the marshal of the United States stands in the same relation to the peace of the United States which the sheriff of the county does to the peace of the State of California; are questions too clear to need argument to prove them. That it would be the duty of a sheriff, if one had been present at this assault by Terry upon Judge Field, to prevent this breach of the peace, to prevent this assault, to prevent the murder which was contemplated by it, cannot be doubted. And if, in performing this duty, it became necessary for the protection of Judge Field, or of himself, to kill Terry, in a case where,

like this, it was evidently a question of the choice of who should be killed, the assailant and violater of the law and disturber of the peace, or the unoffending man who was in his power, there can be no question of the authority of the sheriff to have killed Terry. So the marshal of the United States, charged with the duty of protecting and guarding the judge of the United States court against this special assault upon his person and his life, being present at the critical moment, when prompt action was necessary, found it to be his duty, a duty which he had no liberty to refuse to perform, to take the steps which resulted in Terry's death. This duty was imposed on him by the section of the Revised Statutes which we have recited, in connection with the powers conferred by the State of California upon its peace officers, which become, by this statute, in proper cases, transferred as duties to the marshals of the United States. . . .

The result at which we have arrived upon this examination is, that in the protection of the person and the life of Mr. Justice Field while in the discharge of his official duties, Neagle was authorized to resist the attack of Terry upon him; that Neagle was correct in the belief that without prompt action on his part the assault of Terry upon the judge would have ended in the death of the latter; that such being his well-founded belief, he was justified in taking the life of Terry, as the only means of preventing the death of the man who was intended to be his victim; that in taking the life of Terry, under the circumstances, he was acting under the authority of the law of the United States, and was justified in so doing; and that he is not liable to answer in the courts of California on account of his part in that transaction.

We therefore affirm the judgment of the Circuit Court authorizing his discharge from the custody of the sheriff of San Joaquin County.

[The dissenting opinion of MR. JUSTICE LAMAR, with whom CHIEF JUSTICE FULLER concurred, is omitted.]

IN *Logan* v. *United States*, 144 U. S. 263 (1891), on error to the Circuit Court of the United States for the Northern District of Texas, where Logan and others had been indicted for the statutory offence of conspiracy to injure and oppress citizens of the United States in the free exercise of a right secured to them by the Constitution and laws of the United States and for murder in pursuance thereof, and were convicted of the conspiracy and duly sentenced, — exceptions were taken to various rulings and instructions. MR. JUSTICE GRAY (for the court) said: "The principal question in this case is whether the right of a citizen of the United States, in the custody of a United States marshal under a lawful commitment to answer for an offence against the United States, to be protected against lawless violence, is a right secured to him by the Constitution or laws of the United States, or whether it is a right which can be vindicated only under the laws of the several States.

"This question is presented by the record in several forms. It was raised in the first instance by the defendants 'excepting to' and moving to quash the indictment. A motion to quash an indictment is ordinarily addressed to the discretion of the court, and therefore a refusal to quash cannot generally be assigned for error. *United States* v. *Rosenburgh*, 7 Wall. 580. *United States* v. *Hamilton*, 109 U. S. 63. But the motion in this case appears to have been intended and understood to include an exception, which, according to the practice in Louisiana and Texas, is equivalent to a demurrer. And the same question is distinctly presented by the judge's refusal to instruct the jury as requested, and by the instructions given by him to the jury.

"Upon this question, the court has no doubt. As was said by Chief Justice Marshall, in the great case of *McCulloch* v. *Maryland*, 'The government of the Union, though limited in its powers, is supreme within its sphere of action.' 'No trace is to be found in the Constitution of an intention to create a dependence of the government of the Union on those of the States, for the execution of the great powers assigned to it. Its means are adequate to its ends; and on those means alone was it expected to rely for the accomplishment of its ends. To impose on it the necessity of resorting to means which it cannot control, which another government may furnish or withhold, would render its course precarious, the result of its measures uncertain, and create a dependence on other governments, which might disappoint its most important designs, and is incompatible with the language of the Constitution.' 4 Wheat. 316, 405, 424.

"Among the powers which the Constitution expressly confers upon Congress is the power to make all laws necessary and proper for carrying into execution the powers specifically granted to it, and all other powers vested by the Constitution in the government of the United States, or in any department or officer thereof. In the exercise of this general power of legislation, Congress may use any means appearing to it most eligible and appropriate, which are adapted to the end to be accomplished, and are consistent with the letter and the spirit of the Constitution. *McCulloch* v. *Maryland*, 4 Wheat. 316, 421; *Juilliard* v. *Greenman*, 110 U. S. 421, 440, 441.

"Although the Constitution contains no grant, general or specific, to Congress of the power to provide for the punishment of crimes, except piracies and felonies on the high seas, offences against the law of nations, treason, and counterfeiting the securities and current coin of the United States, no one doubts the power of Congress to provide for the punishment of all crimes and offences against the United States, whether committed within one of the States of the Union, or within territory over which Congress has plenary and exclusive jurisdiction.

"To accomplish this end, Congress has the right to enact laws for the arrest and commitment of those accused of any such crime or offence, and for holding them in safe custody until indictment and trial; and persons arrested and held pursuant to such laws are in the exclu-

sive custody of the United States, and are not subject to the judicial process or executive warrant of any State. *Ableman* v. *Booth*, 21 How. 506; *Tarble's Case*, 13 Wall. 397; *Robb* v. *Connolly*, 111 U. S. 624. The United States, having the absolute right to hold such prisoners, have an equal duty to protect them, while so held, against assault or injury from any quarter. The existence of that duty on the part of the government necessarily implies a corresponding right of the prisoners to be so protected; and this right of the prisoners is a right secured to them by the Constitution and laws of the United States.

"The statutes of the United States have provided that any person accused of a crime or offence against the United States may by any United States judge or commissioner of a Circuit Court be arrested and confined, or bailed, as the case may be, for trial before the court of the United States having cognizance of the offence; and, if bailed, may be arrested by his bail, and delivered to the marshal or his deputy, before any judge or other officer having power to commit for the offence, and be thereupon recommitted to the custody of the marshal, to be held until discharged by due course of law. Rev. Stat. §§ 1014, 1018. They have also provided that all the expenses attendant upon the transportation from place to place, and upon the temporary or permanent confinement, of persons arrested or committed under the laws of the United States, shall be paid out of the Treasury of the United States; and that the marshal, in case of necessity, may provide a convenient place for a temporary jail, and 'shall make such other provision as he may deem expedient and necessary for the safe-keeping of the prisoners arrested or committed under the authority of the United States, until permanent provision for that purpose is made by law.' Rev. Stat. §§ 5536–5538.

"In the case at bar, the indictments alleged, the evidence at the trial tended to prove, and the jury have found by their verdict, that while Charles Marlow and five others, citizens of the United States, were in the custody and control of a deputy marshal of the United States under writs of commitment from a commissioner of the Circuit Court, in default of bail, to answer to indictments for an offence against the laws of the United States, the plaintiffs in error conspired to injure and oppress them in the free exercise and enjoyment of the right, secured to them by the Constitution and laws of the United States, to be protected, while in such custody and control of the deputy marshal, against assault and bodily harm, until they had been discharged by due process of the laws of the United States.

"If, as some of the evidence introduced by the government tended to show, the deputy marshal and his assistants made no attempt to protect the prisoners, but were in league and collusion with the conspirators, that does not lessen or impair the right of protection, secured to the prisoners by the Constitution and laws of the United States.

"The prisoners were in the exclusive custody and control of the United States, under the protection of the United States, and in the

peace of the United States. There was a co-extensive duty on the part of the United States to protect against lawless violence persons so within their custody, control, protection, and peace; and a corresponding right of those persons, secured by the Constitution and laws of the United States, to be so protected by the United States. If the officers of the United States, charged with the performance of the duty, in behalf of the United States, of affording that protection and securing that right, neglected or violated their duty, the prisoners were not the less under the shield and panoply of the United States.

"The cases heretofore decided by this court, and cited in behalf of the plaintiffs in error, are in no way inconsistent with these views, but, on the contrary, contain much to support them. The matter considered in each of those cases was whether the particular right there in question was secured by the Constitution of the United States, and was within the Acts of Congress. But the question before us is so important, and the learned counsel for the plaintiffs in error have so strongly relied on those cases, that it is fit to review them in detail. . . .

"The whole scope and effect of this series of decisions is that, while certain fundamental rights, recognized and declared, but not granted or created, in some of the amendments to the Constitution, are thereby guaranteed only against violation or abridgment by the United States, or by the States, as the case may be, and cannot therefore be affirmatively enforced by Congress against unlawful acts of individuals; yet that every right, created by, arising under or dependent upon, the Constitution of the United States, may be protected and enforced by Congress by such means and in such manner as Congress, in the exercise of the correlative duty of protection, or of the legislative powers conferred upon it by the Constitution, may in its discretion deem most eligible and best adapted to attain the object.

"Among the particular rights which this court, as we have seen, has adjudged to be secured, expressly or by implication, by the Constitution and laws of the United States, and to be within section 5508 of the Revised Statutes, providing for the punishment of conspiracies by individuals to oppress or injure citizens in the free exercise and enjoyment of rights so secured, are the political right of a voter to be protected from violence while exercising his right of suffrage under the laws of the United States; and the private right of a citizen, having made a homestead entry, to be protected from interference while remaining in the possession of the land for the time of occupancy which Congress has enacted shall entitle him to a patent.

"In the case at bar, the right in question does not depend upon any of the amendments to the Constitution, but arises out of the creation and establishment by the Constitution itself of a national government, paramount and supreme within its sphere of action. Any government which has power to indict, try, and punish for crime, and to arrest the accused and hold them in safekeeping until trial, must have the power and the duty to protect against unlawful interference its prisoners

so held, as well as its executive and judicial officers charged with keeping and trying them.

"In the very recent *Case of Neagle*, 135 U. S. 1, at October Term, 1889, it was held that, although there was no express Act of Congress authorizing the appointment of a deputy marshal or other officer to attend a justice of this court while travelling in his circuit, and to protect him against assault or injury, it was within the power and the duty of the executive department to protect a judge of any of the courts of the United States, when there was just reason to believe that he would be in personal danger while executing the duties of his office; that an assault upon such a judge, while in discharge of his official duties, was a breach of the peace of the United States, as distinguished from the peace of the State in which the assault took place; and that a deputy marshal of the United States, specially charged with the duty of protecting and guarding a judge of a court of the United States, had imposed upon him the duty of doing whatever might be necessary for that purpose, even to the taking of human life.

"In delivering judgment, Mr. Justice Miller, repeating the language used by Mr. Justice Bradley speaking for the court in *Ex parte Siebold*, 100 U. S. 371, 394, said: 'It is argued that the preservation of peace and good order in society is not within the powers confided to the government of the United States, but belongs exclusively to the States. Here again we are met with the theory that the government of the United States does not rest upon the soil and territory of the country. We think that this theory is founded on an entire misconception of the nature and powers of that government. We hold it to be an incontrovertible principle, that the government of the United States may, by means of physical force, exercised through its official agents, execute on every foot of American soil the powers and functions that belong to it. This necessarily involves the power to command obedience to its laws, and hence the power to keep the peace to that extent.' 135 U. S. 60. After further discussion of that question, and of the powers of sheriffs in the State of California, where the transaction took place, Mr. Justice Miller added: 'That there is a peace of the United States; that a man assaulting a judge of the United States while in the discharge of his duties violates that peace; that in such case the marshal of the United States stands in the same relation to the peace of the United States which the sheriff of the county does to the peace of the State of California; are questions too clear to need argument to prove them.' 135 U. S. 69.

"The United States are bound to protect against lawless violence all persons in their service or custody in the course of the administration of justice. This duty and the correlative right of protection are not limited to the magistrates and officers charged with expounding and executing the laws, but apply, with at least equal force, to those held in custody on accusation of crime, and deprived of all means of self-defence.

"For these reasons, we are of opinion that the crime of which the plaintiffs in error were indicted and convicted was within the reach of the constitutional powers of Congress, and was covered by section 5508 of the Revised Statutes." . . .

HEPBURN AND DUNDAS v. ELLZEY.

SUPREME COURT OF THE UNITED STATES. 1804.

[2 *Cranch*, 445; 1 *Curtis's Decisions*, 520.]

THIS case came before the court upon a certificate of division of opinion of the judges of the Circuit Court, for the District of Virginia. The question was whether Hepburn and Dundas, the plaintiffs in this cause, who are citizens and residents of the District of Columbia, and are so stated in the pleadings, can maintain an action in this court against the defendant, who is a citizen and inhabitant of the Commonwealth of Virginia, and is also stated so to be in the pleadings, or whether, for want of jurisdiction, the said suit ought not to be dismissed.

MARSHALL, C. J., delivered the opinion of the court.

The question in this case is, whether the plaintiffs, as residents of the District of Columbia, can maintain an action in the Circuit Court of the United States for the District of Virginia.

This depends on the Act of Congress describing the jurisdiction of that court. That Act gives jurisdiction to the Circuit Courts in cases between a citizen of the State in which the suit is brought, and a citizen of another State. To support the jurisdiction in this case, therefore, it must appear that Columbia is a State.

On the part of the plaintiffs it has been urged that Columbia is a distinct political society; and is, therefore, "a State," according to the definitions of writers on general law.

This is true. But as the Act of Congress obviously uses the word "State" in reference to that term as used in the Constitution, it becomes necessary to inquire whether Columbia is a State in the sense of that instrument. The result of that examination is a conviction that the members of the American confederacy only are the States contemplated in the Constitution.

The House of Representatives is to be composed of members chosen by the people of the several States; and each State shall have at least one representative.

The Senate of the United States shall be composed of two senators from each State.

Each State shall appoint, for the election of the executive, a number of electors equal to its whole number of senators and representatives.

These clauses show that the word State is used in the Constitution as designating a member of the Union, and excludes from the term the signification attached to it by writers on the law of nations. When the same term which has been used plainly in this limited sense in the articles respecting the legislative and executive departments, is also employed in that which respects the judicial department, it must be understood as retaining the sense originally given to it.

Other passages from the Constitution have been cited by the plaintiffs to show that the term State is sometimes used in its more enlarged sense. But on examining the passages quoted, they do not prove what was to be shown by them.

It is true that as citizens of the United States, and of that particular district which is subject to the jurisdiction of Congress, it is extraordinary that the courts of the United States, which are open to aliens, and to the citizens of every State in the Union, should be closed upon them. But this is a subject for legislative, not for judicial consideration.

The opinion to be certified to the Circuit Court is, that that court has no jurisdiction in the case.[1]

IN *Serè et al.* v. *Pitot et al.*, 6 Cranch, 332 (1810), MARSHALL, C. J., for the court, said: "Whether the citizens of the Territory of Orleans are to be considered as the citizens of a State, within the meaning of the Constitution, is a question of some difficulty, which would be decided, should one of them sue in any of the circuit courts of the United States. The present inquiry is limited to a suit brought by or against a citizen of the Territory, in the District Court of Orleans. The power of governing and of legislating for a Territory is the inevi-

[1] As regards the mere power of Congress, the District of Columbia is supposed to be on the same footing as the Territories. It was formerly sometimes called the "Territory of Columbia."

"Has Congress a right to impose a direct tax on the District of Columbia? . . . The power, then, to lay and collect duties, imposts, and excises may be exercised, and must be exercised throughout the United States. Does this term designate the whole, or any particular portion of the American empire? Certainly this question can admit of but one answer. It is the name given to our great republic, which is composed of States and Territories. The District of Columbia, or the territory west of the Missouri, is not less within the United States than Maryland or Pennsylvania; and it is not less necessary, on the principles of our Constitution, that uniformity in the imposition of imposts, duties, and excises should be observed in the one than in the other. Since, then, the power to lay and collect taxes, which includes direct taxes, is obviously co-extensive with the power to lay and collect duties, imposts, and excises, and since the latter extends throughout the United States, it follows, that the power to impose direct taxes also extends throughout the United States." [The court held that a direct tax could be levied on the district.] MARSHALL, C. J. (for the court), in *Loughborough* v. *Blake*, 5 Wheat. 317 (1820).

In *Geofroy* v. *Riggs*, 133 U. S. 258 (1889), it was held that the District of Columbia is one of "the States of the Union," within the meaning of Article 7 of the Consular Convention with France, of Feb. 7, 1853, whereby certain rights are secured to Frenchmen in "the States of the Union." — ED.

table consequence of the right to acquire and to hold territory. Could this position be contested, the Constitution of the United States declares that "Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States." Accordingly, we find Congress possessing and exercising the absolute and undisputed power of governing and legislating for the Territory of Orleans. Congress has given them a legislative, an executive, and a judiciary, with such powers as it has been their will to assign to those departments respectively.

In *New Orleans* v. *Winter et al.*, 1 Wheat. 91 (1816), MARSHALL, C. J., for the court, said: "The proceedings of the court . . . are arrested *in limine*, by a question respecting its jurisdiction. In the case of *Hepburn & Dundas* v. *Ellzey*, this court determined, on mature consideration, that a citizen of the District of Columbia could not maintain a suit in the Circuit Court of the United States. That opinion is still retained.

"It has been attempted to distinguish a Territory from the District of Columbia; but the court is of opinion, that this distinction cannot be maintained. They may differ in many respects, but neither of them is a State, in the sense in which that term is used in the Constitution. Every reason assigned for the opinion of the court, that a citizen of Columbia was not capable of suing in the courts of the United States, under the Judiciary Act, is equally applicable to a citizen of a Territory. Gabriel Winter, then, being a citizen of the Mississippi Territory, was incapable of maintaining a suit alone in the Circuit Court of Louisiana."[1]

THE AMERICAN INSURANCE COMPANY ET AL. *v.* THREE HUNDRED AND FIFTY-SIX BALES OF COTTON, DAVID CANTER, CLAIMANT.

SUPREME COURT OF THE UNITED STATES. 1828.

[1 *Peters*, 511. 7 *Curtis's Decisions*, 685.]

Ogden, for the appellants [the plaintiffs]; *Whipple* and *Webster*, *contra*.

MARSHALL, C. J., delivered the opinion of the court.

The plaintiffs filed their libel in this cause in the District Court of South Carolina, to obtain restitution of 356 bales of cotton, part of the cargo of the ship "Point a Petre;" which had been insured by them

[1] These rulings [in *Hepburn* v. *Ellzey* and *New Orleans* v. *Winter*] have never been disturbed, but the principle asserted has been acted upon ever since by the courts, when the point has arisen. — MILLER, J. (for the court), in *Barney* v. *Baltimore*, 6 Wall. 280, 287 (1867). — ED.

on a voyage from New Orleans to Havre de Grace, in France. The "Point a Petre" was wrecked on the coast of Florida, the cargo saved by the inhabitants, and carried into Key West, where it was sold for the purpose of satisfying the salvors; by virtue of a decree of a court consisting of a notary and five jurors, which was erected by an Act of the territorial legislature of Florida. The owners abandoned to the underwriters, who having accepted the same, proceeded against the property, alleging that the sale was not made by order of a court competent to change the property.

David Canter claimed the cotton as a *bona fide* purchaser, under the decree of a competent court, which awarded seventy-six per cent to the salvors on the value of the property saved.

The district judge pronounced the decree of the territorial court a nullity, and awarded restitution to the libellants of such part of the cargo as he supposed to be identified by the evidence, deducting therefrom a salvage of fifty per cent.

The libellants and claimant both appealed. The Circuit Court reversed the decree of the District Court, and decreed the whole cotton to the claimant, with costs, on the ground that the proceedings of the court at Key West were legal, and transferred the property to the purchaser.

From this decree the libellants have appealed to this court.

The cause depends mainly on the question whether the property in the cargo saved was changed by the sale at Key West. The conformity of that sale to the order under which it was made has not been controverted. Its validity has been denied, on the ground that it was ordered by an incompetent tribunal.

The tribunal was constituted by an Act of the territorial legislature of Florida, passed on the 4th July, 1823, which is inserted in the record. That Act purports to give the power which has been exercised; consequently, the sale is valid, if the territorial legislature was competent to enact the law.

The course which the argument has taken, will require that, in deciding this question, the court should take into view the relation in which Florida stands to the United States.

The Constitution confers absolutely on the government of the Union the powers of making war and of making treaties; consequently, that government possesses the power of acquiring territory, either by conquest or by treaty.

The usage of the world is, if a nation be not entirely subdued, to consider the holding of conquered territory as a mere military occupation, until its fate shall be determined at the treaty of peace. If it be ceded by the treaty, the acquisition is confirmed, and the ceded territory becomes a part of the nation to which it is annexed, either on the terms stipulated in the treaty of cession, or on such as its new master shall impose. On such transfer of territory, it has never been held that the relations of the inhabitants with each other undergo any

change. Their relations with their former sovereign are dissolved, and new relations are created between them and the government which has acquired their territory. The same act which transfers their country, transfers the allegiance of those who remain in it; and the law, which may be denominated political, is necessarily changed, although that which regulates the intercourse and general conduct of individuals, remains in force until altered by the newly created power of the State.

On the 2d of February, 1819, Spain ceded Florida to the United States. The 6th article of the treaty of cession, 8 Stats. at Large, 252, contains the following provision: "The inhabitants of the territories which his Catholic Majesty cedes to the United States by this treaty, shall be incorporated in the Union of the United States, as soon as may be consistent with the principles of the Federal Constitution, and admitted to the enjoyment of the privileges, rights, and immunities of the citizens of the United States."

This treaty is the law of the land, and admits the inhabitants of Florida to the enjoyment of the privileges, rights, and immunities of the citizens of the United States. It is unnecessary to inquire whether this is not their condition, independent of stipulation. They do not, however, participate in political power; they do not share in the government till Florida shall become a State. In the mean time, Florida continues to be a Territory of the United States, governed by virtue of that clause in the Constitution which empowers Congress "to make all needful rules and regulations respecting the territory or other property belonging to the United States."

Perhaps the power of governing a Territory belonging to the United States, which has not, by becoming a State, acquired the means of self-government, may result necessarily from the facts that it is not within the jurisdiction of any particular State, and is within the power and jurisdiction of the United States. The right to govern may be the inevitable consequence of the right to acquire territory. Whichever may be the source whence the power is derived, the possession of it is unquestioned. In execution of it, Congress, in 1822, passed "an Act for the establishment of a territorial government in Florida," 3 Stats. at Large, 654, and on the 3d of March, 1823, passed another Act to amend the Act of 1822. Under this Act, the territorial legislature enacted the law now under consideration. . . .

The powers of the Territorial legislature extend to all rightful objects of legislation, subject to the restriction that their laws shall not be "inconsistent with the laws and Constitution of the United States." As salvage is admitted to come within this description, the Act is valid unless it can be brought within the restriction.

The counsel for the libellants contend that it is inconsistent with both the law and the Constitution; that it is inconsistent with the provisions of the law by which the territorial government was created, and with the amendatory Act of March, 1823. It vests, they say, in

an inferior tribunal a jurisdiction which is, by those Acts, vested exclusively in the superior courts of the territory. . . .

The question suggested by this view of the subject, on which the case under consideration must depend, is this: —

Is the admiralty jurisdiction of the district courts of the United States vested in the superior courts of Florida, under the words of the 8th section, declaring that each of the said courts "shall, moreover, have and exercise the same jurisdiction within its limits, in all cases arising under the laws and Constitution of the United States," which was vested in the courts of the Kentucky district?

It is observable that this clause does not confer on the territorial courts all the jurisdiction which is vested in the court of the Kentucky district, but that part of it only which applies to "cases arising under the laws and Constitution of the United States." Is a case of admiralty of this description?

The Constitution and laws of the United States give jurisdiction to the district courts over all cases in admiralty; but jurisdiction over the case does not constitute the case itself. We are, therefore, to inquire whether cases in admiralty and cases arising under the laws and Constitution of the United States are identical.

If we have recourse to that pure fountain from which all the jurisdiction of the Federal courts is derived, we find language employed which cannot well be misunderstood. The Constitution declares that "the judicial power shall extend to all cases in law and equity arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, or other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction."

The Constitution certainly contemplates these as three distinct classes of cases; and, if they are distinct, the grant of jurisdiction over one of them does not confer jurisdiction over either of the other two. The discrimination made between them in the Constitution is, we think, conclusive against their identity. If it were not so, if this were a point open to inquiry, it would be difficult to maintain the proposition that they are the same. A case in admiralty does not, in fact, arise under the Constitution or laws of the United States. These cases are as old as navigation itself; and the law, admiralty and maritime, as it has existed for ages, is applied by our courts to the cases as they arise. It is not, then, to the 8th section of the territorial law that we are to look for the grant of admiralty and maritime jurisdiction to the territorial courts. Consequently, if that jurisdiction is exclusive, it is not made so by the reference to the District Court of Kentucky.

It has been contended that, by the Constitution, the judicial power of the United States extends to all cases of admiralty and maritime jurisdiction, and that the whole of this judicial power must be vested "in one supreme court and in such inferior courts as Congress shall from time to time ordain and establish." Hence, it has been argued

that Congress cannot vest admiralty jurisdiction in courts created by the territorial legislature.

We have only to pursue this subject one step further to perceive that this provision of the Constitution does not apply to it. The next sentence declares that "the judges, both of the supreme and inferior courts, shall hold their offices during good behavior." The judges of the superior courts of Florida hold their offices for four years. These courts, then, are not constitutional courts, in which the judicial power conferred by the Constitution on the general government can be deposited. They are incapable of receiving it. They are legislative courts, created in virtue of the general right of sovereignty which exists in the government, or in virtue of that clause which enables Congress to make all needful rules and regulations respecting the territory belonging to the United States. The jurisdiction with which they are invested is not a part of that judicial power which is defined in the 3d article of the Constitution, but is conferred by Congress, in the execution of those general powers which that body possesses over the Territories of the United States. Although admiralty jurisdiction can be exercised in the States in those courts only which are established in pursuance of the 3d article of the Constitution, the same limitation does not extend to the Territories. In legislating for them, Congress exercises the combined powers of the general and of a State Government.

We think, then, that the Act of the territorial legislature erecting the court by whose decree the cargo of the "Point a Petre" was sold, is not "inconsistent with the laws and Constitution of the United States," and is valid. Consequently, the sale made in pursuance of it changed the property, and the decree of the Circuit Court, awarding restitution of the property to the claimant, ought to be affirmed, with costs.[1]

[1] In the argument at the Bar, great attention has been paid to the meaning of the word "territory."

Ordinarily, when the territory of a sovereign power is spoken of, it refers to that tract of country which is under the political jurisdiction of that sovereign power. Thus Chief Justice Marshall (in *United States* v. *Bevans*, 3 Wheat. 386) says: "What, then, is the extent of jurisdiction which a State possesses? We answer, without hesitation, the jurisdiction of a State is coextensive with its territory." Examples might easily be multiplied of this use of the word, but they are unnecessary because it is familiar. But the word "territory" is not used in this broad and general sense in this clause of the Constitution.

At the time of the adoption of the Constitution, the United States held a great tract of country northwest of the Ohio; another tract, then of unknown extent, ceded by South Carolina; and a confident expectation was then entertained, and afterwards realized, that they then were or would become the owners of other great tracts, claimed by North Carolina and Georgia. These ceded tracts lay within the limits of the United States, and out of the limits of any particular State; and the cessions embraced the civil and political jurisdiction, and so much of the soil as had not previously been granted to individuals.

These words, "territory belonging to the United States," were not used in the Constitution to describe an abstraction, but to identify and apply to these actual sub-

jects matter then existing and belonging to the United States, and other similar subjects which might afterwards be acquired; and this being so, all the essential qualities and incidents attending such actual subjects are embraced within the words "territory belonging to the United States," as fully as if each of those essential qualities and incidents had been specifically described.

I say, the essential qualities and incidents. But in determining what were the essential qualities and incidents of the subject with which they were dealing, we must take into consideration not only all the particular facts which were immediately before them, but the great consideration, ever present to the minds of those who framed and adopted the Constitution, that they were making a frame of government for the people of the United States and their posterity, under which they hoped the United States might be, what they have now become, a great and powerful nation, possessing the power to make war and to conclude treaties, and thus to acquire territory. (See *Serè* v. *Pitot*, 6 Cr. 336; *Am. Ins. Co.* v. *Canter*, 1 Pet. 542.) With these in view, I turn to examine the clause of the article now in question.

It is said this provision has no application to any territory save that then belonging to the United States. I have already shown that, when the Constitution was framed, a confident expectation was entertained, which was speedily realized, that North Carolina and Georgia would cede their claims to that great territory which lay west of those States. No doubt has been suggested that the first clause of this same article, which enabled Congress to admit new States, refers to and includes new States to be formed out of this territory, expected to be thereafter ceded by North Carolina and Georgia, as well as new States to be formed out of territory northwest of the Ohio, which then had been ceded by Virginia. It must have been seen, therefore, that the same necessity would exist for an authority to dispose of and make all needful regulations respecting this territory, when ceded, as existed for a like authority respecting territory which had been ceded.

No reason has been suggested why any reluctance should have been felt, by the framers of the Constitution, to apply this provision to all the territory which might belong to the United States, or why any distinction should have been made, founded on the accidental circumstance of the dates of the cessions; a circumstance in no way material as respects the necessity for rules and regulations, or the propriety of conferring on the Congress power to make them. And if we look at the course of the debates in the Convention on this article, we shall find that the then unceded lands, so far from having been left out of view in adopting this article, constituted, in the minds of members, a subject of even paramount importance.

Again, in what an extraordinary position would the limitation of this clause to territory then belonging to the United States, place the territory which lay within the chartered limits of North Carolina and Georgia. The title to that territory was then claimed by those States, and by the United States; their respective claims are purposely left unsettled by the express words of this clause; and when cessions were made by those States, they were merely of their claims to this territory, the United States neither admitting nor denying the validity of those claims; so that it was impossible then, and has ever since remained impossible, to know whether this territory did or did not then belong to the United States; and, consequently, to know whether it was within or without the authority conferred by this clause, to dispose of and make rules and regulations respecting the territory of the United States. This attributes to the eminent men who acted on this subject a want of ability and forecast, or a want of attention to the known facts upon which they were acting, in which I cannot concur.

There is not, in my judgment, anything in the language, the history, or the subject-matter of this article, which restricts its operation to territory owned by the United States when the Constitution was adopted.

But it is also insisted that provisions of the Constitution respecting territory belonging to the United States do not apply to territory acquired by treaty from a foreign nation. This objection must rest upon the position that the Constitution did not authorize the Federal government to acquire foreign territory, and con-

sequently has made no provision for its government when acquired; or, that though the acquisition of foreign territory was contemplated by the Constitution, its provisions concerning the admission of new States, and the making of all needful rules and regulations respecting territory belonging to the United States, were not designed to be applicable to territory acquired from foreign nations.

It is undoubtedly true, that at the date of the treaty of 1803, between the United States and France, for the cession of Louisiana, it was made a question, whether the Constitution had conferred on the executive department of the government of the United States power to acquire foreign territory by a treaty.

There is evidence that very grave doubts were then entertained concerning the existence of this power. But that there was then a settled opinion in the executive and legislative branches of the government, that this power did not exist, cannot be admitted, without at the same time imputing to those who negotiated and ratified the treaty, and passed the laws necessary to carry it into execution, a deliberate and known violation of their oaths to support the Constitution; and whatever doubts may then have existed, the question must now be taken to have been settled. Four distinct acquisitions of foreign territory have been made by as many different treaties, under as many different administrations. Six States, formed on such territory, are now in the Union. Every branch of this government, during a period of more than fifty years, has participated in these transactions. To question their validity now, is vain. As was said by Mr. Chief Justice Marshall, in the *American Insurance Company* v. *Canter* (1 Peters, 542), "the Constitution confers absolutely on the government of the Union the powers of making war and of making treaties; consequently, that government possesses the power of acquiring territory, either by conquest or treaty." (See *Sere* v. *Pitot*, 6 Cr. 336.) And I add, it also possesses the power of governing it, when acquired, not by resorting to suppositious powers, nowhere found described in the Constitution, but expressly granted in the authority to make all needful rules and regulations respecting the territory of the United States.

There was to be established by the Constitution a frame of government, under which the people of the United States and their posterity were to continue indefinitely. To take one of its provisions, the language of which is broad enough to extend throughout the existence of the Government, and embrace all territory belonging to the United States throughout all time, and the purposes and objects of which apply to all territory of the United States, and narrow it down to territory belonging to the United States when the Constitution was framed, while at the same time it is admitted that the Constitution contemplated and authorized the acquisition, from time to time, of other and foreign territory, seems to me to be an interpretation as inconsistent with the nature and purposes of the instrument, as it is with its language, and I can have no hesitation in rejecting it.

I construe this clause, therefore, as if it had read, Congress shall have power to make all needful rules and regulations respecting those tracts of country, out of the limits of the several States, which the United States have acquired, or may hereafter acquire, by cessions, as well of the jurisdiction as of the soil, so far as the soil may be the property of the party making the cession, at the time of making it.

It has been urged that the words "rules and regulations" are not appropriate terms in which to convey authority to make laws for the government of the territory.

But it must be remembered that this is a grant of power to the Congress — that it is therefore necessarily a grant of power to legislate — and, certainly, rules and regulations respecting a particular subject, made by the legislative power of a country, can be nothing but laws. Nor do the particular terms employed, in my judgment, tend in any degree to restrict this legislative power. Power granted to a legislature to make all needful rules and regulations respecting the territory, is a power to pass all needful laws respecting it.

The word regulate, or regulation, is several times used in the Constitution. It is used in the fourth section of the first article to describe those laws of the States which prescribe the times, places, and manner of choosing senators and representatives; in the second section of the fourth article, to designate the legislative action of a State

on the subject of fugitives from service, having a very close relation to the matter of our present inquiry; in the second section of the third article, to empower Congress to fix the extent of the appellate jurisdiction of this court; and, finally, in the eighth section of the first article are the words, "Congress shall have power to regulate commerce."

It is unnecessary to describe the body of legislation which has been enacted under this grant of power; its variety and extent are well known. But it may be mentioned, in passing, that under this power to regulate commerce, Congress has enacted a great system of municipal laws, and extended it over the vessels and crews of the United States on the high seas and in foreign ports, and even over citizens of the United States resident in China; and has established judicatures, with power to inflict even capital punishment within that country.

If, then, this clause does contain a power to legislate respecting the territory, what are the limits of that power?

To this I answer, that, in common with all the other legislative powers of Congress, it finds limits in the express prohibitions on Congress not to do certain things; that, in the exercise of the legislative power, Congress cannot pass an *ex post facto* law or bill of attainder; and so in respect to each of the other prohibitions contained in the Constitution.

Besides this, the rules and regulations must be needful. But undoubtedly the question whether a particular rule or regulation be needful, must be finally determined by Congress itself. Whether a law be needful, is a legislative or political, not a judicial, question. Whatever Congress deems needful is so, under the grant of power.

Nor am I aware that it has ever been questioned that laws providing for the temporary government of the settlers on the public lands are needful, not only to prepare them for admission to the Union as States, but even to enable the United States to dispose of the lands.

Without government and social order, there can be no property; for without law, its ownership, its use, and the power of disposing of it, cease to exist, in the sense in which those words are used and understood in all civilized States.

Since, then, this power was manifestly conferred to enable the United States to dispose of its public lands to settlers, and to admit them into the Union as States, when in the judgment of Congress they should be fitted therefor, since these were the needs provided for, since it is confessed that government is indispensable to provide for those needs, and the power is, to make all needful rules and regulations respecting the territory, I cannot doubt that this is a power to govern the inhabitants of the territory, by such laws as Congress deems needful, until they obtain admission as States.

Whether they should be thus governed solely by laws enacted by Congress, or partly by laws enacted by legislative power conferred by Congress, is one of those questions which depend on the judgment of Congress — a question which of these is needful — CURTIS, J. in *Dred Scott* v. *Sandford*, 19 How. 610–615 (1856). Compare Taney, C. J. *Ib.* 432–451.

See *Benner* v. *Porter*, 9 How. 235; *U. S.* v. *Guthrie*, 17 How. 284, and *Clinton* v. *Englebrecht*, 13 Wall. 434 (1871). In the last of these cases, at p. 447, Chase, C. J. (for the court) said: "There is no Supreme Court of the United States, nor is there any District Court of the United States, in the sense of the Constitution, in the Territory of Utah. The judges are not appointed for the same terms, nor is the jurisdiction which they exercise part of the judicial power conferred by the Constitution or the general government. The courts are the legislative courts of the Territory, created in virtue of the clause which authorizes Congress to make all needful rules and regulations respecting the Territories belonging to the United States." — ED.

CALLAN *v.* WILSON.

SUPREME COURT OF THE UNITED STATES. 1887.

[127 *U. S.* 540.]

THE court stated the case as follows: —

This was an appeal from a judgment refusing, upon writ of *habeas corpus*, to discharge the appellant from the custody of the appellee as Marshal of the District of Columbia. It appears that by an information filed by the United States in the police court of the District, the petitioner, with others, was charged with the crime of conspiracy, and having been found guilty by the court, was sentenced to pay a fine of twenty-five dollars, and upon default in its payment to suffer imprisonment in jail for the period of thirty days. He perfected an appeal to the Supreme Court of the District, but having subsequently withdrawn it, and having refused to pay the fine imposed upon him, he was committed to the custody of the marshal, to the end that the sentence might be carried into effect.

The contention of the petitioner was that he is restrained of his liberty in violation of the Constitution. . . . To this information the defendants interposed a demurrer, which was overruled. They united in requesting a trial by jury. That request was denied, and a trial was had before the court, without the intervention of a jury, and with the result already stated.

Mr. J. H. Ralston, for appellant. *Mr. Charles S. Moore* was with him on the brief.

Mr. Assistant Attorney-General Maury, for appellee.

MR. JUSTICE HARLAN, after stating the case as above reported, delivered the opinion of the court.

It is contended by the appellant that the Constitution of the United States secured to him the right to be tried by a jury, and, that right having been denied, the police court was without jurisdiction to impose a fine upon him, or to order him to be imprisoned until such fine was paid. This precise question is now, for the first time, presented for determination by this court. If the appellant's position be sustained, it will follow that the statute (Rev. Stat. Dist. Col. § 1064), dispensing with a petit jury, in prosecutions by information in the police court, is inapplicable to cases like the present one.

The third article of the Constitution provides that "the trial of all crimes, except in cases of impeachment, shall be by jury, and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed." The Fifth Amendment provides that no person shall "be deprived of life, liberty, or property, without due process of law." By the Sixth Amendment it is declared that "in all criminal prosecutions the accused shall

enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence."

The contention of the appellant is, that the offence with which he is charged is a "crime" within the meaning of the third article of the Constitution, and that he was entitled to be tried by a jury; that his trial by the police court, without a jury, was not "due process of law" within the meaning of the Fifth Amendment; and that, in any event, the prosecution against him was a "criminal prosecution," in which he was entitled, by the Sixth Amendment, to a speedy and public trial by an impartial jury.

The contention of the government is, that the Constitution does not require that the right of trial by jury shall be secured to the people of the District of Columbia; that the original provision, that when a crime was not committed within any State "the trial shall be at such place or places as the Congress may by law have directed," had, probably, reference only to offences committed on the high seas; that, in adopting the Sixth Amendment, the people of the States were solicitous about trial by jury in the States and nowhere else, leaving it entirely to Congress to declare in what way persons should be tried who might be accused of crime on the high seas, and in the District of Columbia and in places to be thereafter ceded for the purposes, respectively, of a seat of government, forts, magazines, arsenals, and dock-yards; and, consequently, that that amendment should be deemed to have superseded so much of the third article of the Constitution as relates to the trial of crimes by a jury.

Upon a careful examination of this position we are of opinion that it cannot be sustained without violence to the letter and spirit of the Constitution.

The third article of the Constitution provides for a jury in the trial of "all crimes, except in cases of impeachment." The word "crime," in its more extended sense, comprehends every violation of public law; in a limited sense, it embraces offences of a serious or atrocious character. In our opinion, the provision is to be interpreted in the light of the principles which, at common law, determined whether the accused, in a given class of cases, was entitled to be tried by a jury. It is not to be construed as relating only to felonies, or offences punishable by confinement in the penitentiary. It embraces as well some classes of misdemeanors, the punishment of which involves or may involve the deprivation of the liberty of the citizen. It would be a narrow construction of the Constitution to hold that no prosecution for a misdemeanor is a prosecution for a "crime" within the meaning of the third article, or a "criminal prosecution" within the meaning of the Sixth

Amendment. And we do not think that the amendment was intended to supplant that part of the third article which relates to trial by jury. There is no necessary conflict between them. Mr. Justice Story says that the amendment, "in declaring that the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State or district wherein the crime shall have been committed (which district shall be previously ascertained by law), and to be informed of the nature and cause of the accusation, and to be confronted with the witnesses against him, does but follow out the established course of the common law in all trials for crimes." Story on the Constitution, § 1791. And as the guarantee of a trial by jury, in the third article, implied a trial in that mode and according to the settled rules of the common law, the enumeration, in the Sixth Amendment, of the rights of the accused in criminal prosecutions, is to be taken as a declaration of what those rules were, and is to be referred to the anxiety of the people of the States to have in the supreme law of the land, and so far as the agencies of the general government were concerned, a full and distinct recognition of those rules, as involving the fundamental rights of life, liberty, and property. This recognition was demanded and secured for the benefit of all the people of the United States, as well those permanently or temporarily residing in the District of Columbia, as those residing or being in the several States. There is nothing in the history of the Constitution or of the original amendments to justify the assertion that the people of this district may be lawfully deprived of the benefit of any of the constitutional guarantees of life, liberty, and property — especially of the privilege of trial by jury in criminal cases. In the draft of a constitution reported by the Committee of Five on the 6th of August, 1787, in the convention which framed the Constitution, the 4th section of Article XI. read that "the trial of all criminal offences (except in cases of impeachment) shall be in the States where they shall be committed; and shall be by jury." 1 Elliott's Deb. (2d ed.), 229. But that article was, by unanimous vote, amended so as to read: "The trial of all crimes (except in cases of impeachment) shall be by jury; and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State, then the trial shall be at such place or places as the legislature may direct." *Ib.* 270. The object of thus amending the section, Mr. Madison says, was "to provide for trial by jury of offences committed out of any State." 3 Madison Papers, 144. In *Reynolds* v. *United States*, 98 U. S. 145, 154, it was taken for granted that the Sixth Amendment of the Constitution secured to the people of the Territories the right of trial by jury in criminal prosecutions; and it had been previously held in *Webster* v. *Reid*, 11 How. 437, 460, that the Seventh Amendment secured to them a like right in civil actions at common law. We cannot think that the people of this district have, in that regard, less rights than those accorded to the people of the Territories of the United States.

It is next insisted that the constitutional guarantee of trial by jury in all criminal prosecutions — even supposing it to exist for the people of the district — has not been denied. . . .

The argument, made in behalf of the government, implies that if Congress should provide the police court with a grand jury, and authorize that court to try, without a petit jury, all persons indicted — even for crimes punishable by confinement in the penitentiary — such legislation would not be an invasion of the constitutional right of trial by jury, provided the accused, after being tried and sentenced in the police court, is given an unobstructed right of appeal to, and trial by jury in, another court to which the case may be taken. We cannot assent to that interpretation of the Constitution. Except in that class or grade of offences called petty offences, which, according to the common law, may be proceeded against summarily in any tribunal legally constituted for that purpose, the guarantee of an impartial jury to the accused in a criminal prosecution, conducted either in the name, or by or under the authority of, the United States, secures to him the right to enjoy that mode of trial from the first moment, and in whatever court, he is put on trial for the offence charged. In such cases a judgment of conviction, not based upon a verdict of guilty by a jury, is void. To accord to the accused a right to be tried by a jury, in an appellate court, after he has been once fully tried otherwise than by a jury, in the court of original jurisdiction, and sentenced to pay a fine or be imprisoned for not paying it, does not satisfy the requirements of the Constitution. When, therefore, the appellant was brought before the Supreme Court of the district, and the fact was disclosed that he had been adjudged guilty of the crime of conspiracy charged in the information in this case, without ever having been tried by a jury, he should have been restored to his liberty.

For the reasons stated,

The judgment is reversed, and the cause remanded with directions to discharge the appellant from custody.

In *Mormon Church* v. *United States*, 136 U. S. 1, 42–43 (1889), Mr. Justice Bradley (for the court) said: —

"The principal questions raised are, first, as to the power of Congress to repeal the charter of the Church of Jesus Christ of Latter-Day Saints; and, secondly, as to the power of Congress and the courts to seize the property of said corporation and to hold the same for the purposes mentioned in the decree.

"The power of Congress over the Territories of the United States is general and plenary, arising from and incidental to the right to acquire the territory itself, and from the power given by the Constitution to make all needful rules and regulations respecting the territory or other property belonging to the United States. It would be absurd to hold that the United States has power to acquire territory, and no power to govern it when acquired. The power to acquire territory, other than

the territory northwest of the Ohio River (which belonged to the United States at the adoption of the Constitution), is derived from the treaty-making power and the power to declare and carry on war. The incidents of these powers are those of national sovereignty, and belong to all independent governments. The power to make acquisitions of territory by conquest, by treaty, and by cession is an incident of national sovereignty. The Territory of Louisiana, when acquired from France, and the Territories west of the Rocky Mountains, when acquired from Mexico, became the absolute property and domain of the United States, subject to such conditions as the government, in its diplomatic negotiations, had seen fit to accept relating to the rights of the people then inhabiting those Territories. Having rightfully acquired said Territories, the United States government was the only one which could impose laws upon them, and its sovereignty over them was complete. No State of the Union had any such right of sovereignty over them; no other country or government had any such right. These propositions are so elementary, and so necessarily follow from the condition of things arising upon the acquisition of new territory, that they need no argument to support them. They are self-evident. . . . Mr. Justice Nelson delivering the opinion of the court in *Benner* v. *Porter*, 9 How. 235, 242, speaking of the territorial governments established by Congress, says: 'They are legislative governments, and their courts legislative courts, Congress, in the exercise of its powers in the organization and government of the Territories, combining the powers of both the Federal and State authorities.' Chief Justice Waite, in the case of *National Bank* v. *County of Yankton*, 101 U. S. 129, 133, said: 'In the organic Act of Dakota there was not an express reservation of power in Congress to amend the Acts of the territorial legislature, nor was it necessary. Such a power is an incident of sovereignty, and continues until granted away. Congress may not only abrogate laws of the territorial legislatures, but it may itself legislate directly for the local government. It may make a void Act of the territorial legislature valid, and a valid Act void. In other words, it has full and complete legislative authority over the people of the Territories and all the departments of the territorial governments. It may do for the Territories what the people, under the Constitution of the United States, may do for the States.' In a still more recent case, and one relating to the legislation of Congress over the Territory of Utah itself, *Murphy* v. *Ramsey*, 114 U. S. 15, 44, Mr. Justice Matthews said: 'The counsel for the appellants in argument seem to question the constitutional power of Congress to pass the Act of March 22, 1882, so far as it abridges the rights of electors in the Territory under previous laws. But that question is, we think, no longer open to discussion. It has passed beyond the stage of controversy into final judgment. The people of the United States as sovereign owners of the national Territories, have supreme power over them and their inhabitants. In the exercise of this sovereign dominion, they are represented by the government of the United States, to whom all the

powers of government over that subject have been delegated, subject only to such restrictions as are expressed in the Constitution, or are necessarily implied in its terms.' Doubtless Congress in legislating for the Territories would be subject to those fundamental limitations in favor of personal rights which are formulated in the Constitution and its amendments; but these limitations would exist rather by inference and the general spirit of the Constitution from which Congress derives all its powers, than by any express and direct application of its provisions." [1]

[1] "It would seem, from these various congressional regulations of the Territories belonging to the United States, that Congress have supreme power in the government of them, depending on the exercise of their sound discretion. That discretion has hitherto been exercised in wisdom and good faith, and with an anxious regard for the security of the rights and privileges of the inhabitants, as defined and declared in the ordinance of July, 1787, and in the Constitution of the United States. 'All admit,' said Chief Justice Marshall (4 Wheaton, 422), 'the constitutionality of a territorial government.' But neither the District of Columbia, nor a Territory, is a State, within the meaning of the Constitution, or entitled to claim the privileges secured to the members of the Union. This has been so adjudged by the Supreme Court. *Hepburn* v. *Ellzey*, 2 Cranch, 445; *Corporation of New Orleans* v. *Winter*, 1 Wheaton, 91. Nor will a writ of error or appeal lie from a territorial court to the Supreme Court, unless there be a special statute provision for the purpose. *Clarke* v. *Bazadone*, 1 Cranch, 212; *United States* v. *More*, 3 *Ib.* 159. If, therefore, the government of the United States should carry into execution the project of colonizing the great valley of the Columbia or Oregon River, to the west of the Rocky Mountains, it would afford a subject of grave consideration, what would be the future civil and political destiny of that country. It would be a long time before it would be populous enough to be created into one or more independent States; and in the mean time, upon the doctrine taught by the Acts of Congress, and even by the judicial decisions of the Supreme Court, the colonists would be in a state of the most complete subordination, and as dependent upon the will of Congress as the people of this country would have been upon the king and Parliament of Great Britain, if they could have sustained their claim to bind us in all cases whatsoever. Such a state of absolute sovereignty on the one hand, and of absolute dependence on the other, is not congenial with the free and independent spirit of our native institutions; and the establishment of distant territorial governments, ruled according to will and pleasure, would have a very natural tendency, as all proconsular governments have had, to abuse and oppression." — 1 *Kent's Com.* *385.

The foregoing passage is found, in substantially the same form, in all the editions of Kent's Commentaries, beginning with the first in 1826.

Compare the doctrine of *U. S.* v. *Kagama*, 118 U. S. 375 (1886), deciding that the United States has full legislative power over tribal Indians, on reservations in the States as well as the Territories, — and the grounds on which it is put. "These Indians," said MILLER, J., for the court, "are within the geographical limits of the United States. The soil and the people within these limits are under the political control of the government of the United States, or of the States of the Union. There exist within the broad domain of sovereignty but these two. There may be cities, counties, and other organized bodies with limited legislative functions, but they are all derived from, or exist in, subordination to one or the other of these. The territorial governments owe all their powers to the statutes of the United States conferring on them the powers which they exercise, and which are liable to be withdrawn, modified, or repealed at any time by Congress. What authority the State governments may have to enact criminal laws for the Indians will be presently considered. But this power of Congress to organize territorial governments, and make laws for their inhabitants, arises not so much from the clause in the Constitution in regard to disposing of

JONES v. UNITED STATES.

SUPREME COURT OF THE UNITED STATES. 1890.

[137 *U. S.* 202.]

. . . *Mr. E. J. Waring*, *Mr. John Henry Keene, Jr.*, and *Mr. Archibald Stirling*, for plaintiffs in error. *Mr. Joseph S. Davis* and *Mr. J. Edward Stirling* were with them on the brief.

Mr. Attorney-General, for defendants in error.

MR. JUSTICE GRAY delivered the opinion of the court.

This was an indictment, found in the District Court of the United States for the District of Maryland, and remitted to the Circuit Court under Rev. Stat. § 1039, alleging that Henry Jones, late of that district, on September 14, 1889, "at Navassa Island, a place which then and there was under the sole and exclusive jurisdiction of the United States, and out of the jurisdiction of any particular State or district of the United States, the same being, at the time of the committing of the offences in the manner and form as hereinafter stated by the persons hereinafter named, an island situated in the Caribbean Sea, and named Navassa Island, and which was then and there recognized and considered by the United States as containing a deposit of guano, within the meaning and terms of the laws of the United States relating to such islands, and which was then and there recognized and considered by the United States as appertaining to the United States, and which was also then and there in the possession of the United States, under the laws of the United States then and there in force relating to such islands," murdered one Thomas N. Foster, by giving him three mortal blows with an axe, of which he there died on the same day; and that

and making rules and regulations concerning the territory and other property of the United States, as from the ownership of the country in which the Territories are, and the right of exclusive sovereignty which must exist in the national government, and can be found nowhere else. *Murphy* v. *Ramsey*, 114 U. S. 15, 44. . . . [It is then laid down that the general government may legislate for tribal Indians on both State and territorial reservations.] They owe no allegiance to the States, and receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the Federal government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the executive and by Congress, and by this court, whenever the question has arisen. . . . The power of the general government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that government, because it never has existed anywhere else, because the theatre of its exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its laws on all the tribes."

In dealing with the tribal Indians, the United States government has never proceeded on the theory that its action was restrained by the amendments, or by other like clauses in the body of the Federal Constitution. — ED.

other persons named aided and abetted in the murder. The indictment, after charging the murder in usual form, alleged that the District of Maryland was the District of the United States into which the defendant was afterwards first brought from the Island of Navassa.

The defendant filed a general demurrer, which was overruled, and he then pleaded not guilty. The jury returned a verdict of guilty; and a bill of exceptions was tendered by the defendant, and allowed by the court, in substance as follows: — . . .

After verdict, the defendant moved in arrest of judgment, for various reasons, the only one of which, relied on in argument, was this: "Because the Act of August 18, 1856, c. 164, now codified with amendments as Title 72 of the Revised Statutes of the United States, is unconstitutional and void, and the court was without jurisdiction to try the defendant under the indictment found against him."

The motion was overruled, and the defendant sentenced to death; and he sued out this writ of error under the Act of February 6, 1889, c. 113, § 6; 25 Stat. 656. . . .

By section 6 of the same Act, re-enacted in section 5576 of the Revised Statutes, all acts done, and offences or crimes committed, on any such island, rock, or key, by persons who may land thereon, or in the waters adjacent thereto, "shall be held and deemed to have been done or committed on the high seas, on board a merchant ship or vessel belonging to the United States, and be punished according to the laws of the United States relating to such ships or vessels and offences on the high seas; which laws, for the purposes aforesaid, are hereby extended to and over such islands, rocks, or keys."

This section does not (as argued for the defendant) assume to extend the admiralty jurisdiction over land; but, in the exercise of the power of the United States to preserve peace and punish crime in all regions over which they exercise jurisdiction, it unequivocally extends the provisions of the Statutes of the United States for the punishment of offences committed upon the high seas to like offences committed upon guano islands which have been determined by the President to appertain to the United States. In either case, the crime, the punishment, and the procedure are statutory, the whole criminal jurisdiction of the courts of the United States being derived from Acts of Congress. *United States* v. *Hudson*, 7 Cranch, 32; *United States* v. *Britton*, 108 U. S. 199, 206.

By the Constitution of the United States, while a crime committed within any State must be tried in that State and in a district previously ascertained by law, yet a crime not committed within any State of the Union may be tried at such place as Congress may by law have directed. Constitution, art. 3, § 2; Amendments, art. 6; *United States* v. *Dawson*, 15 How. 467, 488. Congress has directed that "the trial of all offences committed upon the high seas or elsewhere, out of the jurisdiction of any particular State or district, shall be in the district where the offender is found, or into which he is first brought." Rev. Stat.

§ 730. And Congress has awarded the punishment of death to the crime of murder, whether committed upon the high seas or other tide-waters out of the jurisdiction of any particular State, or "within any fort, arsenal, dock-yard, magazine, or in any other place or district of country under the exclusive jurisdiction of the United States." Rev. Stat. § 5339. Both these Acts of Congress clearly include murder committed on any land within the exclusive jurisdiction of the United States, and not within any judicial district, as well as murder committed on the high seas. *Ex parte Bollman*, 4 Cranch, 75, 136; *United States* v. *Bevans*, 3 Wheat. 336, 390, 391; *United States* v. *Arwo*, 19 Wall. 486.

By the law of nations, recognized by all civilized States, dominion of new territory may be acquired by discovery and occupation, as well as by cession or conquest; and when citizens or subjects of one nation, in its name, and by its authority or with its assent, take and hold actual, continuous, and useful possession (although only for the purpose of carrying on a particular business, such as catching and curing fish, or working mines) of territory unoccupied by any other government or its citizens, the nation to which they belong may exercise such jurisdiction and for such period as it sees fit over territory so acquired. This principle affords ample warrant for the legislation of Congress concerning guano islands. Vattel, lib. 1, c. 18; Wheaton on International Law (8th ed.) §§ 161, 165, 176, note 104; Halleck on International Law, c. 6, §§ 7, 15; 1 Phillimore on International Law (3d ed.) §§ 227, 229, 230, 232, 242; 1 Calvo Droit International (4th ed.) §§ 266, 277, 300; *Whiton* v. *Albany Ins. Co.*, 109 Mass. 24, 31.

Who is the sovereign, *de jure* or *de facto*, of a territory is not a judicial, but a political question, the determination of which by the legislative and executive departments of any government conclusively binds the judges, as well as all other officers, citizens, and subjects of that government. This principle has always been upheld by this court, and has been affirmed under a great variety of circumstances. . . .

Judgment affirmed.

IN RE ROSS.

SUPREME COURT OF THE UNITED STATES. 1890.

[140 *U. S.* 453.]

THE petitioner below, the appellant here, was imprisoned in the penitentiary at Albany in the State of New York. He was convicted on the 20th of May, 1880, in the American consular tribunal in Japan, of the crime of murder, committed on board of an American ship in the harbor of Yokohama in that empire, and sentenced to death.

On the 6th of August following, his sentence was commuted by the President to imprisonment for life in the penitentiary at Albany, and to that place he was taken, and there he has ever since been confined. Nearly ten years afterwards, on the 19th of March, 1890, he applied to the Circuit Court of the United States for the Northern District of New York for a writ of *habeas corpus* for his discharge, alleging that his conviction, sentence, and imprisonment were unlawful, and stating the causes thereof and the attendant circumstances. The writ was issued, directed to the superintendent of the penitentiary, who made return that he held the petitioner under the warrant of the President. . . .

To this warrant was annexed a copy of the petitioner's acceptance of the conditional pardon of the President, certified to be correct by the United States consul-general at Japan. . . .

The case was then heard by the Circuit Court, counsel appearing for the petitioner and the assistant United States attorney for the government. . . .

On the 9th of May, 1880, the appellant, John M. Ross, was one of the crew of the American ship Bullion, then in the waters of Japan, and lying at anchor in the harbor of Yokohama. On that day, on board of the ship, he assaulted Robert Kelly, its second mate, with a knife, inflicting in his neck a mortal wound, of which in a few minutes afterwards he died on the deck of the ship. Ross was at once arrested by direction of the master of the vessel and placed in irons, and on the same day he was taken ashore and confined in jail at Yokohama. On the following day, May 10, the master filed with the American consul-general at that place, Thomas B. Van Buren, a complaint against Ross, charging him with the murder of the mate. It contained sufficient averments of the offence, was verified by the oath of the master, and to it the consul-general appended his certificate that he had reasonable grounds for believing its contents were true. The complaint described the accused as one "supposed to be a citizen of the United States."

On the 18th of that month an amended complaint was filed by the master of the ship with the consul-general, in which the accused was described as "an American seaman, duly and lawfully enrolled and shipped and doing service as such seaman on board the American ship Bullion." The complaint was also amended in some other particulars. . . .

Previously to its being filed the accused appeared with counsel before the consul-general, and the complaint being read to him, he presented an affidavit stating that he was a subject of Great Britain, a native of Prince Edward's Island, a dependency of the British Empire, and had never renounced the rights or liabilities of a British subject or been expatriated from his native allegiance or been naturalized in any other country. Upon this affidavit he contended that the court was without jurisdiction over him, by reason of his being a subject of Great Britain, and he prayed that he be discharged. His contention was termed in the record a demurrer to the complaint.

The court held that as the accused was a seaman on an American vessel, he was subject to its jurisdiction, and overruled the objection. The counsel of the accused then moved that the charge against him be dismissed, on the ground that he could not be held for the offence except upon the presentment or indictment of a grand jury, but this motion was also overruled.

Four associates were drawn, as required by statute and the consular regulations, to sit with the consul-general on the trial of the accused, and, being sworn to answer questions as to their eligibility, the accused stated that he had no questions to ask them on that subject. They were then sworn in to try the cause "in accordance with court regulations." A motion for a jury on the trial was also made and denied. The amended complaint was then substituted in place of the original, to which no objection was interposed, and to it the accused pleaded "not guilty," and asked for the names of the witnesses for the prosecution, which were furnished to him. The witnesses were then sworn and examined, and they established beyond all possible doubt the offence of murder charged against the accused, which was committed under circumstances of great atrocity. The court found him guilty of murder, and he was sentenced to suffer death in such manner and at such time and place as the United States minister should direct. The conviction and sentence were concurred in by the four associates, and were approved by Mr. Bingham, the minister of the United States in Japan. The minister transmitted the record of the case to the Department of State for the consideration of the President, and for commutation of the sentence or pardon of the prisoner, if deemed advisable. The President subsequently directed the issue to the prisoner of a pardon on condition that he be imprisoned at hard labor for the term of his natural life in the penitentiary at Albany, and it was accepted by him on that condition. His sentence was accordingly commuted, and he was removed to the Albany penitentiary.

The Circuit Court, after hearing argument of counsel and full consideration of the subject, made an order on January 21, 1891, denying the motion of the prisoner for his discharge, and remanding him to the penitentiary and the custody of its superintendent. 44 Fed. Rep. 185. From that order the case was brought here on appeal.

Mr. George W. Kirchwey, for appellant made the following points.

Mr. Assistant Attorney-General Parker for appellee.

Mr. Justice Field, after stating the case, delivered the opinion of the court.

The Circuit Court did not refuse to discharge the petitioner upon any independent conclusion as to the validity of the legislation of Congress establishing the consular tribunal in Japan, and the trial of Americans for offences committed within the territory of that country, without the indictment of a grand jury, and without a trial by a petit jury, but placed its decision upon the long and uniform acquiescence by the executive,

administrative, and legislative departments of the government in the validity of the legislation. Nor did the Circuit Court consider whether the status of the petitioner as a citizen of the United States, or as an American within the meaning of the treaty with Japan, could be questioned, while he was a seaman of an American ship, under the protection of the American flag, but simply stated the view taken on that subject by the minister to Japan, the State Department, and the President. Said the court: "During the thirty years since the statutes conferring the judicial powers on ministers and consuls, which have been referred to, were enacted, that jurisdiction has been freely exercised. Citizens of the United States have been tried for serious offences before these officers, without preliminary indictment or a common-law jury, and convicted and punished. These trials have been authorized by the regulations, orders and decrees of ministers, and it must be presumed that the regulations, orders and decrees of ministers prescribing the mode of trial have been transmitted to the Secretary of the State, and by him been laid before Congress for revision, as required by law. Unless the petitioner was not properly subject to this jurisdiction because he was not a citizen of the United States, his trial and sentence were in all respects modal, as well as substantial, regular and valid under the laws of Congress, according to the construction placed upon these statutes by the acquiescence of the executive, administrative, and legislative departments of the government for this long period of time."

Under these circumstances the Circuit Court was of opinion that it ought not to adjudge that the sentence imposed upon the petitioner was utterly unwarranted and void, when the case was one in which his rights could be adequately protected by this court, and when a decision by the Circuit Court setting him at liberty, although it might be reversed, would be practically irrevocable.

The Circuit Court might have found an additional ground for not calling in question the legislation of Congress, in the uniform practice of civilized governments for centuries to provide consular tribunals in other than Christian countries, or to invest their consuls with judicial authority, which is the same thing, for the trial of their own subjects or citizens for offences committed in those countries, as well as for the settlement of civil disputes between them; and in the uniform recognition, down to the time of the formation of our government, of the fact that the establishment of such tribunals was among the most important subjects for treaty stipulations. This recognition of their importance has continued ever since, though the powers of those tribunals are now more carefully defined than formerly. *Dainese* v. *Hale*, 91 U. S. 13.

The practice of European governments to send officers to reside in foreign countries, authorized to exercise a limited jurisdiction over vessels and seamen of their country, to watch the interests of their countrymen and to assist in adjusting their disputes and protecting their commerce, goes back to a very early period, even preceding what are

termed the Middle Ages. During those ages these commercial magistrates, generally designated as consuls, possessed to some extent a representative character, sometimes discharging judicial and diplomatic functions. In other than Christian countries they were, by treaty stipulations, usually clothed with authority to hear complaints against their countrymen and to sit in judgment upon them when charged with public offences. After the rise of Islamism, and the spread of its followers over eastern Asia and other countries bordering on the Mediterranean, the exercise of this judicial authority became a matter of great concern. The intense hostility of the people of Moslem faith to all other sects, and particularly to Christians, affected all their intercourse, and all proceedings had in their tribunals. Even the rules of evidence adopted by them placed those of different faith on unequal grounds in any controversy with them. For this cause, and by reason of the barbarous and cruel punishments inflicted in those countries, and the frequent use of torture to enforce confession from parties accused, it was a matter of deep interest to Christian governments to withdraw the trial of their subjects, when charged with the commission of a public offence, from the arbitrary and despotic action of the local officials. Treaties conferring such jurisdiction upon these consuls were essential to the peaceful residence of Christians within those countries and the successful prosecution of commerce with their people.

The treaty-making power vested in our government extends to all proper subjects of negotiation with foreign governments. It can, equally with any of the former or present governments of Europe, make treaties providing for the exercise of judicial authority in other countries by its officers appointed to reside therein.

We do not understand that any question is made by counsel as to its power in this respect. His objection is to the legislation by which such treaties are carried out, contending that, so far as crimes of a felonious character are concerned, the same protection and guarantee against an undue accusation or an unfair trial, secured by the Constitution to citizens of the United States at home, should be enjoyed by them abroad. In none of the laws which have been passed by Congress to give effect to treaties of the kind has there been any attempt to require indictment by a grand jury before one can be called upon to answer for a public offence of that grade committed in those countries, or to secure a jury on the trial of the offence. Yet the laws on that subject have been passed without objection to their constitutionality. Indeed, objection on that ground was never raised in any quarter, so far as we are informed, until a recent period.

It is now, however, earnestly pressed by counsel for the petitioner, but we do not think it tenable. By the Constitution a government is ordained and established "for the United States of America," and not for countries outside of their limits. The guarantees it affords against accusation of capital or infamous crimes, except by indictment or presentment by a grand jury, and for an impartial trial by a jury when

thus accused, apply only to citizens and others within the United States, or who are brought there for trial for alleged offences committed elsewhere, and not to residents or temporary sojourners abroad. *Cook* v. *United States*, 138 U. S. 157, 181. The Constitution can have no operation in another country. When, therefore, the representatives or officers of our government are permitted to exercise authority of any kind in another country, it must be on such conditions as the two countries may agree, the laws of neither one being obligatory upon the other. The deck of a private American vessel, it is true, is considered for many purposes constructively as territory of the United States, yet persons on board of such vessels, whether officers, sailors, or passengers, cannot invoke the protection of the provisions referred to until brought within the actual territorial boundaries of the United States. And, besides, their enforcement abroad in numerous places, where it would be highly important to have consuls invested with judicial authority, would be impracticable from the impossibility of obtaining a competent grand or petit jury. The requirement of such a body to accuse and to try an offender would, in a majority of cases, cause an abandonment of all prosecution. The framers of the Constitution, who were fully aware of the necessity of having judicial authority exercised by our consuls in non-Christian countries, if commercial intercourse was to be had with their people, never could have supposed that all the guarantees in the administration of the law upon criminals at home were to be transferred to such consular establishments, and applied before an American who had committed a felony there could be accused and tried. They must have known that such a requirement would defeat the main purpose of investing the consul with judicial authority. While, therefore, in one aspect the American accused of crime committed in those countries is deprived of the guarantees of the Constitution against unjust accusation and a partial trial, yet in another aspect he is the gainer, in being withdrawn from the procedure of their tribunals, often arbitrary and oppressive, and sometimes accompanied with extreme cruelty and torture. Letter of Mr. Cushing to Mr. Calhoun of September 29, 1844, accompanying President's message communicating abstract of treaty with China, Senate Doc. 58, 28th Cong. 2d Sess.; Letter on Judicial Exterritorial Rights by Secretary Frelinghuysen to Chairman of Senate Committee on Foreign Relations of April 29, 1882, Senate Doc. 89, 47th Cong. 1st Sess.; Phillimore on Int. Law, vol. 2, part 7; Halleck on Int. Law, c. 41. . . .

The jurisdiction of the consular tribunal, as is thus seen, is to be exercised and enforced in accordance with the laws of the United States; and of course in pursuance of them the accused will have an opportunity of examining the complaint against him, or will be presented with a copy stating the offence he has committed, will be entitled to be confronted with the witnesses against him and to cross-examine them, and to have the benefit of counsel; and, indeed, will have the benefit of all the provisions necessary to secure a fair trial before the

consul and his associates. The only complaint of this legislation made by counsel is that, in directing the trial to be had before the consul and associates summoned to sit with him, it does not require a previous presentment or indictment by a grand jury, and does not give to the accused a petit jury. The want of such clauses, as affecting the validity of the legislation, we have already considered. It is not pretended that the prisoner did not have, in other respects, a fair trial in the consular court.

It is further objected to the proceedings in the consular court that the offence with which the petitioner was charged, having been committed on board of a vessel of the United States in Japanese waters, was not triable before the consular court; and that the petitioner, being a subject of Great Britain, was not within the jurisdiction of that court. These objections we will now proceed to consider.

The argument presented in support of the first of these positions is briefly this. Congress has provided for the punishment of murder committed upon the high seas, or any arm or bay of the sea within the admiralty and maritime jurisdiction of the United States, and out of the jurisdiction of any particular State; and has provided that the trial of all offences committed upon the high seas, out of the jurisdiction of any particular State, shall be in the district where the offender is found or into which he is first brought. The term "high seas" includes waters on the sea-coast without the boundaries of low-water mark; and the waters of the port of Yokohama constitute, within the meaning of the statute, high seas. Therefore it is contended that, although the ship Bullion was at the time lying in those waters, the offence for which the appellant was tried and convicted was committed on the high seas and within the jurisdiction of the domestic tribunals of the United States, and is not punishable elsewhere. In support of this position it is assumed that the jurisdiction of the consular court is limited to offences committed on land, within the territory of Japan, to the exclusion of offences committed on waters within that territory.

There is, as it seem to us, an obvious answer to this argument. The jurisdiction to try offences committed on the high seas in the district where the offender may be found, or into which he may be first brought, is not exclusive of the jurisdiction of the consular tribunal to try a similar offence when committed in a port of a foreign country in which that tribunal is established, and the offender is not taken to the United States. There is no law of Congress compelling the master of a vessel to carry or transport him to any home port when he can be turned over to a consular court having jurisdiction of similar offences committed in the foreign country. 7 Opinions Attys. Gen. 722. The provisions conferring jurisdiction in capital cases upon the consuls in Japan, when the offence is committed in that country, are embodied in the Revised Statutes, with the provisions as to the jurisdiction of domestic tribunals over such offences committed on the high seas; and those statutes were re-enacted together, and, as re-enacted, went into operation at the same

time. To both effect must be given in proper cases, where they are applicable. We do not adopt the limitation stated by counsel to the jurisdiction of the consular tribunal, that it extends only to offences committed on land. Neither the treaty nor the Revised Statutes to carry them into effect contain any such limitation. The latter speak of offences committed in the country of Japan — meaning within the territorial jurisdiction of that country — which includes its ports and navigable waters as well as its lands.

The position that the petitioner, being a subject of Great Britain, was not within the jurisdiction of the consular court, is more plausible, but admits, we think, of a sufficient answer. The national character of the petitioner, for all the purposes of the consular jurisdiction, was determinable by his enlistment as one of the crew of the American ship Bullion. . . .

It is true that the occasion for consular tribunals in Japan may hereafter be less than at present, as every year that country progresses in civilization and in the assimilation of its system of judicial procedure to that of Christian countries, as well as in the improvement of its penal statutes; but the system of consular tribunals which have a general similarity in their main provisions, is of the highest importance, and their establishment in other than Christian countries, where our people may desire to go in pursuit of commerce, will often be essential for the protection of their persons and property. . . . *Order affirmed.*[1]

[1] That the treaty power of the United States extends to all proper subjects of negotiation between our government and the governments of other nations, is clear. It is also clear that the protection which should be afforded to the citizens of one country owning property in another, and the manner in which that property may be transferred, devised, or inherited, are fitting subjects for such negotiation and of regulation by mutual stipulations between the two countries. As commercial intercourse increases between different countries, the residence of citizens of one country within the territory of the other naturally follows, and the removal of their disability from alienage to hold, transfer, and inherit property in such cases tends to promote amicable relations. Such removal has been within the present century the frequent subject of treaty arrangement. The treaty power, as expressed in the Constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the government or of its departments, and those arising from the nature of the government itself and of that of the States. It would not be contended that it extends so far as to authorize what the Constitution forbids, or a change in the character of the government or in that of one of the States, or a cession of any portion of the territory of the latter, without its consent. *Fort Leavenworth Railroad Co.* v. *Lowe*, 114 U. S. 525, 541. But with these exceptions, it is not perceived that there is any limit to the questions which can be adjusted touching any matter which is properly the subject of negotiation with a foreign country. *Ware* v. *Hylton*, 3 Dall. 199; *Chirac* v. *Chirac*, 2 Wheat 259; *Hauenstein* v. *Lynham*, 100 U. S. 483; 8 Opinions Attys. Gen. 417; *The People* v. *Gerke*, 5 Cal. 381. — FIELD, J., for the court in *Geofroy* v. *Riggs*, 133 U. S. 258, 266.

The case of *Chirac* v. *Chirac*, 2 Wheat 259 (1817), held that a treaty had done away with the incapacity of alienage imposed by certain State laws. In *U. S.* v. *Forty-three Gallons of Whiskey*, 93 U. S. 188, 197 (1876), DAVIS, J., for the court, said: "The power to make treaties with the Indian tribes is, as we have seen, coextensive with that to make treaties with foreign nations. In regard to the latter, it is, beyond doubt, ample to cover all the usual subjects of diplomacy. One of them relates to the

FONG YUE TING *v.* UNITED STATES.
WONG QUAN *v.* UNITED STATES.
LEE JOE *v.* UNITED STATES.

SUPREME COURT OF THE UNITED STATES. 1893.

[149 *U. S.* 698.]

THESE were three writs of *habeas corpus*, granted by the Circuit Court of the United States, for the Southern District of New York, upon petitions of Chinese laborers, arrested and held by the marshal of the district for not having certificates of residence, under section 6 of the Act of May 5, 1892, c. 60, which is copied in the margin. . . .

Each petition alleged that the petitioner was arrested and detained without due process of law, and that section 6 of the Act of May 5, 1892, was unconstitutional and void.

In each case, the Circuit Court, after a hearing upon the writ of *habeas corpus* and the return of the marshal, dismissed the writ of *habeas corpus*, and allowed an appeal of the petitioner to this court, and admitted him to bail pending the appeal. All the proceedings, from the arrest to the appeal, took place on May 6.

Mr. Joseph H. Choate and *Mr. J. Hubley Ashton*, for appellants.

Mr. Maxwell Evarts was on Mr. Choate's brief.

Mr. Solicitor-General, for appellees.

MR. JUSTICE GRAY, after stating the facts, delivered the opinion of the court.

The general principles of public law which lie at the foundation of these cases are clearly established by previous judgments of this court, and by the authorities therein referred to.

In the recent case of *Nishimura Ekiu* v. *United States*, 142 U. S. 651, 659, the court, in sustaining the action of the executive department, putting in force an Act of Congress for the exclusion of aliens, said: "It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe. In the United States, this power is vested in the national government, to which the Constitution has committed

disability of the citizens or subjects of either contracting nation to take, by descent or devise, real property situate in the territory of the other. If a treaty to which the United States is a party removed such disability, and secured to them the right so to take and hold such property, as if they were natives of this country, it might contravene the statutes of a State; but, in that event, the courts would disregard them, and give to the alien the full protection conferred by its provisions If this result can be thus obtained, surely the Federal government may, in the exercise of its acknowledged power to treat with Indians, make the provision in question, coming, as it fairly does, within the clause relating to the regulation of commerce." — ED.

the entire control of international relations, in peace as well as in war. It belongs to the political department of the government, and may be exercised either through treaties made by the President and Senate, or through statutes enacted by Congress."

The same views were more fully expounded in the earlier case of *Chae Chan Ping* v. *United States*, 130 U. S. 581, in which the validity of a former Act of Congress, excluding Chinese laborers from the United States, under the circumstances therein stated, was affirmed.

In the elaborate opinion delivered by Mr. Justice Field, in behalf of the court, it was said: "Those laborers are not citizens of the United States; they are aliens. That the government of the United States, through the action of the legislative department, can exclude aliens from its territory is a proposition which we do not think open to controversy. Jurisdiction over its own territory to that extent is an incident of every independent nation. It is a part of its independence. If it could not exclude aliens, it would be to that extent subject to the control of another power." "The United States, in their relation to foreign countries and their subjects or citizens, are one nation, invested with powers which belong to independent nations, the exercise of which can be invoked for the maintenance of its absolute independence and security throughout its entire territory." 130 U. S. 603, 604.

It was also said, repeating the language of Mr. Justice Bradley in *Knox* v. *Lee*, 12 Wall. 457, 555: "The United States is not only a government, but it is a national government, and the only government in this country that has the character of nationality. It is invested with power over all the foreign relations of the country, war, peace, and negotiations and intercourse with other nations; all of which are forbidden to the State governments." 130 U. S. 605. And it was added: "For local interests the several States of the Union exist; but for international purposes, embracing our relations with foreign nations, we are but one people, one nation, one power." 130 U. S. 606.

The court then went on to say: "To preserve its independence, and give security against foreign aggression and encroachment, is the highest duty of every nation, and to attain these ends nearly all other considerations are to be subordinated. It matters not in what form such aggression and encroachment come, whether from the foreign nation acting in its national character, or from vast hordes of its people crowding in upon us. The government, possessing the powers which are to be exercised for protection and security, is clothed with authority to determine the occasion on which the powers shall be called forth; and its determination, so far as the subjects affected are concerned, is necessarily conclusive upon all its departments and officers. If, therefore, the government of the United States, through its legislative department, considers the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security, their exclusion is not to be stayed because at the time there are no actual hostilities with the nation of which the foreigners are subjects.

The existence of war would render the necessity of the proceeding only more obvious and pressing. The same necessity, in a less pressing degree, may arise when war does not exist, and the same authority which adjudges the necessity in one case must also determine it in the other. In both cases, its determination is conclusive upon the judiciary. If the government of the country of which the foreigners excluded are subjects is dissatisfied with this action, it can make complaint to the executive head of our government, or resort to any other measure which, in its judgment, its interests or dignity may demand; and there lies its only remedy. The power of the government to exclude foreigners from the country, whenever, in its judgment, the public interests require such exclusion, has been asserted in repeated instances, and never denied by the executive or legislative departments." 130 U. S. 606, 607. This statement was supported by many citations from the diplomatic correspondence of successive Secretaries of State, collected in Wharton's International Law Digest, § 206.

The right of a nation to expel or deport foreigners, who have not been naturalized or taken any steps towards becoming citizens of the country, rests upon the same grounds, and is as absolute and unqualified as the right to prohibit and prevent their entrance into the country.

This is clearly affirmed in despatches referred to by the court in *Chae Chan Ping's Case.* In 1856, Mr. Marcy wrote: "Every society possesses the undoubted right to determine who shall compose its members, and it is exercised by all nations, both in peace and war. A memorable example of the exercise of this power in time of peace was the passage of the alien law of the United States in the year 1798." In 1869, Mr. Fish wrote: "The control of the people within its limits, and the right to expel from its territory persons who are dangerous to the peace of the State, are too clearly within the essential attributes of sovereignty to be seriously contested." Wharton's International Law Digest, § 206; 130 U. S. 607.

The statements of leading commentators on the law of nations are to the same effect. . . .

The right to exclude or to expel all aliens, or any class of aliens, absolutely or upon certain conditions, in war or in peace, being an inherent and inalienable right of every sovereign and independent nation, essential to its safety, its independence, and its welfare, the question now before the court is whether the manner in which Congress has exercised this right in sections 6 and 7 of the Act of 1892 is consistent with the Constitution.

The United States are a sovereign and independent nation, and are vested by the Constitution with the entire control of international relations, and with all the powers of government necessary to maintain that control and to make it effective. The only government of this country, which other nations recognize or treat with, is the government of the Union; and the only American flag known throughout the world is the flag of the United States.

The Constitution of the United States speaks with no uncertain sound upon this subject. That instrument, established by the people of the United States as the fundamental law of the land, has conferred upon the President the executive power; has made him the commander-in-chief of the army and navy; has authorized him, by and with the consent of the Senate, to make treaties, and to appoint ambassadors, public ministers, and consuls; and has made it his duty to take care that the laws be faithfully executed. The Constitution has granted to Congress the power to regulate commerce with foreign nations, including the entrance of ships, the importation of goods, and the bringing of persons into the ports of the United States; to establish a uniform rule of naturalization; to define and punish piracies and felonies committed on the high seas, and offences against the law of nations; to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water; to raise and support armies, to provide and maintain a navy, and to make rules for the government and regulation of the land and naval forces; and to make all laws necessary and proper for carrying into execution these powers, and all other powers vested by the Constitution in the government of the United States, or in any department or officer thereof. And the several States are expressly forbidden to enter into any treaty, alliance, or confederation; to grant letters of marque and reprisal; to enter into any agreement or compact with another State, or with a foreign power; or to engage in war, unless actually invaded, or in such imminent danger as will not admit of delay.

In exercising the great power which the people of the United States, by establishing a written constitution as the supreme and paramount law, have vested in this court, of determining, whenever the question is properly brought before it, whether the Acts of the legislature or of the executive are consistent with the Constitution, it behooves the court to be careful that it does not undertake to pass upon political questions, the final decision of which has been committed by the Constitution to the other departments of the government. . . .

The power to exclude or to expel aliens, being a power affecting international relations, is vested in the political departments of the government, and is to be regulated by treaty or by Act of Congress, and to be executed by the executive authority according to the regulations so established, except so far as the judicial department has been authorized by treaty or by statute, or is required by the paramount law of the Constitution, to intervene.

In *Nishimura Ekiu's Case*, it was adjudged that, although Congress might, if it saw fit, authorize the courts to investigate and ascertain the facts upon which the alien's right to land was made by the statutes to depend, yet Congress might intrust the final determination of those facts to an executive officer, and that, if it did so, his order was due process of law, and no other tribunal, unless expressly authorized by law to do so, was at liberty to re-examine the evidence on which he acted, or to controvert its sufficiency. 142 U. S. 660.

The power to exclude aliens and the power to expel them rest upon one foundation, are derived from one source, are supported by the same reasons, and are in truth but parts of one and the same power.

The power of Congress, therefore, to expel, like the power to exclude aliens, or any specified class of aliens, from the country, may be exercised entirely through executive officers; or Congress may call in the aid of the judiciary to ascertain any contested facts on which an alien's right to be in the country has been made by Congress to depend. . . .

In our jurisprudence, it is well settled that the provisions of an Act of Congress, passed in the exercise of its constitutional authority, on this, as on any other subject, if clear and explicit, must be upheld by the courts, even in contravention of express stipulations in an earlier treaty. As was said by this court in *Chae Chan Ping's Case*, following previous decisions: "The treaties were of no greater legal obligation than the Act of Congress. By the Constitution, laws made in pursuance thereof and treaties made under the authority of the United States are both declared to be the supreme law of the land, and no paramount authority is given to one over the other. A treaty, it is true, is in its nature a contract between nations, and is often merely promissory in its character, requiring legislation to carry its stipulations into effect. Such legislation will be open to future repeal or amendment. If the treaty operates by its own force, and relates to a subject within the power of Congress, it can be deemed in that particular only the equivalent of a legislative Act, to be repealed or modified at the pleasure of Congress. In either case, the last expression of the sovereign will must control." "So far as a treaty made by the United States with any foreign nation can become the subject of judicial cognizance in the courts of this country, it is subject to such Acts as Congress may pass for its enforcement, modification, or repeal." 130 U. S. 600. See also *Foster* v. *Neilson*, 2 Pet. 253, 314; *Edye* v. *Robertson*, 112 U. S. 580, 597–599; *Whitney* v. *Robertson*, 124 U. S. 190.

By the supplementary Act of October 1, 1888, c. 1064, it was enacted, in section 1, that "from and after the passage of this Act, it shall be unlawful for any Chinese laborer, who shall at any time heretofore have been, or who may now or hereafter be, a resident within the United States, and who shall have departed or shall depart therefrom, and shall not have returned before the passage of this Act, to return to, or remain in, the United States;" and in section 2, that "no certificates of identity, provided for in the fourth and fifth sections of the Act to which this is a supplement, shall hereafter be issued; and every certificate heretofore issued in pursuance thereof is hereby declared void and of no effect, and the Chinese laborer claiming admission by virtue thereof shall not be permitted to enter the United States." 25 Stat. 504. . . .

By the law of nations, doubtless, aliens residing in a country, with the intention of making it a permanent place of abode, acquire, in one sense, a domicil there; and, while they are permitted by the nation to retain such a residence and domicil, are subject to its laws, and may

invoke its protection against other nations. This is recognized by those publicists who, as has been seen, maintain in the strongest terms the right of the nation to expel any or all aliens at its pleasure. Vattel, lib. 1, c. 19, § 213; 1 Phillimore, c. 18, § 321; Mr. Marcy, in *Koszta's Case*, Wharton's International Law Digest, § 198. See also *Lau Ow Bew* v. *United States*, 144 U. S. 47, 62; Merlin, Repertoire de Jurisprudence, Domicile, § 13, quoted in the case, above cited, of *In re Adam*, 1 Moore, P. C. 460, 472, 473.

Chinese laborers, therefore, like all other aliens residing in the United States for a shorter or longer time, are entitled, so long as they are permitted by the government of the United States to remain in the country, to the safeguards of the Constitution, and to the protection of the laws, in regard to their rights of person and of property, and to their civil and criminal responsibility. But they continue to be aliens, having taken no steps towards becoming citizens, and incapable of becoming such under the naturalization laws; and therefore remain subject to the power of Congress to expel them, or to order them to be removed and deported from the country, whenever in its judgment their removal is necessary or expedient for the public interest. . . .

The question whether, and upon what conditions, these aliens shall be permitted to remain within the United States being one to be determined by the political departments of the government, the judicial department cannot properly express an opinion upon the wisdom, the policy or the justice of the measures enacted by Congress in the exercise of the powers confided to it by the Constitution over this subject. . . . In each of these cases the judgment of the Circuit Court, dismissing the writ of *habeas corpus*, is right and must be *Affirmed.*

[BREWER, J., FIELD, J., and FULLER, C. J., dissented.]

NOTE.

THE scope of the judicial power of the United States is seen by the Constitution, Art. 3, s. 2, and Art. 6, cl. 2. But not all this power has ever been conferred upon the courts. Kent (Com. i. *314, 12th ed.) says: "The disposal of the judicial power, except in a few specified cases, belongs to Congress; and the courts cannot exercise jurisdiction in every case to which the judicial power extends, without the intervention of Congress, who are not bound to enlarge the jurisdiction of the Federal courts to every subject which the Constitution might warrant. . . . A considerable portion of the judicial power, placed at the disposal of Congress by the Constitution, has been intentionally permitted to lie dormant, by not being called into action by law."

The student should acquaint himself with certain leading points as to the jurisdiction of the courts of the United States; *e. g.* those which appear in Rev. St. U. S. ss. 639, 641, 687, 691–693 incl., 697, 699, 702, 705, 707, 709, and in the Appellate Courts Act, 26 U. S. Stat. at Large, 826. References to later statutes may be found in Gould and Tucker's Notes on the Rev. Stats. See also Curtis, Jurisdiction U. S. Courts, *passim*, and Foster's Federal Practice. — ED.

APPENDIX TO PART I.

A CONSTITUTION OR FORM OF GOVERNMENT FOR THE COMMONWEALTH OF MASSACHUSETTS.[1]

PREAMBLE.

THE end of the institution, maintenance, and administration of government, is to secure the existence of the body politic, to protect it, and to furnish the individuals who compose it with the power of enjoying in safety and tranquillity their natural rights, and the blessings of life: and whenever these great objects are not obtained, the people have a right to alter the government, and to take measures necessary for their safety, prosperity, and happiness.

The body politic is formed by a voluntary association of individuals: it is a social compact, by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good. It is the duty of the people, therefore, in framing a constitution of government, to provide for an equitable mode of making laws, as well as for an impartial interpretation and a faithful execution of them; that every man may, at all times, find his security in them.

We, therefore, the people of Massachusetts, acknowledging, with grateful hearts, the goodness of the great Legislator of the universe, in affording us, in the course of His providence, an opportunity, deliberately and peaceably, without fraud, violence, or surprise, of entering into an original, explicit, and solemn compact with each other; and of forming a new constitution of civil government, for ourselves and posterity; and devoutly imploring His direction in so interesting a design, do agree upon, ordain, and establish the following *Declaration of Rights, and Frame of Government*, as the CONSTITUTION OF THE COMMONWEALTH OF MASSACHUSETTS.

PART THE FIRST.

A Declaration of the Rights of the Inhabitants of the Commonwealth of Massachusetts.

ARTICLE I. All men are born free and equal, and have certain natural, essential, and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing, and protecting property; in fine, that of seeking and obtaining their safety and happiness.

II. It is the right as well as the duty of all men in society, publicly, and at stated seasons, to worship the SUPREME BEING, the great Creator and Preserver of the universe. And no subject shall be hurt, molested, or restrained, in his person, liberty, or estate, for worshipping GOD in the manner and season most agreeable to the dictates of his own conscience; or for his religious profession of sentiments; provided he doth not disturb the public peace, or obstruct others in their religious worship.

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[1] Printed from the official edition of Massachusetts Acts and Resolves for 1893. This instrument went into operation in October, 1780. See *ante*, 54–55, 215, and 220. — ED.

III.[1] [As the happiness of a people, and the good order and preservation of civil government, essentially depend upon piety, religion, and morality; and as these cannot be generally diffused through a community but by the institution of the public worship of GOD, and of public instructions in piety, religion, and morality: Therefore, to promote their happiness, and to secure the good order and preservation of their government, the people of this Commonwealth have a right to invest their legislature with power to authorize and require, and the legislature shall, from time to time, authorize and require the several towns, parishes, precincts, and other bodies politic, or religious societies, to make suitable provision, at their own expense, for the institution of the public worship of GOD, and for the support and maintenance of public Protestant teachers of piety, religion, and morality, in all cases where such provision shall not be made voluntarily.

And the people of this Commonwealth have also a right to, and do, invest their legislature with authority to enjoin upon all the subjects an attendance upon the instructions of the public teachers aforesaid, at stated times and seasons, if there be any on whose instructions they can conscientiously and conveniently attend.

Provided, notwithstanding, that the several towns, parishes, precincts, and other bodies politic, or religious societies, shall, at all times, have the exclusive right of electing their public teachers, and of contracting with them for their support and maintenance.

And all moneys paid by the subject to the support of public worship, and of the public teachers aforesaid, shall, if he require it, be uniformly applied to the support of the public teacher or teachers of his own religious sect or denomination, provided there be any on whose instructions he attends; otherwise it may be paid towards the support of the teacher or teachers of the parish or precinct in which the said moneys are raised.

And every denomination of Christians, demeaning themselves peaceably, and as good subjects of the Commonwealth, shall be equally under the protection of the law: and no subordination of any one sect or denomination to another shall ever be established by law].

IV. The people of this Commonwealth have the sole and exclusive right of governing themselves, as a free, sovereign, and independent State; and do, and forever hereafter shall, exercise and enjoy every power, jurisdiction, and right, which is not, or may not hereafter be, by them expressly delegated to the United States of America, in Congress assembled.

V. All power residing originally in the people, and being derived from them, the several magistrates and officers of government, vested with authority, whether legislative, executive, or judicial, are their substitutes and agents, and are at all times accountable to them.

VI. No man, nor corporation, or association of men, have any other title to obtain advantages, or particular and exclusive privileges, distinct from those of the community, than what arises from the consideration of services rendered to the public; and this title being in nature neither hereditary, nor transmissible to children, or descendants, or relations by blood, the idea of a man born a magistrate, lawgiver, or judge, is absurd and unnatural.

VII. Government is instituted for the common good; for the protection, safety, prosperity, and happiness of the people; and not for the profit, honor, or private interest of any one man, family, or class of men: Therefore the people alone have an incontestible, unalienable, and indefeasible right to institute government; and to reform, alter, or totally change the same, when their protection, safety, prosperity, and happiness require it.

VIII. In order to prevent those who are vested with authority from becoming oppressors, the people have a right, at such periods and in such manner as they shall establish by their frame of government, to cause their public officers to return to private life; and to fill up vacant places by certain and regular elections and appointments.

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[1] Amendment, Article XI. substituted for this.

IX. All elections ought to be free; and all the inhabitants of this Commonwealth, having such qualifications as they shall establish by their frame of government, have an equal right to elect officers, and to be elected, for public employments.

X. Each individual of the society has a right to be protected by it in the enjoyment of his life, liberty, and property, according to standing laws. He is obliged, consequently, to contribute his share to the expense of this protection; to give his personal service, or an equivalent, when necessary; but no part of the property of any individual can, with justice, be taken from him, or applied to public uses, without his own consent, or that of the representative body of the people. In fine, the people of this Commonwealth are not controllable by any other laws than those to which their constitutional representative body have given their consent. And whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor.

XI. Every subject of the Commonwealth ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which he may receive in his person, property, or character. He ought to obtain right and justice freely, and without being obliged to purchase it; completely, and without any denial; promptly, and without delay; conformably to the laws.

XII. No subject shall be held to answer for any crimes or offence, until the same is fully and plainly, substantially, and formally, described to him; or be compelled to accuse, or furnish evidence against himself. And every subject shall have a right to produce all proofs that may be favorable to him; to meet the witnesses against him face to face, and to be fully heard in his defence by himself, or his counsel, at his election. And no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land.

And the legislature shall not make any law that shall subject any person to a capital or infamous punishment, excepting for the government of the army and navy, without trial by jury.

XIII. In criminal prosecutions, the verification of facts, in the vicinity where they happen, is one of the greatest securities of the life, liberty, and property of the citizen.

XIV. Every subject has a right to be secure from all unreasonable searches, and seizures of his person, his houses, his papers, and all his possessions. All warrants, therefore, are contrary to this right, if the cause or foundation of them be not previously supported by oath or affirmation, and if the order in the warrant to a civil officer, to make search in suspected places, or to arrest one or more suspected persons, or to seize their property, be not accompanied with a special designation of the persons or objects of search, arrest, or seizure: and no warrant ought to be issued but in cases, and with the formalities prescribed by the laws.

XV. In all controversies concerning property, and in all suits between two or more persons, except in cases in which it has heretofore been otherways used and practised, the parties have a right to a trial by jury; and this method of procedure shall be held sacred, unless, in causes arising on the high seas, and such as relate to mariners' wages, the legislature shall hereafter find it necessary to alter it.

XVI. The liberty of the press is essential to the security of freedom in a State: it ought not, therefore, to be restrained in this Commonwealth.

XVII. The people have a right to keep and to bear arms for the common defence. And as, in time of peace, armies are dangerous to liberty, they ought not to be maintained without the consent of the legislature; and the military power shall always be held in an exact subordination to the civil authority, and be governed by it.

XVIII. A frequent recurrence to the fundamental principles of the Constitution, and a constant adherence to those of piety, justice, moderation, temperance, industry, and frugality, are absolutely necessary to preserve the advantages of liberty, and to maintain a free government. The people ought, consequently, to have a particular attention to all those principles, in the choice of their officers and representatives: and

they have a right to require of their lawgivers and magistrates an exact and constant observance of them, in the formation and execution of the laws necessary for the good administration of the Commonwealth.

XIX. The people have a right, in an orderly and peaceable manner, to assemble to consult upon the common good; give instructions to their representatives, and to request of the legislative body, by the way of addresses, petitions, or remonstrances, redress of the wrongs done them, and of the grievances they suffer.

XX. The power of suspending the laws, or the execution of the laws, ought never to be exercised but by the legislature, or by authority derived from it, to be exercised in such particular cases only as the legislature shall expressly provide for.

XXI. The freedom of deliberation, speech, and debate, in either house of the legislature, is so essential to the rights of the people, that it cannot be the foundation of any accusation or prosecution, action or complaint, in any other court or place whatsoever.

XXII. The legislature ought frequently to assemble for the redress of grievances, for correcting, strengthening, and confirming the laws, and for making new laws, as the common good may require.

XXIII. No subsidy, charge, tax, impost, or duties ought to be established, fixed, laid, or levied, under any pretext whatsoever, without the consent of the people or their representatives in the legislature.

XXIV. Laws made to punish for actions done before the existence of such laws, and which have not been declared crimes by preceding laws, are unjust, oppressive, and inconsistent with the fundamental principles of a free government.

XXV. No subject ought, in any case, or in any time, to be declared guilty of treason or felony by the legislature.

XXVI. No magistrate or court of law shall demand excessive bail or sureties, impose excessive fines, or inflict cruel or unusual punishments.

XXVII. In time of peace, no soldier ought to be quartered in any house without the consent of the owner; and in time of war, such quarters ought not be made but by the civil magistrate, in a manner ordained by the legislature.

XXVIII. No person can in any case be subject to law-martial, or to any penalties or pains, by virtue of that law, except those employed in the army or navy, and except the militia in actual service, but by authority of the legislature.

XXIX. It is essential to the preservation of the rights of every individual, his life, liberty, property, and character that there be an impartial interpretation of the laws, and administration of justice. It is the right of every citizen to be tried by judges as free, impartial, and independent as the lot of humanity will admit. It is, therefore, not only the best policy, but for the security of the rights of the people, and of every citizen, that the judges of the Supreme Judicial Court should hold their offices as long as they behave themselves well; and that they should have honorable salaries ascertained and established by standing laws.

XXX. In the government of this Commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men.[1]

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[1] "It is plain that where the law is made by one man there it may be unmade by one man; so that the man is not governed by the law, but the law by the man, which amounts to the government of the man, and not of the law. Whereas the law being not to be made but by the many, no man is governed by another man, but by that only which is the common interest; by which means this amounts to a government of laws and not of men." — JAMES HARRINGTON, *The Art of Lawgiving*, Preface; OCEANA *and Other Works*, 3d ed. 386.

"Sir," said Rufus Choate, in the Massachusetts Convention of 1853, for revising the Constitution of the State (1 Debates, 120), "that same Bill of Rights, which so solicitously separates executive, judicial, and legislative powers from each other,' to the end,' — in the fine and noble expression of Harrington, borrowed from the 'ancient

PART THE SECOND.

The Frame of Government.

The people, inhabiting the territory formerly called the Province of Massachusetts Bay, do hereby solemnly and mutually agree with each other, to form themselves into a free, sovereign, and independent body politic, or State, by the name of THE COMMONWEALTH OF MASSACHUSETTS.

CHAPTER I.

THE LEGISLATIVE POWER.

SECTION I.

The General Court.

ARTICLE I. The department of legislation shall be formed by two branches, a Senate and House of Representatives; each of which shall have a negative on the other.

The legislative body shall assemble every year [on the last Wednesday in May, and at such other times as they shall judge necessary; and shall dissolve and be dissolved on the day next preceding the said last Wednesday in May;] [1] and shall be styled, THE GENERAL COURT OF MASSACHUSETTS.

II. No bill or resolve of the Senate or House of Representatives shall become a law, and have force as such, until it shall have been laid before the Governor for his revisal; and if he, upon such revision, approve thereof, he shall signify his approbation by signing the same. But if he have any objection to the passing of such bill or resolve, he shall return the same, together with his objections thereto, in writing, to the Senate or House of Representatives, in whichsoever the same shall have originated; who shall enter the objections sent down by the Governor, at large, on their ecords, and proceed to reconsider the said bill or resolve. But if after such reconsideration, two-thirds of the said Senate or House of Representatives, shall, notwithstanding the said objections, agree to pass the same, it shall, together with the objections, be sent to the other branch of the legislature, where it shall also be reconsidered, and if approved by two-thirds of the members present, shall have the force of a law: but in all such cases, the votes of both houses shall be determined by yeas and nays; and the names of the persons voting for, or against, the said bill or resolve, shall be entered upon the public records of the Commonwealth.

And in order to prevent unnecessary delays, if any bill or resolve shall not be returned by the Governor within five days after it shall have been presented, the same shall have the force of a law.

III. The General Court shall forever have full power and authority to erect and constitute judicatories and courts of record, or other courts, to be held in the name of the Commonwealth, for the hearing, trying, and determining of all manner of crimes, offences, pleas, processes, plaints, actions, matters, causes, and things, whatsoever, arising or happening within the Commonwealth, or between or concerning persons

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prudence,' one of those historical phrases of the old glorious school of liberty of which this Bill of Rights is so full, — and which phrases I entreat the good taste of my accomplished friends in my eye, to whom it is committed, to spare in their very rust, as they would spare the general English of the Bible, — 'to the end it may be a government of laws, and not of men;' that same Bill of Rights separates the people, with the san. solicitude. and for the same reason, from every part of their actual government, — ' , the end it may be a government of laws and not of men.' " — ED.

[1] For change of time, etc., see Amendments, Art. X.

inhabiting, or residing, or brought within the same: whether the same be criminal or civil, or whether the said crimes be capital or not capital, and whether the said pleas be real, personal, or mixed; and for the awarding and making out of execution there upon. To which courts and judicatories are hereby given and granted full power and authority, from time to time, to administer oaths or affirmations, for the better discovery of truth in any matter in controversy or depending before them.

IV. And further, full power and authority are hereby given and granted to the said General Court, from time to time to make, ordain, and establish, all manner of wholesome and reasonable orders, laws, statutes, and ordinances, directions, and instructions, either with penalties or without; so as the same be not repugnant or contrary to this Constitution, as they shall judge to be for the good and welfare of this Commonwealth, and for the government and ordering thereof, and of the subjects of the same, and for the necessary support and defence of the government thereof;[1] and to name and settle annually, or provide by fixed laws for the naming and settling, all civil officers within the said Commonwealth, the election and constitution of whom are not hereafter in this form of government otherwise provided for; and to set forth the several duties, powers, and limits, of the several civil and military officers of this Commonwealth, and the forms of such oaths or affirmations as shall be respectively administered unto them for the execution of their several offices and places, so as the same be not repugnant or contrary to this Constitution; and to impose and levy proportional and reasonable assessments, rates, and taxes, upon all the inhabitants of, and persons resident, and estates lying, within the said Commonwealth; and also to impose and levy reasonable duties and excises upon any produce, goods, wares, merchandise, and commodities, whatsoever, brought into, produced, manufactured, or being within the same; to be issued and disposed of by warrant, under the hand of the Governor of this Commonwealth for the time being, with the advice and consent of the Council, for the public service, in the necessary defence and support of the government of the said Commonwealth, and the protection and preservation of the subjects thereof, according to such acts as are or shall be in force within the same.

And while the public charges of government, or any part thereof, shall be assessed on polls and estates, in the manner that has hitherto been practised, in order that such assessments may be made with equality, there shall be a valuation of estates within the Commonwealth, taken anew once in every ten years at least, and as much oftener as the General Court shall order.

CHAPTER I.

SECTION II.

Senate.

ARTICLE I.[2] [There shall be annually elected, by the freeholders and other inhabitants of this Commonwealth, qualified as in this Constitution is provided, forty persons

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[1] These words (and indeed the same is true of the whole of §§ III. and IV.), are taken from the Provincial Charter of 1691 (1 Poore's Charters, 951), with only such variations as are needed to adapt them to the new purposes: . . . "And we do further . . . give and grant to the said governor and the great and general court or assembly . . . full power and authority from time to time to make, ordain, and establish all manner of wholesome and reasonable orders, laws, statutes, and ordinances, directions, and instructions, either with penalties or without (so as the same be not repugnant or contrary to the laws of this our realm of England) as they shall judge to be for the good and welfare of our said province or territory, and for the government and ordering thereof and of the people inhabiting or who shall inhabit the same, and for the necessary support and defence of the government thereof." — ED.

[2] Superseded by Amendments, Art. XIII., which was also superseded by Amendments, Art. XXII. For provision as to councillors, see Amendments, Art. XVI.

to be councillors and senators for the year ensuing their election; to be chosen by the inhabitants of the districts into which the Commonwealth may, from time to time, be divided by the General Court for that purpose: and the General Court, in assigning the numbers to be elected by the respective districts, shall govern themselves by the proportion of the public taxes paid by the said districts; and timely make known to the inhabitants of the Commonwealth the limits of each district, and the number of councillors and senators to be chosen therein; provided that the number of such districts shall never be less than thirteen; and that no district be so large as to entitle the same to choose more than six senators.

And the several counties in this Commonwealth shall, until the General Court shall determine it necessary to alter the said districts, be districts for the choice of councillors and senators (except that the counties of Dukes County and Nantucket shall form one district for that purpose) and shall elect the following number for councillors and senators, viz.: Suffolk, six; Essex, six; Middlesex, five; Hampshire, four; Plymouth, three; Barnstable, one; Bristol, three; York, two; Dukes County and Nantucket, one; Worcester, five; Cumberland, one; Lincoln, one; Berkshire, two.]

II. The Senate shall be the first branch of the legislature; and the senators shall be chosen in the following manner, viz.: there shall be a meeting on the [first Monday in April],[1] annually, forever, of the inhabitants of each town in the several counties of this Commonwealth; to be called by the selectmen, and warned in due course of law, at least seven days before the [first Monday in April], for the purpose of electing persons to be senators and councillors; [and at such meetings every male inhabitant of twenty-one years of age and upwards, having a freehold estate within the Commonwealth, of the annual income of three pounds, or any estate of the value of sixty pounds, shall have a right to give in his vote for the senators for the district of which he is an inhabitant].[2] And to remove all doubts concerning the meaning of the word "inhabitant" in this Constitution, every person shall be considered as an inhabitant, for the purpose of electing and being elected into any office, or place within this State, in that town, district, or plantation where he dwelleth, or hath his home.

The selectmen of the several towns shall preside at such meetings impartially; and shall receive the votes of all the inhabitants of such towns present and qualified to vote for senators, and shall sort and count them in open town meeting, and in presence of the town clerk, who shall make a fair record, in presence of the selectmen, and in open town meeting, of the name of every person voted for, and of the number of votes against his name: and a fair copy of this record shall be attested by the selectmen and the town clerk, and shall be sealed up, directed to the Secretary of the Commonwealth for the time being, with a superscription, expressing the purport of the contents thereof, and delivered by the town clerk of such towns, to the sheriff of the county in which such town lies, thirty days at least before [the last Wednesday in May][3] annually; or it shall be delivered into the secretary's office seventeen days at least before the said [last Wednesday in May]: and the sheriff of each county shall deliver all such certificates by him received, into the secretary's office, seventeen days before the said [last Wednesday in May].

And the inhabitants of plantations unincorporated, qualified as this Constitution provides, who are or shall be empowered and required to assess taxes upon themselves toward the support of government, shall have the same privilege of voting for councillors and senators in the plantations where they reside, as town inhabitants have in their respective towns; and the plantation meetings for that purpose shall be held annually [on the same first Monday in April],[4] at such place in the plantations, respectively, as the assessors thereof shall direct; which assessors shall have like authority for notifying the electors, collecting and returning the votes, as the selectmen and town clerks have in their several towns, by this Constitution. And all other persons living in places un-

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[1] See Amendments, Arts. X. and XV. As to cities, see Amendments, Art. II.

[2] Superseded by Amendments, Arts. III., XX., XXVIII., XXX., XXXI., and XXXII.

[3] Time changed to first Wednesday of January. See Amendments, Art. X.

[4] Time of election changed by Amendments, Art. XV.

incorporated (qualified as aforesaid) who shall be assessed to the support of government by the assessors of an adjacent town, shall have the privilege of giving in their votes for councillors and senators in the town where they shall be assessed, and be notified of the place of meeting by the selectmen of the town where they shall be assessed, for that purpose, accordingly.

III. And that there may be a due convention of senators on the [last Wednesday in May][1] annually, the Governor with five of the Council, for the time being, shall, as soon as may be, examine the returned copies of such records; and fourteen days before the said day he shall issue his summons to such persons as shall appear to be chosen by [a majority of][2] voters, to attend on that day, and take their seats accordingly: provided, nevertheless, that for the first year the said returned copies shall be examined by the president and five of the council of the former constitution of government; and the said president shall, in like manner, issue his summons to the persons so elected, that they may take their seats as aforesaid.

IV. The Senate shall be the final judge of the elections, returns, and qualifications of their own members, as pointed out in the Constitution; and shall [on the said last Wednesday in May][3] annually, determine and declare who are elected by each district to be senators [by a majority of votes; and in case there shall not appear to be the full number of senators returned elected by a majority of votes for any district, the deficiency shall be supplied in the following manner, viz.: The members of the House of Representatives, and such senators as shall be declared elected, shall take the names of such persons as shall be found to have the highest number of votes in such district, and not elected, amounting to twice the number of senators wanting, if there be so many voted for; and out of these shall elect by ballot a number of senators sufficient to fill up the vacancies in such district; and in this manner all such vacancies shall be filled up in every district of the Commonwealth; and in like manner all vacancies in the senate, arising by death, removal out of the State, or otherwise, shall be supplied as soon as may be, after such vacancies shall happen].[4]

V. Provided, nevertheless, that no person shall be capable of being elected as a senator [who is not seised in his own right of a freehold, within this Commonwealth, of the value of three hundred pounds at least, or possessed of personal estate to the value of six hundred pounds at least, or of both to the amount of the same sum, and][5] who has not been an inhabitant of this Commonwealth for the space of five years immediately preceding his election, and, at the time of his election, he shall be an inhabitant in the district for which he shall be chosen.

VI. The Senate shall have power to adjourn themselves, provided such adjournments do not exceed two days at a time.

VII. The Senate shall choose its own president, appoint its own officers, and determine its own rules of proceedings.

VIII. The Senate shall be a court with full authority to hear and determine all impeachments made by the House of Representatives, against any officer or officers of the Commonwealth, for misconduct and mal-administration in their offices. But previous to the trial of every impeachment the members of the Senate shall respectively be sworn, truly and impartially to try and determine the charge in question, according to evidence. Their judgment, however, shall not extend further than to removal from office and disqualification to hold or enjoy any place of honor, trust or profit, under this Commonwealth; but the party so convicted shall be, nevertheless, liable to indictment, trial, judgment, and punishment, according to the laws of the land.

IX. [Not less than sixteen members of the Senate shall constitute a quorum for doing business.][6]

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[1] Time changed to first Wednesday in January by Amendments, Art. X.

[2] Majority changed to plurality by Amendments, Art. XIV.

[3] Time changed to first Wednesday of January by Amendments, Art. X.

[4] Majority changed to plurality by Amendments, Art. XIV. Changed to election by people. See Amendments, Art. XXIV.

[5] Property qualification abolished. See Amendments, Art. XIII.

[6] See Amendments, Arts. XXII. and XXXIII.

CHAPTER I.

SECTION III.

House of Representatives.

ARTICLE I. There shall be, in the legislature of this Commonwealth, a representation of the people, annually elected, and founded upon the principle of equality.

II. [And in order to provide for a representation of the citizens of this Commonwealth, founded upon the principle of equality, every corporate town containing one hundred and fifty ratable polls may elect one representative; every corporate town containing three hundred and seventy-five ratable polls may elect two representatives; every corporate town containing six hundred ratable polls may elect three representatives; and proceeding in that manner, making two hundred and twenty-five ratable polls the mean increasing number for every additional representative.

Provided, nevertheless, that each town now incorporated, not having one hundred and fifty ratable polls, may elect one representative; but no place shall hereafter be incorporated with the privilege of electing a representative, unless there are within the same one hundred and fifty ratable polls.][1]

And the House of Representatives shall have power from time to time to impose fines upon such towns as shall neglect to choose and return members to the same, agreeably to this Constitution.

The expenses of travelling to the General Assembly, and returning home, once in every session, and no more, shall be paid by the government, out of the public treasury, to every member who shall attend as seasonably as he can, in the judgment of the house, and does not depart without leave.

III. Every member of the House of Representatives shall be chosen by written votes; [and, for one year at least next preceding his election, shall have been an inhabitant of, and have been seised in his own right of a freehold of the value of one hundred pounds within the town he shall be chosen to represent, or any ratable estate to the value of two hundred pounds; and he shall cease to represent the said town immediately on his ceasing to be qualified as aforesaid].[2]

IV. [Every male person, being twenty-one years of age, and resident in any particular town in this Commonwealth for the space of one year next preceding, having a freehold estate within the said town of the annual income of three pounds, or any estate of the value of sixty pounds, shall have a right to vote in the choice of a representative or representatives for the said town.][3]

V. [The members of the House of Representatives shall be chosen annually in the month of May, ten days at least before the last Wednesday of that month.][4]

VI. The House of Representatives shall be the grand inquest of this Commonwealth; and all impeachments made by them shall be heard and tried by the Senate.

VII. All money bills shall originate in the House of Representatives; but the Senate may propose or concur with amendments, as on other bills.

VIII. The House of Representatives shall have power to adjourn themselves; provided such adjournment shall not exceed two days at a time.

IX. [Not less than sixty members of the House of Representatives shall constitute a quorum for doing business.][5]

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[1] Superseded by Amendments, Arts. XII. and XIII., which were also superseded by Amendments, Art. XXI. 7 Mass. 523.

[2] New provision as to residence. See Amendments, Art. XXI. Property qualifications abolished by Amendments, Art. XIII.

[3] These provisions superseded by Amendments, Arts III., XX., XXVIII., XXX., XXXI., and XXXII. See also Amendments, Art. XXIII., which was annulled by Art. XXVI.

[4] Time of election changed by Amendments, Art. X., and changed again by Amendments, Art. XV.

[5] See Amendments, Arts. XXI. and XXXIII.

X. The House of Representatives shall be the judge of the returns, elections, and qualifications of its own members, as pointed out in the Constitution; shall choose their own speaker; appoint their own officers, and settle the rules and orders of proceeding in their own house. They shall have authority to punish by imprisonment every person, not a member, who shall be guilty of disrespect to the house, by any disorderly or contemptuous behavior in its presence; or who, in the town where the General Court is sitting, and during the time of its sitting, shall threaten harm to the body or estate of any of its members, for any thing said or done in the house; or who shall assault any of them therefor; or who shall assault, or arrest, any witness, or other person, ordered to attend the house, in his way in going or returning; or who shall rescue any person arrested by the order of the house.

And no member of the House of Representatives shall be arrested, or held to bail on mean process, during his going unto, returning from, or his attending the General Assembly.

XI. The Senate shall have the same powers in the like cases; and the Governor and Council shall have the same authority to punish in like cases: provided, that no imprisonment on the warrant or order of the Governor, Council, Senate, or House of Representatives, for either of the above described offences, be for a term exceeding thirty days.

And the Senate and House of Representatives may try and determine all cases where their rights and privileges are concerned, and which, by the Constitution, they have authority to try and determine, by committees of their own members, or in such other way as they may respectively think best.

CHAPTER II.

EXECUTIVE POWER.

SECTION I.

Governor.

ARTICLE I. There shall be a supreme executive magistrate, who shall be styled — THE GOVERNOR OF THE COMMONWEALTH OF MASSACHUSETTS; and whose title shall be — HIS EXCELLENCY.

II. The Governor shall be chosen annually; and no person shall be eligible to this office, unless, at the time of his election, he shall have been an inhabitant of this Commonwealth for seven years next preceding; [and unless he shall at the same time be seised, in his own right, of a freehold, within the Commonwealth, of the value of one thousand pounds]; [and unless he shall declare himself to be of the Christian religion].[1]

III. Those persons who shall be qualified to vote for senators and representatives within the several towns of this Commonwealth shall, at a meeting to be called for that purpose, on the [first Monday of April][2] annually, give in their votes for a Governor, to the selectmen, who shall preside at such meetings; and the town clerk, in the presence and with the assistance of the selectmen, shall, in open town meeting, sort and count the votes, and form a list of the persons voted for, with the number of votes for each person against his name; and shall make a fair record of the same in the town books, and a public declaration thereof in the said meeting; and shall, in the presence of the inhabitants, seal up copies of the said list, attested by him and the selectmen, and transmit the same to the sheriff of the county, thirty days at least before the [last Wednesday in May];[3] and the sheriff shall transmit the same to the secretary's

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[1] [See Amendments, Arts. VII. and XXIV.]

[2] Time of election changed by Amendments, Art. X., and changed again by Amendments, Art. XV.

[3] Time changed to first Wednesday of January by Amendments, Art. X.

office, seventeen days at least before the said [last Wednesday in May]; or the selectmen may cause returns of the same to be made to the office of the Secretary of the Commonwealth, seventeen days at least before the said day; and the secretary shall lay the same before the Senate and the House of Representatives on the [last Wednesday in May], to be by them examined; and [in case of an election by a majority of all the votes returned],[1] the choice shall be by them declared and published; [but if no person shall have a majority of votes, the House of Representatives shall, by ballot, elect two out of four persons who had the highest number of votes, if so many shall have been voted for; but, if otherwise, out of the number voted for; and make return to the Senate of the two persons so elected; on which the Senate shall proceed, by ballot, to elect one, who shall be declared Governor]

IV. The Governor shall have authority, from time to time, at his discretion, to assemble and call together the councillors of this Commonwealth for the time being; and the Governor with the said councillors, or five of them at least, shall, and may, from time to time, hold and keep a Council, for the ordering and directing the affairs of the Commonwealth, agreeably to the Constitution and the laws of the land.

V. The Governor, with advice of Council, shall have full power and authority, during the session of the General Court, to adjourn or prorogue the same to any time the two houses shall desire; [and to dissolve the same on the day next preceding the last Wednesday in May; and, in the recess of the said court, to prorogue the same from time to time, not exceeding ninety days in any one recess];[2] and to call it together sooner than the time to which it may be adjourned or prorogued, if the welfare of the Commonwealth shall require the same; and in case of any infectious distemper prevailing in the place where the said court is next at any time to convene, or any other cause happening, whereby danger may arise to the health or lives of the members from their attendance, he may direct the session to be held at some other, the most convenient place within the State.

[And the Governor shall dissolve the said General Court on the day next preceding the last Wednesday in May.][3]

VI. In cases of disagreements between the two Houses, with regard to the necessity, expediency, or time of adjournment or prorogation, the Governor, with advice of the Council, shall have a right to adjourn or prorogue the General Court, not exceeding ninety days, as he shall determine the public good shall require.

VII. The Governor of this Commonwealth, for the time being, shall be the commander-in-chief of the army and navy, and of all the military forces of the State, by sea and land; and shall have full power, by himself, or by any commander, or other officer or officers, from time to time, to train, instruct, exercise, and govern the militia and navy; and, for the special defence and safety of the Commonwealth, to assemble in martial array, and put in warlike posture, the inhabitants thereof, and to lead and conduct them, and with them to encounter, repel, resist, expel, and pursue, by force of arms, as well by sea as by land, within or without the limits of this Commonwealth, and also to kill, slay, and destroy, if necessary, and conquer, by all fitting ways, enterprises, and means whatsoever, all and every such person and persons as shall, at any time hereafter, in a hostile manner, attempt or enterprise the destruction, invasion, detriment, or annoyance of this Commonwealth; and to use and exercise over the army and navy, and over the militia in actual service, the law-martial, in time of war or invasion, and also in time of rebellion, declared by the legislature to exist, as occasion shall necessarily require; and to take and surprise, by all ways and means whatsoever, all and every such person or persons, with their ships, arms, ammunition, and other goods, as shall, in a hostile manner, invade, or attempt the invading, conquering, or annoying this Commonwealth; and that the Governor be intrusted with all these and other powers, incident to the offices of captain-general and commander-in-chief, and admiral, to be exercised agreeably to the rules and regulations of the Constitution, and the laws of the land, and not otherwise.

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[1] Changed to plurality by Amendments, Art. XIV.

[2] As to dissolution, see Amendments, Art. X.

[3] As to dissolution, see Amendments, Art. X.

Provided, that the said Governor shall not, at any time hereafter, by virtue of any power by this Constitution granted, or hereafter to be granted to him by the legislature, transport any of the inhabitants of this Commonwealth, or oblige them to march out of the limits of the same, without their free and voluntary consent, or the consent of the General Court; except so far as may be necessary to march or transport them by land or water, for the defence of such part of the State to which they cannot otherwise conveniently have access.

VIII. The power of pardoning offences, except such as persons may be convicted of before the Senate by an impeachment of the house, shall be in the Governor, by and with the advice of Council; but no charter of pardon, granted by the Governor, with advice of the Council before conviction, shall avail the party pleading the same, notwithstanding any general or particular expressions contained therein, descriptive of the offence or offences intended to be pardoned.

IX. All judicial officers [the attorney-general], the solicitor-general [all sheriffs], coroners [and registers of probate],[1] shall be nominated and appointed by the Governor, by and with the advice and consent of the Council; and every such nomination shall be made by the Governor, and made at least seven days prior to such appointment.

X. The captains and subalterns of the militia shall be elected by the written votes of the train-band and alarm lists of their respective companies [of twenty-one years of age and upwards];[2] the field officers of regiments shall be elected by the written votes of the captains and subalterns of their respective regiments; the brigadiers shall be elected, in like manner, by the field officers of their respective brigades; and such officers, so elected, shall be commissioned by the Governor, who shall determine their rank.

The legislature shall, by standing laws, direct the time and manner of convening the electors, and of collecting votes, and of certifying to the Governor the officers elected.

The major-generals shall be appointed by the Senate and House of Representatives, each having a negative upon the other; and be commissioned by the Governor.

And if the electors of brigadiers, field officers, captains, or subalterns, shall neglect or refuse to make such elections, after being duly notified, according to the laws for the time being, then the Governor, with advice of Council, shall appoint suitable persons to fill such offices.

[And no officer, duly commissioned to command in the militia, shall be removed from his office, but by the address of both Houses to the Governor, or by fair trial in court-martial, pursuant to the laws of the Commonwealth for the time being.][3]

The commanding officers of regiments shall appoint their adjutants and quartermasters; the brigadiers their brigade-majors; and the major-generals their aids; and the Governor shall appoint the adjutant-general.

The Governor, with advice of Council, shall appoint all officers of the continental army, whom by the confederation of the United States it is provided that this Commonwealth shall appoint, as also all officers of forts and garrisons.

The divisions of the militia into brigades, regiments, and companies, made in pursuance of the militia laws now in force, shall be considered as the proper divisions of the militia of this Commonwealth, until the same shall be altered in pursuance of some future law.

XI. No moneys shall be issued out of the treasury of this Commonwealth, and disposed of (except such sums as may be appropriated for the redemption of bills of credit or treasurer's notes, or for the payment of interest arising thereon) but by warrant under the hand of the Governor for the time being, with the advice and consent of the Council, for the necessary defence and support of the Commonwealth; and for the

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[1] For provisions as to election of Attorney-General, see Amendments, Art. XVII. For provision as to election of Sheriffs, Registers of Probate, etc., see Amendments, Art. XIX. For provision as to appointment of Notaries Public, see Amendments, Art. IV.

[2] Limitation of age struck out by Amendments, Art. V.

[3] Superseded by Amendments, Art. IV.

protection and preservation of the inhabitants thereof, agreeably to the acts and resolves of the General Court.

XII. All public boards, the commissary-general, all superintending officers of public magazines and stores, belonging to this Commonwealth, and all commanding officers of forts and garrisons within the same, shall once in every three months, officially, and without requisition, and at other times, when required by the Governor, deliver to him an account of all goods, stores, provisions, ammunition, cannon with their appendages, and small arms with their accoutrements, and of all other public property whatever under their care respectively; distinguishing the quantity, number, quality, and kind of each, as particularly as may be; together with the condition of such forts and garrisons; and the said commanding officer shall exhibit to the Governor, when required by him, true and exact plans of such forts, and of the land and sea or harbor or harbors, adjacent.

And the said boards, and all public officers, shall communicate to the Governor, as soon as may be after receiving the same, all letters, despatches, and intelligences of a public nature, which shall be directed to them respectively.

XIII. As the public good requires that the Governor should not be under the undue influence of any of the members of the General Court by a dependence on them for his support, that he should in all cases act with freedom for the benefit of the public, that he should not have his attention necessarily diverted from that object to his private concerns, and that he should maintain the dignity of the Commonwealth in the character of its chief magistrate, it is necessary that he should have an honorable stated salary of a fixed and permanent value, amply sufficient for those purposes, and established by standing laws: and it shall be among the first acts of the General Court, after the commencement of this Constitution, to establish such salary by law accordingly.

Permanent and honorable salaries shall also be established by law for the justices of the Supreme Judicial Bench.

And if it shall be found that any of the salaries aforesaid, so established, are insufficient, they shall, from time to time, be enlarged, as the General Court shall judge proper.

CHAPTER II.

SECTION II.

Lieutenant-Governor.

ARTICLE I. There shall be annually elected a lieutenant-governor of the Commonwealth of Massachusetts, whose title shall be — HIS HONOR; and who shall be qualified, in point of [religion],[1] property, and residence in the Commonwealth, in the same manner with the Governor; and the day and manner of his election, and the qualifications of the electors, shall be the same as are required in the election of a Governor. The return of the votes for this officer, and the declaration of his election, shall be in the same manner; [and if no one person shall be found to have a majority of all the votes returned, the vacancy shall be filled by the Senate and House of Representatives, in the same manner as the Governor is to be elected, in case no one person shall have a majority of the votes of the people to be Governor.][2]

II. The Governor, and in his absence the Lieutenant-Governor, shall be president of the Council, but shall have no vote in council, and the Lieutenant-Governor shall always be a member of the Council, except when the chair of the Governor shall be vacant.

III. Whenever the chair of the Governor shall be vacant, by reason of his death, or absence from the Commonwealth, or otherwise, the Lieutenant-Governor, for the time being, shall, during such vacancy, perform all the duties incumbent upon the Governor, and shall have and exercise all the powers and authorities, which by this Constitution the Governor is vested with, when personally present.

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[1] See Amendments, Arts. VII. and XXXIV.

[2] Election by plurality provided for by Amendments, Art. XIV.

CHAPTER II.

SECTION III.

Council, and the Manner of Settling Elections by the Legislature.

ARTICLE I. There shall be a Council for advising the Governor in the executive part of the government, to consist of [nine][1] persons besides the Lieutenant-Governor, whom the Governor, for the time being, shall have full power and authority from time to time at his discretion to assemble and call together; and the Governor, with the said councillors, or five of them at least, shall and may, from time to time, hold and keep a Council, for the ordering and directing the affairs of the Commonwealth, according to the laws of the land.

II. [Nine councillors shall be annually chosen from among the persons returned for councillors and senators, on the last Wednesday in May, by the joint ballot of the senators and representatives assembled in one room; and in case there shall not be found upon the first choice, the whole number of nine persons who will accept a seat in the Council, the deficiency shall be made up by the electors aforesaid from among the people at large; and the number of senators left shall constitute the Senate for the year. The seats of the persons thus elected from the Senate, and accepting the trust, shall be vacated in the Senate.][2]

III. The councillors, in the civil arrangements of the Commonwealth, shall have rank next after the Lieutenant-Governor.

IV. [Not more than two councillors shall be chosen out of any one district of this Commonwealth.][3]

V. The resolutions and advice of the Council shall be recorded in a register, and signed by the members present; and this record may be called for at any time by either house of the legislature; and any member of the Council may insert his opinion, contrary to the resolution of the majority.

VI. Whenever the office of the Governor and Lieutenant-Governor shall be vacant, by reason of death, absence, or otherwise, then the Council, or the major part of them, shall, during such vacancy, have full power and authority to do, and execute, all and every such acts, matters, and things, as the Governor or lieutenant-governor might or could, by virtue of this Constitution, do or execute, if they, or either of them, were personally present.

VII. [And whereas the elections appointed to be made, by this Constitution, on the last Wednesday in May annually, by the two Houses of the legislature, may not be completed on that day, the said elections may be adjourned from day to day until the same shall be completed. And the order of elections shall be as follows: The vacancies in the Senate, if any, shall first be filled up; the Governor and Lieutenant-Governor shall then be elected, provided there should be no choice of them by the people; and afterwards the two Houses shall proceed to the election of the Council.][4]

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[1] Number of councillors changed to eight. See Amendments, Art. XVI.

[2] Modified by Amendments, Arts. X. and XIII. Superseded by Amendments, Art. XVI.

[3] Superseded by Amendments, Art. XVI.

[4] Superseded by Amendments, Arts. XVI. and XXV.

CHAPTER II.

SECTION IV.

Secretary, Treasurer, Commissary, etc.

ARTICLE I. [The secretary, treasurer, and receiver-general, and the commissary-general, notaries public, and][1] naval officers, shall be chosen annually, by joint ballot of the senators and representatives in one room. And, that the citizens of this Commonwealth may be assured, from time to time, that the moneys remaining in the public treasury, upon the settlement and liquidation of the public accounts, are their property, no man shall be eligible as treasurer and receiver-general more than five years successively.

II. The records of the Commonwealth shall be kept in the office of the secretary, who may appoint his deputies, for whose conduct he shall be accountable; and he shall attend the Governor and Council, the Senate and House of Representatives, in person, by his deputies, as they shall respectively require.

CHAPTER III.

JUDICIARY POWER.

ARTICLE I. The tenure, that all commission officers shall by law have in their offices, shall be expressed in their respective commissions. All judicial officers, duly appointed, commissioned, and sworn, shall hold their offices during good behavior, excepting such concerning whom there is different provision made in this Constitution: provided, nevertheless, the Governor, with consent of the Council, may remove them upon the address of both houses of the legislature.

II. Each branch of the legislature, as well as the Governor and Council, shall have authority to require the opinions of the justices of the Supreme Judicial Court, upon important questions of law, and upon solemn occasions.

III. In order that the people may not suffer from the long continuance in place of any justice of the peace who shall fail of discharging the important duties of his office with ability or fidelity, all commissions of justices of the peace shall expire and become void, in the term of seven years from their respective dates; and, upon the expiration of any commission, the same may, if necessary, be renewed, or another person appointed, as shall most conduce to the well-being of the Commonwealth.

IV. The judges of probate of wills, and for granting letters of administration, shall hold their courts at such place or places, on fixed days, as the convenience of the people shall require; and the legislature shall, from time to time, hereafter, appoint such times and places; until which appointments, the said courts shall be holden at the times and places which the respective judges shall direct.

V. All causes of marriage, divorce, and alimony, and all appeals from the judges of probate, shall be heard and determined by the Governor and Council, until the legislature shall, by law, make other provision.

CHAPTER IV.

DELEGATES TO CONGRESS.

[The delegates of this Commonwealth to the Congress of the United States, shall, some time in the month of June, annually, be elected by the joint ballot of the Senate

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[1] For provision as to election of Secretary, Treasurer, and Receiver-General, and Auditor and Attorney-General, see Amendments, Art. XVII.

and House of Representatives, assembled together in one room; to serve in Congress for one year, to commence on the first Monday in November then next ensuing. They shall have commissions under the hand of the Governor, and the great seal of the Commonwealth; but may be recalled at any time within the year, and others chosen and commissioned, in the same manner, in their stead.]

CHAPTER V.

THE UNIVERSITY AT CAMBRIDGE AND ENCOURAGEMENT OF LITERATURE, ETC.

SECTION I.

The University.

ARTICLE I. Whereas our wise and pious ancestors, so early as the year one thousand six hundred and thirty-six, laid the foundation of Harvard College, in which university many persons of great eminence have, by the blessing of GOD, been initiated in those arts and sciences which qualified them for public employments, both in Church and State; and whereas the encouragement of arts and sciences, and all good literature, tends to the honor of GOD, the advantage of the Christian religion, and the great benefit of this and the other United States of America, — it is declared, that the PRESIDENT AND FELLOWS OF HARVARD COLLEGE, in their corporate capacity, and their successors in that capacity, their officers and servants, shall have, hold, use, exercise, and enjoy, all the powers, authorities, rights, liberties, privileges, immunities, and franchises, which they now have, or are entitled to have, hold, use, exercise, and enjoy; and the same are hereby ratified and confirmed unto them, the said President and Fellows of Harvard College, and to their successors, and to their officers and servants, respectively, forever.

II. And whereas there have been at sundry times, by divers persons, gifts, grants, devises of houses, lands, tenements, goods, chattels, legacies, and conveyances, heretofore made, either to Harvard College in Cambridge, in New England, or to the President and Fellows of Harvard College, or to the said college by some other description, under several charters successively; it is declared, that all the said gifts, grants, devises, legacies, and conveyances, are hereby forever confirmed unto the President and Fellows of Harvard College, and to their successors in the capacity aforesaid, according to the true intent and meaning of the donor or donors, grantor or grantors, devisor or devisors.

III. And whereas, by an Act of the General Court of the colony of Massachusetts Bay, passed in the year one thousand six hundred and forty-two, the Governor and Deputy-Governor, for the time being, and all the magistrates of that jurisdiction, were, with the President, and a number of the clergy in the said Act described, constituted the overseers of Harvard College; and it being necessary, in this new constitution of government to ascertain who shall be deemed successors to the said Governor, Deputy-Governor, and magistrates; it is declared, that the Governor, Lieutenant-Governor, council, and senate of this Commonwealth, are, and shall be deemed, their successors, who, with the President of Harvard College, for the time being, together with the ministers of the congregational churches in the towns of Cambridge, Watertown, Charlestown, Boston, Roxbury, and Dorchester, mentioned in the said Act, shall be, and hereby are, vested with all the powers and authority belonging, or in any way appertaining to the overseers of Harvard College; provided, that nothing herein shall be construed to prevent the legislature of this Commonwealth from making such alterations in the government of the said university, as shall be conducive to its advantage, and the interest of the republic of letters, in as full a manner as might have been done by the legislature of the late Province of the Massachusetts Bay.

CHAPTER V.

SECTION II.

The Encouragement of Literature, etc.

Wisdom and knowledge, as well as virtue, diffused generally among the body of the people, being necessary for the preservation of their rights and liberties; and as these depend on spreading the opportunities and advantages of education in the various parts of the country, and among the different orders of the people, it shall be the duty of legislatures and magistrates, in all future periods of this Commonwealth, to cherish the interests of literature and the sciences, and all seminaries of them; especially the university at Cambridge, public schools and grammar schools in the towns; to encourage private societies and public institutions, rewards and immunities, for the promotion of agriculture, arts, sciences, commerce, trades, manufactures, and a natural history of the country; to countenance and inculcate the principles of humanity and general benevolence, public and private charity, industry and frugality, honesty and punctuality in their dealings; sincerity, good-humor, and all social affections, and generous sentiments, among the people.

CHAPTER VI.

OATHS AND SUBSCRIPTIONS; INCOMPATIBILITY OF AND EXCLUSION FROM OFFICES; PECUNIARY QUALIFICATIONS; COMMISSIONS; WRITS; CONFIRMATION OF LAWS; HABEAS CORPUS; THE ENACTING STYLE; CONTINUANCE OF OFFICERS; PROVISION FOR A FUTURE REVISAL OF THE CONSTITUTION, ETC.

ARTICLE I. [Any person chosen governor, lieutenant-governor, councillor, senator, or representative, and accepting the trust, shall, before he proceed to execute the duties of his place or office, make and subscribe the following declaration, *viz.*: —

"I, A. B., do declare, that I believe the Christian religion, and have a firm persuasion of its truth; and that I am seised and possessed, in my own right, of the property required by the Constitution, as one qualification for the office or place to which I am elected."

And the Governor, Lieutenant-Governor, and councillors, shall make and subscribe the said declaration, in the presence of the two Houses of Assembly; and the senators and representatives, first elected under this Constitution, before the President and five of the Council of the former Constitution; and forever afterwards before the Governor and Council for the time being.] [1]

And every person chosen to either of the places or offices aforesaid, as also any person appointed or commissioned to any judicial, executive, military, or other office under the government, shall, before he enters on the discharge of the business of his place or office, take and subscribe the following declaration, and oaths or affirmations, *viz.*: —

["I, A. B., do truly and sincerely acknowledge, profess, testify, and declare, that the Commonwealth of Massachusetts is, and of right ought to be, a free, sovereign, and independent State; and I do swear, that I will bear true faith and allegiance to the said Commonwealth, and that I will defend the same against traitorous conspiracies and all hostile attempts whatsoever; and that I do renounce and abjure all allegiance, subjection, and obedience to the king, queen, or government of Great Britain (as the case may be), and every other foreign power whatsoever; and that no foreign prince, person, prelate, State, or potentate, hath, or ought to have, any jurisdiction, superiority, pre-eminence, authority, dispensing, or other power, in any matter, civil, ecclesiastical, or spiritual, within this Commonwealth, except the authority and power which is or may be vested by their constituents in the Congress of the United States: and I do further

[1] Abolished. See amendments, Art. VII.

testify and declare, that no man or body of men hath or can have any right to absolve or discharge me from the obligation of this oath, declaration, or affirmation; and that I do make this acknowledgment, profession, testimony, declaration, denial, renunciation, and abjuration, heartily and truly, according to the common meaning and acceptation of the foregoing words, without any equivocation, mental evasion, or secret reservation whatsoever. So help me, GOD.][1]

"I, A. B., do solemnly swear and affirm, that I will faithfully and impartially discharge and perform all the duties incumbent on me as , according to the best of my abilities and understanding, agreeably to the rules and regulations of the Constitution and the laws of the Commonwealth. So help me, GOD."

Provided, always, that when any person chosen or appointed as aforesaid, shall be of the denomination of the people called Quakers, and shall decline taking the said oath[s], he shall make his affirmation in the foregoing form, and subscribe the same, omitting the words ["*I do swear*," "*and abjure*," "*oath or*," "*and abjuration*," in the first oath, and in the second oath, the words] "*swear and*," and [in each of them] the words "*So help me*, GOD;" subjoining instead thereof, "*This I do under the pains and penalties of perjury.*"

And the said oaths or affirmations shall be taken and subscribed by the Governor, Lieutenant-Governor, and councillors, before the President of the Senate, in the presence of the two Houses of Assembly; and by the senators and representatives first elected under this Constitution, before the President and five of the Council of the former Constitution; and forever afterwards before the Governor and Council for the time being; and by the residue of the officers aforesaid, before such persons and in such manner as from time to time shall be prescribed by the legislature.

II. No governor, lieutenant-governor, or judge of the Supreme Judicial Court, shall hold any other office or place, under the authority of this Commonwealth, except such as by this Constitution they are admitted to hold, saving that the judges of the said court may hold the offices of justices of the peace through the State; nor shall they hold any other place or office, or receive any pension or salary from any other State or government or power whatever.

No person shall be capable of holding or exercising at the same time, within this State, more than one of the following offices, *viz.*: Judge of probate — sheriff — register of probate — or register of deeds; and never more than any two offices, which are to be held by appointment of the Governor, or the Governor and Council, or the Senate, or the House of Representatives, or by the election of the people of the State at large, or of the people of any county, military offices, and the offices of justices of the peace excepted, shall be held by one person.

No person holding the office of judge of the Supreme Judicial Court — secretary — attorney-general — solicitor-general — treasurer or receiver-general — judge of probate — commissary-general — [president, professor, or instructor of Harvard College][2] — sheriff — clerk of the House of Representatives — register of probate — register of deeds — clerk of the Supreme Judicial Court — clerk of the inferior Court of Common Pleas — or officer of the customs, including in this description naval officers — shall at the same time have a seat in the Senate or House of Representatives; but their being chosen or appointed to, and accepting the same, shall operate as a resignation of their seat in the Senate or House of Representatives; and the place so vacated shall be filled up.

And the same rule shall take place in case any judge of the said Supreme Judicial Court, or judge of probate, shall accept a seat in council; or any councillor shall accept of either of those offices or places.

And no person shall ever be admitted to hold a seat in the legislature, or any office of trust or importance under the government of this Commonwealth, who shall, in the due course of law, have been convicted of bribery or corruption in obtaining an election or appointment.

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[1] For new oath of allegiance, see amendments, Art. VI.

[2] Officers of Harvard College excepted by Amendments, Art. XXVII.

III. In all cases where sums of money are mentioned in this Constitution, the value thereof shall be computed in silver, at six shillings and eightpence per ounce; and it shall be in the power of the legislature, from time to time, to increase such qualifications, as to property, of the persons to be elected to offices, as the circumstances of the Commonwealth shall require.

IV. All commissions shall be in the name of the Commonwealth of Massachusetts, signed by the Governor and attested by the secretary or his deputy, and have the great seal of the Commonwealth affixed thereto.

V. All writs, issuing out of the clerk's office in any of the courts of law, shall be in the name of the Commonwealth of Massachusetts; they shall be under the seal of the court from whence they issue; they shall bear test of the first justice of the court to which they shall be returnable, who is not a party, and be signed by the clerk of such court.

VI. All the laws which have heretofore been adopted, used, and approved in the Province, Colony, or State of Massachusetts Bay, and usually practised on in the courts of law, shall still remain and be in full force, until altered or repealed by the legislature; such parts only excepted as are repugnant to the rights and liberties contained in this Constitution.

VII. The privilege and benefit of the writ of *habeas corpus* shall be enjoyed in this Commonwealth, in the most free, easy, cheap, expeditious, and ample manner; and shall not be suspended by the legislature, except upon the most urgent and pressing occasions, and for a limited time, not exceeding twelve months.

VIII. The enacting style, in making and passing all Acts, statutes, and laws, shall be — "Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same."

IX. To the end there may be no failure of justice, or danger arise to the Commonwealth from a change of the form of government, all officers, civil and military, holding commissions under the government and people of Massachusetts Bay in New England, and all other officers of the said government and people, at the time this Constitution shall take effect, shall have, hold, use, exercise, and enjoy, all the powers and authority to them granted or committed, until other persons shall be appointed in their stead; and all courts of law shall proceed in the execution of the business of their respective departments; and all the executive and legislative officers, bodies, and powers shall continue in full force, in the enjoyment and exercise of all their trusts, employments, and authority; until the General Court, and the supreme and executive officers under this Constitution, are designated and invested with their respective trusts, powers, and authority.

X. [In order the more effectually to adhere to the principles of the Constitution, and to correct those violations which by any means may be made therein, as well as to form such alterations as from experience shall be found necessary, the General Court which shall be in the year of our Lord one thousand seven hundred and ninety-five, shall issue precepts to the selectmen of the several towns, and to the assessors of the unincorporated plantations, directing them to convene the qualified voters of their respective towns and plantations, for the purpose of collecting their sentiments on the necessity or expediency of revising the Constitution, in order to amendments.

And if it shall appear, by the returns made, that two-thirds of the qualified voters throughout the State, who shall assemble and vote in consequence of the said precepts, are in favor of such revision or amendment, the General Court shall issue precepts, or direct them to be issued from the secretary's office, to the several towns to elect delegates to meet in convention for the purpose aforesaid.

The said delegates to be chosen in the same manner and proportion as their representatives in the second branch of the legislature are by this Constitution to be chosen.][1]

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[1] For existing provision as to amendments, see amendments, Art. IX.

[In 1821 nine amendments to this Constitution were proposed by a convention and adopted by the people. Of these, the ninth was as follows: —

ART. IX. If, at any time hereafter, any specific and particular amendment or amend-

XI. This form of government shall be enrolled on parchment, and deposited in the secretary's office, and be a part of the laws of the land; and printed copies thereof shall be prefixed to the book containing the laws of this Commonwealth, in all future editions of the said laws.

ARTICLES OF CONFEDERATION.

Articles of Confederation and Perpetual Union between the States of New Hampshire, Massachusetts Bay, Rhode Island and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, and Georgia.

ARTICLE I. The style of this Confederacy shall be, "The United States of America."

ARTICLE II. Each State retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this Confederation expressly delegated to the United States in Congress assembled.

ARTICLE III. The said States hereby severally enter into a firm league of friendship with each other, for their common defence, the security of their liberties, and their mutual and general welfare, binding themselves to assist each other against all force offered to, or attacks made upon them, or any of them, on account of religion, sovereignty, trade, or any other pretence whatever.

ARTICLE IV. The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free inhabitants of each of these States, paupers, vagabonds, and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several States; and the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce subject to the same duties, impositions, and restrictions as the inhabitants thereof respectively; provided that such restrictions shall not extend so far as to prevent the removal of property imported into any State to any other State of which the owner is an inhabitant; provided also, that no imposition, duties, or restriction shall be laid by any State on the property of the United States or either of them. If any person guilty of, or charged with, treason, felony, or other high misdemeanor in any State shall flee from justice and be found in any of the United States, he shall, upon demand of the Governor or executive power of the State from which he fled, be delivered up and removed to the State having jurisdiction of his offence. Full faith and credit shall be given in each of these States to the records, acts, and judicial proceedings of the courts and magistrates of every other State.

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ments to the Constitution be proposed in the General Court, and agreed to by a majority of the senators and two-thirds of the members of the House of Representatives present and voting thereon, such proposed amendment or amendments shall be entered on the journals of the two Houses, with the yeas and nays taken thereon, and referred to the General Court then next to be chosen, and shall be published; and if, in the General Court next chosen as aforesaid, such proposed amendment or amendments shall be agreed to by a majority of the senators and two-thirds of the members of the House of Representatives present and voting thereon, then it shall be the duty of the General Court to submit such proposed amendment or amendments to the people; and if they shall be approved and ratified by a majority of the qualified voters, voting thereon, at meetings legally warned and holden for that purpose, they shall become part of the Constitution of this Commonwealth.

Under the mode of change thus prescribed, there have been added, down to the end of the year 1893, twenty-five other amendments, making thirty-four in all. See *ante*, 220. — ED.]

ARTICLE V. For the more convenient management of the general interests of the United States, delegates shall be annually appointed in such manner as the legislature of each State shall direct, to meet in Congress on the first Monday in November, in every year with a power reserved to each State to recall its delegates, or any of them, at any time within the year, and to send others in their stead for the remainder of the year. No State shall be represented in Congress by less than two, nor by more than seven members; and no person shall be capable of being a delegate for more than three years in any term of six years; nor shall any person, being a delegate, be capable of holding any office under the United States for which he, or another for his benefit, receives any salary, fees, or emolument of any kind. Each State shall maintain its own delegates in any meeting of the States and while they act as members of the committee of the States. In determining questions in the United States in Congress assembled, each State shall have one vote. Freedom of speech and debate in Congress shall not be impeached or questioned in any court or place out of Congress; and the members of Congress shall be protected in their persons from arrests and imprisonment during the time of their going to and from, and attendance on, Congress, except for treason, felony, or breach of the peace.

ARTICLE VI. No State, without the consent of the United States, in Congress assembled, shall send any embassy to, or receive any embassy from, or enter into any conference, agreement, alliance, or treaty with any king, prince, or State; nor shall any person holding any office of profit or trust under the United States, or any of them, accept of any present, emolument, office, or title of any kind whatever from any king, prince, or foreign State; nor shall the United States, in Congress assembled, or any of them, grant any title of nobility.

No two or more States shall enter into any treaty, confederation, or alliance whatever between them, without the consent of the United States, in Congress assembled, specifying accurately the purposes for which the same is to be entered into, and how long it shall continue.

No State shall lay any imposts or duties which may interfere with any stipulations in treaties entered into by the United States, in Congress assembled, with any king, prince, or State, in pursuance of any treaties already proposed by Congress to the courts of France and Spain.

No vessels of war shall be kept up in time of peace by any State, except such number only as shall be deemed necessary by the United States, in Congress assembled, for the defence of such State or its trade, nor shall any body of forces be kept up by any State in time of peace, except such number only as, in the judgment of the United States, in Congress assembled, shall be deemed requisite to garrison the forts necessary for the defence of such State; but every State shall always keep up a well-regulated and disciplined militia, sufficiently armed and accoutered, and shall provide and constantly have ready for use in public stores a due number of field-pieces and tents, and a proper quantity of arms, ammunition, and camp equipage.

No State shall engage in any war without the consent of the United States, in Congress assembled, unless such State be actually invaded by enemies, or shall have received certain advice of a resolution being formed by some nation of Indians to invade such State, and the danger is so imminent as not to admit of a delay till the United States, in Congress assembled, can be consulted; nor shall any State grant commissions to any ships or vessels of war, nor letters of marque or reprisal, except it be after a declaration of war by the United States, in Congress assembled, and then only against the kingdom or state, and the subjects thereof, against which war has been so declared, and under such regulations as shall be established by the United States, in Congress assembled, unless such State be infested by pirates, in which case vessels of war may be fitted out for that occasion, and kept so long as the danger shall continue, or until the United States, in Congress assembled, shall determine otherwise.

ARTICLE VII. When land forces are raised by any State for the common defence, all officers of or under the rank of colonel shall be appointed by the legislature of each State respectively by whom such forces shall be raised, or in such manner as

such State shall direct, and all vacancies shall be filled up by the State which first made the appointment.

ARTICLE VIII. All charges of war, and all other expenses that shall be incurred for the common defence, or general welfare, and allowed by the United States, in Congress assembled, shall be defrayed out of a common treasury, which shall be supplied by the several States in proportion to the value of all land within each State, granted to, or surveyed for, any person, as such land and the buildings and improvements thereon shall be estimated, according to such mode as the United States, in Congress assembled, shall, from time to time, direct and appoint. The taxes for paying that proportion shall be laid and levied by the authority and direction of the legislatures of the several States, within the time agreed upon by the United States, in Congress assembled.

ARTICLE IX. The United States, in Congress assembled, shall have the sole and exclusive right and power of determining on peace and war, except in the cases mentioned in the sixth Article; of sending and receiving ambassadors; entering into treaties and alliances, provided that no treaty of commerce shall be made, whereby the legislative power of the respective States shall be restrained from imposing such imposts and duties on foreigners as their own people are subjected to, or from prohibiting the exportation or importation of any species of goods or commodities whatever; of establishing rules for deciding, in all cases, what captures on land and water shall be legal, and in what manner prizes taken by land or naval forces in the service of the United States shall be divided or appropriated; of granting letters of marque and reprisal in times of peace; appointing courts for the trial of piracies and felonies committed on the high seas; and establishing courts for receiving and determining finally appeals in all cases of captures; provided that no member of Congress shall be appointed a judge of any of the said courts.

The United States, in Congress assembled, shall also be the last resort on appeal in all disputes and differences now subsisting, or that hereafter may arise between two or more States concerning boundary, jurisdiction, or any other cause whatever; which authority shall always be exercised in the manner following: Whenever the legislative or executive authority, or lawful agent of any State in controversy with another, shall present a petition to Congress, stating the matter in question, and praying for a hearing, notice thereof shall be given by order of Congress to the legislative or executive authority of the other State in controversy, and a day assigned for the appearance of the parties by their lawful agents, who shall then be directed to appoint, by joint consent, commissioners or judges to constitute a court for hearing and determining the matter in question; but if they cannot agree, Congress shall name three persons out of each of the United States, and from the list of such persons each party shall alternately strike out one, the petitioners beginning, until the number shall be reduced to thirteen; and from that number not less than seven nor more than nine names, as Congress shall direct, shall, in the presence of Congress, be drawn out by lot; and the persons whose names shall be so drawn, or any five of them, shall be commissioners or judges, to hear and finally determine the controversy, so always as a major part of the judges who shall hear the cause shall agree in the determination; and if either party shall neglect to attend at the day appointed, without showing reasons which Congress shall judge sufficient, or being present, shall refuse to strike, the Congress shall proceed to nominate three persons out of each State, and the secretary of Congress shall strike in behalf of such party absent or refusing; and the judgment and sentence of the court, to be appointed in the manner before prescribed, shall be final and conclusive; and if any of the parties shall refuse to submit to the authority of such court, or to appear or defend their claim or cause, the court shall nevertheless proceed to pronounce sentence or judgment, which shall in like manner be final and decisive; the judgment or sentence and other proceedings being in either case transmitted to Congress, and lodged among the Acts of Congress for the security of the parties concerned; provided, that every commissioner, before he sits in judgment, shall take an oath, to be administered by one of the judges of the Supreme or Superior Court of the State where the cause shall be tried, "well and truly to hear and

determine the matter in question, according to the best of his judgment, without favor, affection, or hope of reward." Provided, also, that no State shall be deprived of territory for the benefit of the United States.

All controversies concerning the private right of soil claimed under different grants of two or more States, whose jurisdictions, as they may respect such lands and the States which passed such grants are adjusted, the said grants or either of them being at the same time claimed to have originated antecedent to such settlement of jurisdiction, shall, on the petition of either party to the Congress of the United States, be finally determined, as near as may be, in the same manner as is before prescribed for deciding disputes respecting territorial jurisdiction between different States.

The United States, in Congress assembled, shall also have the sole and exclusive right and power of regulating the alloy and value of coin struck by their own authority, or by that of the respective States; fixing the standard of weights and measures throughout the United States; regulating the trade and managing all affairs with the Indians, not members of any of the States; provided that the legislative right of any State, within its own limits, be not infringed or violated; establishing and regulating post-offices from one State to another, throughout all the United States, and exacting such postage on the papers passing through the same as may be requisite to defray the expenses of the said office; appointing all officers of the land forces in the service of the United States, excepting regimental officers; appointing all the officers of the naval forces, and commissioning all officers whatever in the service of the United States; making rules for the government and regulation of the said land and naval forces, and directing their operations.

The United States, in Congress assembled, shall have authority to appoint a committee, to sit in the recess of Congress, to be denominated, "A Committee of the States," and to consist of one delegate from each State, and to appoint such other committees and civil officers as may be necessary for managing the general affairs of the United States under their direction; to appoint one of their number to preside; provided that no person be allowed to serve in the office of president more than one year in any term of three years; to ascertain the necessary sums of money to be raised for the service of the United States, and to appropriate and apply the same for defraying the public expenses; to borrow money or emit bills on the credit of the United States, transmitting every half year to the respective States an account of the sums of money so borrowed or emitted; to build and equip a navy; to agree upon the number of land forces, and to make requisitions from each State for its quota, in proportion to the number of white inhabitants in such State, which requisition shall be binding; and thereupon the legislature of each State shall appoint the regimental officers, raise the men, and clothe, arm, and equip them in a soldier-like manner, at the expense of the United States; and the officers and men so clothed, armed, and equipped, shall march to the place appointed, and within the time agreed on by the United States, in Congress assembled; but if the United States, in Congress assembled, shall, on consideration of circumstances, judge proper that any State should not raise men, or should raise a smaller number than its quota, and that any other State should raise a greater number of men than the quota thereof, such extra number shall be raised, officered, clothed, armed, and equipped in the same manner as the quota of such State, unless the legislature of such State shall judge that such extra number cannot be safely spared out of the same, in which case they shall raise, officer, clothe, arm, and equip as many of such extra number as they judge can be safely spared, and the officers and men so clothed, armed, and equipped shall march to the place appointed, and within the time agreed on by the United States, in Congress assembled.

The United States, in Congress assembled, shall never engage in a war, nor grant letters of marque and reprisal in time of peace, nor enter into any treaties or alliances, nor coin money, nor regulate the value thereof, nor ascertain the sums and expenses necessary for the defence and welfare of the United States, or any of them, nor emit bills, nor borrow money on the credit of the United States, nor appropriate money, nor agree upon the number of vessels of war to be built or purchased, or the number of land or sea forces to be raised, nor appoint a commander-in-chief of the army or

navy, unless nine States assent to the same, nor shall a question on any other point, except for adjourning from day to day, be determined, unless by the votes of a majority of the United States, in Congress assembled.

The Congress of the United States shall have power to adjourn to any time within the year, and to any place within the United States, so that no period of adjournment be for a longer duration than the space of six months, and shall publish the journal of their proceedings monthly, except such parts thereof relating to treaties, alliances, or military operations as in their judgment require secrecy; and the yeas and nays of the delegates of each State, on any question, shall be entered on the journal when it is desired by any delegate; and the delegates of a State, or any of them, at his or their request, shall be furnished with a transcript of the said journal except such parts as are above excepted, to lay before the legislatures of the several States.

ARTICLE X. The committee of the States, or any nine of them, shall be authorized to execute, in the recess of Congress, such of the powers of Congress as the United States, in Congress assembled, by the consent of nine States, shall, from time to time, think expedient to vest them with; provided that no power be delegated to the said committee, for the exercise of which, by the Articles of Confederation, the voice of nine States in the Congress of the United States assembled is requisite.

ARTICLE XI. Canada, acceding to this Confederation, and joining in the measures of the United States, shall be admitted into, and entitled to all the advantages of this Union; but no other colony shall be admitted into the same, unless such admission be agreed to by nine States.

ARTICLE XII. All bills of credit emitted, moneys borrowed, and debts contracted by or under the authority of Congress, before the assembling of the United States, in pursuance of the present Confederation, shall be deemed and considered as a charge against the United States, for payment and satisfaction whereof the said United States and the public faith are hereby solemnly pledged.

ARTICLE XIII. Every State shall abide by the determinations of the United States, in Congress assembled, on all questions which by this Confederation are submitted to them. And the Articles of this Confederation shall be inviolably observed by every State, and the Union shall be perpetual; nor shall any alteration at any time hereafter be made in any of them, unless such alteration be agreed to in a Congress of the United States, and be afterwards confirmed by the legislatures of every State.

AND WHEREAS it hath pleased the great Governor of the world to incline the hearts of the legislatures we respectively represent in Congress to approve of, and to authorize us to ratify, the said Articles of Confederation and perpetual Union, know ye, that we, the undersigned delegates, by virtue of the power and authority to us given for that purpose, do, by these presents, in the name and in behalf of our respective constituents, fully and entirely ratify and confirm each and every of the said Articles of Confederation and perpetual Union, and all and singular the matters and things therein contained. And we do further solemnly plight and engage the faith of our respective constituents, that they shall abide by the determinations of the United States, in Congress assembled, on all questions which by the said Confederation are submitted to them; and that the articles thereof shall be inviolably observed by the States we respectively represent, and that the Union shall be perpetual. In witness whereof, we have hereunto set our hands in Congress. Done at Philadelphia, in the State of Pennsylvania, the ninth day of July, in the year of our Lord 1778, and in the third year of the Independence of America [1]

[1] Ratified by the last of the States March 1, 1781. — ED.

CONSTITUTION OF THE UNITED STATES, WITH THE AMENDMENTS.[1]

WE THE PEOPLE of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this CONSTITUTION for the United States of America.

ARTICLE. I.

SECTION. 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

SECTION. 2. The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, [which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.][2] The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode-Island and Providence Plantations one, Connecticut five, New-York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.

The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.

SECTION. 3. The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one Vote.

Immediately after they shall be assembled in Consequence of the first Election, they shall be divided as equally as may be into three Classes. The Seats of the Senators of the first Class shall be vacated at the Expiration of the second Year, of the second Class at the Expiration of the fourth Year, and of the third Class at the Expiration of the sixth Year, so that one third may be chosen every second Year; and if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any

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[1] Printed, by permission, from an edition by Professors Hart and Channing of Harvard University (published by A. Lovell & Co., New York), of which the editors say: "The text . . . is the result of careful comparison by one of the editors with the original manuscripts, Feb. 10, 11, 1893; and it is intended to be absolutely exact in word, spelling, capitalization, and punctuation." Some of the editors' notes have been omitted, some notes have been added, and certain section-marks inserted by the editors have been dropped. An obvious misprint, "Uember," for "Member" (first line p. 409, *infra*), has been corrected. Otherwise the text above-named is exactly followed. — ED.

[2] Superseded by Fourteenth Amendment.

State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies.

No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.

The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided.

The Senate shall chuse their other Officers, and also a President pro tempore, in the Absence of the Vice President, or when he shall exercise the Office of President of the United States.

The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

SECTION. 4. The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

The Congress shall assemble at least once in every Year, and such Meeting shall be on the first Monday in December, unless they shall by Law appoint a different Day.

SECTION. 5. Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide.

Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.

Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.

Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.

SECTION. 6. The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

SECTION. 7. All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objec-

tions, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

SECTION. 8. The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

To borrow Money on the credit of the United States;

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

To establish Post Offices and post Roads;

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

To constitute Tribunals inferior to the supreme Court;

To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

To provide and maintain a Navy;

To make Rules for the Government and Regulation of the land and naval Forces;

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings; — And

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

SECTION. 9. The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress

prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.

The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

No Bill of Attainder or ex post facto Law shall be passed.

No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.

No Tax or Duty shall be laid on Articles exported from any State.

No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another.

No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.

SECTION. 10. No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress.

No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

ARTICLE. II.

SECTION. 1. The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows

Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

[The Electors shall meet in their respective States, and vote by Ballot for two Persons, of whom one at least shall not be an Inhabitant of the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted. The Person having the greatest Number of Votes shall be the President, if such Number be a Majority of the whole Number of Electors appointed; and if there be more than one who have such Majority, and have an equal Number of Votes, then the House of Representatives shall immediately chuse by Ballot one of them for President; and if no Person have a Majority, then from the five highest on the List the said House shall in like Manner chuse the President. But in chusing the President, the Votes shall be taken by States, the Representation from each State having one Vote; A quorum for this Purpose shall

consist of a Member or Members from two thirds of the States, and a Majority of all the States shall be necessary to a Choice. In every Case, after the Choice of the President, the Person having the greatest Number of Votes of the Electors shall be the Vice President. But if there should remain two or more who have equal Votes, the Senate shall chuse from them by Ballot the Vice President.][1]

The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.

No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.

In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation, or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.

The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be encreased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.

Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation: —

"I do solemnly swear (or affirm) that I will faithfully execute the Office of President "of the United States, and will to the best of my Ability, preserve, protect and defend "the Constitution of the United States."

SECTION. 2. The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

SECTION. 3. He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

SECTION. 4. The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

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[1] Superseded by Twelfth Amendment.

ARTICLE III.

SECTION. 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

SECTION. 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; — to all Cases affecting Ambassadors, other public Ministers and Consuls; — to all Cases of admiralty and maritime Jurisdiction; — to Controversies to which the United States shall be a Party; — to Controversies between two or more States; — between a State and Citizens of another State;[1] — between Citizens of different States, — between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

SECTION. 3. Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

ARTICLE. IV.

SECTION. 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

SECTION. 2. The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.

SECTION. 3. New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

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[1] Limited in its construction by the Eleventh Amendment. (See *Hans* v. *La.*, *ante*, p 295.) — ED.

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

SECTION. 4. The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

ARTICLE. V.

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

ARTICLE. VI.

All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

ARTICLE. VII.

The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.

[Note of the draughtsman as to interlineations in the text of the manuscript.]

DONE in Convention by the Unanimous Consent of the States present the Seventeenth Day of September in the Year of our Lord one thousand seven hundred and Eighty seven and of the Independance of the United States of America the Twelfth **In Witness** whereof We have hereunto subscribed our names.

Attest
WILLIAM JACKSON
Secretary.

Go WASHINGTON—
Presidt and deputy from Virginia.

[Here follow the names of thirty-eight deputies representing twelve States. — ED.]

ARTICLES in addition to and Amendment of the Constitution of the United States of America, proposed by Congress, and ratified by the Legislatures of the several States, pursuant to the fifth Article of the original Constitution.[1]

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[1] This heading appears only in the joint resolution submitting the first ten amendments.

[ARTICLE I.]

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

[ARTICLE II.]

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

[ARTICLE III.]

No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

[ARTICLE IV.]

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

[ARTICLE V]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

[ARTICLE VI.]

In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

[ARTICLE VII.]

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

[ARTICLE VIII.]

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

[ARTICLE IX.]

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

[ARTICLE X.]

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.[1]

[ARTICLE XI.]

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.[2]

[ARTICLE XII.]

The Electors shall meet in their respective states, and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate; — The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted; — The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President. — The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.[3]

ARTICLE XIII.

SECTION 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction. SECTION 2. Congress shall have power to enforce this article by appropriate legislation.[4]

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[1] The first ten amendments were proposed by Congress September 25, 1789, and declared in force December 15, 1791. — JOHNSTON, *Hist. Am. Politics.* — ED.

[2] Proposed by Congress March 5, 1794, and declared in force January 8, 1798. — JOHNSTON, *ubi supra.* — ED.

[3] Proposed by Congress December 12, 1803, and declared in force September 25, 1804. — JOHNSTON, *ubi supra.* — ED.

[4] Proposed by Congress February 1, 1865, and declared in force December 18, 1865. — JOHNSTON, *ubi supra.* — ED.

Article XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.[1]

Article XV.

Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude. —

Section 2. The Congress shall have power to enforce this article by appropriate legislation.[2] —

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[1] Proposed by Congress June 16, 1866, and declared in force July 28, 1868. — Johnston, *ubi supra*. — Ed.

[2] Proposed by Congress February 26, 1869, and declared in force March 30, 1870. — Johnston, *ubi supra*. — Ed.

PASSAGES FROM ALL THE STATE CONSTITUTIONS (OTHER THAN THAT OF MASSACHUSETTS) PRECEDING THE FEDERAL CONSTITUTION.

CONSTITUTION OF NEW HAMPSHIRE. 1776.[1]

In Congress at Exeter, January 5, 1776.

VOTED, That this Congress take up CIVIL GOVERNMENT for this colony in manner and form following, viz.

WE, the members of the Congress of New Hampshire, chosen and appointed by the free suffrages of the people of said colony, and authorized and empowered by them to meet together, and use such means and pursue such measures as we should judge best for the public good; and in particular to establish some form of government, provided that measure should be recommended by the Continental Congress: And a recommendation to that purpose having been transmitted to us from the said Congress: Have taken into our serious consideration the unhappy circumstances, into which this colony is involved by means of many grievous and oppressive acts of the British Parliament, depriving us of our natural and constitutional rights and privileges; to enforce obedience to which acts a powerful fleet and army have been sent to this country by the ministry of Great Britain, who have exercised a wanton and cruel abuse of their power, in destroying the lives and properties of the colonists in many places with fire and sword, taking the ships and lading from many of the honest and industrious inhabitants of this colony employed in commerce, agreeable to the laws and customs a long time used here.

The sudden and abrupt departure of his Excellency John Wentworth, Esq., our late Governor, and several of the Council, leaving us destitute of legislation, and no executive courts being open to punish criminal offenders; whereby the lives and properties of the honest people of this colony are liable to the machinations and evil designs of wicked men, *Therefore*, for the preservation of peace and good order, and for the security of the lives and properties of the inhabitants of this colony, we conceive ourselves reduced to the necessity of establishing A FORM OF GOVERNMENT to continue during the present unhappy and unnatural contest with Great Britain; PROTESTING and DECLARING that we never sought to throw off our dependance upon Great Britain, but felt ourselves happy under her protection, while we could enjoy our constitutional rights and privileges. And that we shall rejoice if such a reconciliation between us and our parent State can be effected as shall be approved by the CONTINENTAL CONGRESS, in whose prudence and wisdom we confide.

Accordingly pursuant to the trust reposed in us, WE DO RESOLVE, that this Congress assume the name, power and authority of a house of Representatives or Assembly for the *Colony of New-Hampshire*. And that said House then proceed to choose twelve persons, being reputable freeholders and inhabitants within this colony, in the following manner, viz. five in the county of Rockingham, two in the county of Strafford, two in the county of Hillsborough, two in the county of Cheshire, and one in the county of Grafton, to be a distinct and separate branch of the Legislature, by the name of a COUNCIL for this colony, to continue as such until the third Wednesday in December next; any seven of whom to be a quorum to do business. That such Council appoint their President, and in his absence that the senior counsellor preside; that a Secretary be appointed by both branches, who may be a counssellor, or otherwise, as they shall choose.

That no act or resolve shall be valid and put into execution unless agreed to, and passed by both branches of the legislature.

That all public officers for the said colony, and each county, for the current year, be

[1] See *ante*, 214. This was the earliest of our constitutions. — ED.

appointed by the Council and Assembly, except the several clerks of the Executive Courts, who shall be appointed by the Justices of the respective Courts.

That all bills, resolves, or votes for raising, levying and collecting money originate in the house of Representatives.

That at any session of the Council and Assembly neither branch shall adjourn from any longer time than from Saturday till the next Monday without consent of the other.

And it is further resolved, That if the present unhappy dispute with Great Britain should continue longer than this present year, and the Continental Congress give no instruction or direction to the contrary, the Council be chosen by the people of each respective county in such manner as the Council and house of Representatives shall order.

That general and field officers of the militia, on any vacancy, be appointed by the two houses, and all inferior officers be chosen by the respective companies.

That all officers of the Army be appointed by the two houses, except they should direct otherwise in case of any emergency.

That all civil officers for the colony and for each county be appointed, and the time of their continuance in office be determined by the two houses, except clerks of Courts, and county treasurers, and recorders of deeds.

That a treasurer, and a recorder of deeds for each county be annually chosen by the people of each county respectively; the votes for such officers to be returned to the respective courts of General Sessions of the Peace in the county, there to be ascertained as the Council and Assembly shall hereafter direct.

That precepts in the name of the Council and Assembly, signed by the President of the Council, and Speaker of the house of Representatives, shall issue annually at or before the first day of November, for the choice of a Council and house of Representatives to be returned by the third Wednesday in December then next ensuing, in such manner as the Council and Assembly shall hereafter prescribe. — 2 *Poore's Constitutions*, 1279.

CONSTITUTION OF NEW HAMPSHIRE. 1784.[1]

Part I. — The Bill of Rights.

Article I. All men are born equally free and independent; therefore, all government of right originates from the people, is founded in consent, and instituted for the general good.

VIII. All power residing originally in, and being derived from the people, all the magistrates and officers of government, are their substitutes and agents, and at all times accountable to them.

XXIX. The power of suspending the laws, or the execution of them, ought never to be exercised but by the legislature, or by authority derived therefrom, to be exercised in such particular cases only as the legislature shall expressly provide for.

XXXV. It is essential to the preservation of the rights of every individual, his life, liberty, property and character, that there be an impartial interpretation of the laws, and administration of justice. It is the right of every citizen to be tried by judges as impartial as the lot of humanity will admit. It is therefore not only the best policy, but for the security of the rights of the people, that the judges of the supreme (or superior) judicial court should hold their offices so long as they behave well; and that they should have honorable salaries, ascertained and established by standing laws.

XXXVII. In the government of this state, the three essential powers thereof, to wit, the legislative, executive and judicial, ought to be kept as separate from and independent of each other, as the nature of a free government will admit, or as is consistent with that chain of connection that binds the whole fabric of the constitution in one indissoluble bond of union and amity.

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[1] See *ante*, 214, 215. — Ed.

PART II. — THE FORM OF GOVERNMENT.

THE people inhabiting the territory formerly called the Province of New-Hampshire, do hereby solemnly and mutually agree with each other, to form themselves into a free, sovereign, and independent Body-politic, or State, by the name of the STATE OF NEW HAMPSHIRE.

THE GENERAL COURT.

THE supreme legislative power within this State shall be vested in the senate and house of representatives, each of which shall have a negative on the other.

THE senate and house shall assemble every year on the first Wednesday of June, and at such other times as they may judge necessary; and shall dissolve, and be dissolved, seven days next preceding the said first Wednesday of June; and shall be stiled THE GENERAL COURT OF NEW-HAMPSHIRE.

THE general court shall forever have full power and authority to erect and constitute judicatories and courts of record, or other courts, to be holden in the name of the State, for the hearing, trying, and determining all manner of crimes, offences, pleas, processes, plaints, actions, causes, matters and things whatsoever, arising, or happening within this state, or between or concerning persons inhabiting or residing, or brought within the same, whether the same be criminal or civil, or whether the crimes be capital or not capital, and whether the said pleas be real, personal, or mixed; and for the awarding and issuing execution thereon. To which courts and judicatories are hereby given and granted full power and authority, from time to time to administer oaths or affirmations, for the better discovery of truth in any matter in controversy, or depending before them.

AND farther, full power and authority are hereby given and granted to the said general court, from time to time, to make, ordain and establish, all manner of wholesome and reasonable orders, laws, statutes, ordinances, directions and instructions, either with penalties or without; so as the same be not repugnant, or contrary to this constitution, as they may judge for the benefit and welfare of this state, and for the governing and ordering thereof, and of the subjects of the same, for the necessary support and defence of the government thereof. . . .

SENATE.

THERE shall be annually elected by the freeholders and other inhabitants of this state, qualified as in this constitution is provided, twelve persons to be senators for the year ensuing their election. . . .

The senate shall be a court with full power and authority to hear and determine all impeachments made by the house of representatives, against any officer or officers of the state, for misconduct or mal-administration in their offices. But previous to the trial of any such impeachment, the members of the senate shall respectively be sworn, truly and impartially to try and determine the charge in question according to evidence. Their judgment, however, shall not extend farther than removal from office, disqualification to hold or enjoy any place of honor, trust or profit under this state; but the party so convicted, shall nevertheless be liable to indictment, trial, judgment, and punishment, according to laws of the land.

HOUSE OF REPRESENTATIVES.

THERE shall be in the legislature of this state a representation of the people annually elected and founded upon principles of equality. . . .

EXECUTIVE POWER. — PRESIDENT.

THERE shall be a supreme executive magistrate, who shall be stiled, THE PRESIDENT OF THE STATE OF NEW-HAMPSHIRE; and whose title shall be HIS EXCELLENCY. . . .

ALL judicial officers . . . shall be nominated and appointed by the president and council; and every such nomination shall be made at least seven days prior to such appointment, and no appointment shall take place, unless three of the council agree thereto. . . .

PERMANENT and honorable salaries shall be established by law for the justices of the superior court. . . .

JUDICIARY POWER.

THE tenure, that all commission officers shall have by law in their offices, shall be expressed in their respective commissions. All judicial officers, duly appointed, commissioned and sworn, shall hold their offices during good behaviour, excepting those concerning whom there is a different provision made in this constitution: *Provided nevertheless*, the president, with consent of council, may remove them upon the address of both houses of the legislature.

EACH branch of the legislature, as well as the president and council, shall have authority to require the opinions of the justices of the superior court upon important questions of law, and upon solemn occasions.

IN order that the people may not suffer from the long continuance in place of any justice of the peace, who shall fail in discharging the important duties of his office with ability and fidelity, all commissions of justices of the peace shall become void, at the expiration of five years from their respective dates; and upon the expiration of any commission, the same may, if necessary, be renewed, or another person appointed, as shall most conduce to the well-being of the State. . . .

To preserve an effectual adherence to the principles of the constitution, and to correct any violations thereof, as well as to make such alterations therein, as from experience may be found necessary, the general court shall at the expiration of seven years from the time this constitution shall take effect, issue precepts, or direct them to be issued from the secretary's office, to the several towns and incorporated places, to elect delegates to meet in convention for the purposes aforesaid: the said delegates to be chosen in the same manner, and proportioned as the representatives to the general assembly; provided that no alteration shall be made in this constitution before the same shall be laid before the towns and unincorporated places, and approved by two-thirds of the qualified voters present, and voting upon the question. — 2 *Poore's Constitutions*, 1280.

CONSTITUTION OF SOUTH CAROLINA. 1776.[1]

. . . And whereas the judges of courts of law here have refused to exercise their respective functions, so that it is become indispensably necessary that during the present situation of American affairs, and until an accommodation of the unhappy differences between Great Britain and America can be obtained, (an event which, though traduced and treated as rebels, we still earnestly desire,) some mode should be established by common consent, and for the good of the people, the origin and end of all governments, for regulating the internal polity of this colony. The congress being vested with powers competent for the purpose, and having fully deliberated touching the premises, do therefore resolve:

I. That this congress being a full and free representation of the people of this colony, shall henceforth be deemed and called the general assembly of South Carolina, and as such shall continue until the twenty-first day of October next, and no longer.

II. That the general assembly shall, out of their own body, elect by ballot a legislative council, to consist of thirteen n bers, (seven of whom shall be a quorum,) and to continue for the same time as th neral assembly.

III. That the general assembly and the said legislative council shall jointly choose

[1] This constitution was framed by the "provincial congress" of South Carolina, and adopted March 26, 1776. It was not submitted to the people for ratification.

by ballot from among themselves, or from the people at large, a president and commander-in-chief and a vice-president of the colony.

VII. That the legislative authority be vested in the president and commander-in-chief, the general assembly and legislative council. All money-bills for the support of government shall originate in the general assembly, and shall not be altered or amended by the legislative council, but may be rejected by them. All other bills and ordinances may take rise in the general assembly or legislative council, and may be altered, amended, or rejected by either. Bills having passed the general assembly and legislative council may be assented to or rejected by the president and commander-in-chief. Having received his assent, they shall have all the force and validity of an act of general assembly of this colony. And the general assembly and legislative council, respectively, shall enjoy all other privileges which have at any time been claimed or exercised by the commons house of assembly, but the legislative council shall have no power of expelling their own members.

XVI. That the vice-president of the colony and the privy council, or the vice-president and a majority of the privy council for the time being, shall exercise the powers of a court of chancery, and there shall be an ordinary who shall exercise the powers heretofore exercised by that officer in this colony.

XIX. That justices of the peace shall be nominated by the general assembly and commissioned by the president and commander-in-chief, during pleasure. They shall not be entitled to fees except on prosecutions for felony, and not acting in the magistracy, they shall not be entitled to the privileges allowed to them by law.

XX. That all other judicial officers shall be chosen by ballot, jointly by the general assembly and legislative council, and except the judges of the court of chancery, commissioned by the president and commander-in-chief, during good behavior, but shall be removed on address of the general assembly and legislative council.

XXIX. That the resolutions of this or any former congress of this colony, and all laws now of force here, (and not hereby altered,) shall so continue until altered or repealed by the legislature of this colony, unless where they are temporary, in which case they shall expire at the times respectively limited for their duration.

XXX. That the executive authority be vested in the president and commander-in-chief, limited and restrained as aforesaid.

XXXIII. That all persons who shall be chosen and appointed to any office or to any place of trust, before entering upon the execution of office, shall take the following oath: "I, A. B., do swear that I will, to the utmost of my power, support, maintain, and defend the Constitution of South Carolina, as established by Congress on the twenty-sixth day of March, one thousand seven hundred and seventy-six, until an accommodation of the differences between Great Britain and America shall take place, or I shall be released from this oath by the legislative authority of the said colony: So help me God." And all such persons shall also take an oath of office.

XXXIV. That the following yearly salaries be allowed to the public officers undermentioned: The president and commander-in-chief, nine thousand pounds; the chief justice and the assistant judges, the salaries, respectively, as by act of assembly established. . . . — 2 *Poore's Constitutions*, 1615.

CONSTITUTION OF SOUTH CAROLINA. 1778.[1]

An act for establishing the constitution of the State of South Carolina.

II. That the legislative authority be vested in a general assembly, to consist of two distinct bodies, a senate and house of representatives, but that the legislature of this

[1] This constitution was framed by the general assembly of South Carolina, by which it was passed as an "act" March 19, 1778, although it did not go into effect until November, 1778. It was soon afterwards declared by the supreme court of South Carolina that both the constitution of 1776 and the constitution of 1778 were simply acts of the general assembly, which that body could repeal or amend at pleasure. [This constitution was in force till 1790. — Ed.]

State, as established by the constitution or form of government passed the twenty-sixth of March, one thousand seven hundred and seventy-six, shall continue and be in full force until the twenty-ninth day of November ensuing.

III. That as soon as may be after the first meeting of the senate and house of representatives, and at every first meeting of the senate and house of representatives thereafter, to be elected by virtue of this constitution, they shall jointly in the house of representatives choose by ballot from among themselves or from the people at large a governor and commander-in-chief, a lieutenant-governor, both to continue for two years, and a privy council, all of the Protestant religion, and till such choice shall be made the former president or governor and commander-in-chief, and vice-president or lieutenant-governor, as the case may be, and privy council, shall continue to act as such.

[Art. IX. Provides for a privy council.]

XI. That the executive authority be vested in the governor and commander-in-chief, in manner herein mentioned.

XVI. That all money bills for the support of government shall originate in the house of representatives, and shall not be altered or amended by the senate, but may be rejected by them, and that no money be drawn out of the public treasury but by the legislative authority of the State. All other bills and ordinances may take rise in the senate or house of representatives, and be altered, amended, or rejected by either. Acts and ordinances having passed the general assembly shall have the great seal affixed to them by a joint committee of both houses, who shall wait upon the governor to receive and return the seal, and shall then be signed by the president of the senate and speaker of the house of representatives, in the senate-house, and shall thenceforth have all the force and validity of a law, and be lodged in the secretary's office. And the senate and house of representatives, respectively, shall enjoy all other privileges which have at any time been claimed or exercised by the commons house of assembly.

XXIII. That the form of impeaching all officers of the State for mal and corrupt conduct in their respective offices, not amenable to any other jurisdiction, be vested in the house of representatives. But that it shall always be necessary that two-third parts of the members present do consent to and agree in such impeachment. That the senators and such of the judges of this State as are not members of the house of representatives, be a court for the trial of impeachments, under such regulations as the legislature shall establish, and that previous to the trial of every impeachment, the members of the said court shall respectively be sworn truly and impartially to try and determine the charge in question according to evidence, and no judgment of the said court, except judgment of acquittal, shall be valid, unless it shall be assented to by two-third parts of the members then present, and on every trial, as well on impeachments as others, the party accused shall be allowed counsel.

XXIV. That the lieutenant-governor of the State and a majority of the privy council for the time being shall, until otherwise altered by the legislature, exercise the powers of a court of chancery, and there shall be ordinaries appointed in the several districts of this State, to be chosen by the senate and house of representatives jointly by ballot, in the house of representatives, who shall, within their respective districts, exercise the powers heretofore exercised by the ordinary, and until such appointment is made the present ordinary in Charleston shall continue to exercise that office as heretofore.

XXV. That the jurisdiction of the court of admiralty be confined to maritime causes.

XXVI. That justices of the peace shall be nominated by the senate and house of representatives jointly, and commissioned by the governor and commander-in-chief during pleasure. They shall be entitled to receive the fees heretofore established by law; and not acting in the magistracy, they shall not be entitled to the privileges allowed them by law.

XXVII. That all other judicial officers shall be chosen by ballot, jointly by the senate and house of representatives, and, except the judges of the court of chan-

cery, commissioned by the governor and commander-in-chief during good behavior, but shall be removed on address of the senate and house of representatives.

XLIV. That no part of this constitution shall be altered without notice being previously given of ninety days, nor shall any part of the same be changed without the consent of a majority of the members of the senate and house of representatives. — 2 *Poore's Constitutions*, 1620.

VIRGINIA BILL OF RIGHTS. 1776.[1]

A declaration of rights made by the representatives of the good people of Virginia, assembled in full and free convention; which rights do pertain to them and their posterity, as the basis and foundation of government.

SEC. 2. That all power is vested in, and consequently derived from, the people; that magistrates are their trustees and servants, and at all times amenable to them.

SEC. 5. That the legislative and executive powers of the State should be separate and distinct from the judiciary; and that the members of the two first may be restrained from oppression, by feeling and participating the burdens of the people, they should, at fixed periods, be reduced to a private station, return into that body from which they were originally taken, and the vacancies be supplied by frequent, certain, and regular elections, in which all, or any part of the former members, to be again eligible, or ineligible, as the laws shall direct.

SEC. 7. That all power of suspending laws, or the execution of laws, by any authority, without consent of the representatives of the people, is injurious to their rights, and ought not to be exercised. — 2 *Poore's Constitutions*, 1908.

CONSTITUTION OF VIRGINIA. 1776.[2]

The legislative, executive, and judiciary departments, shall be separate and distinct, so that neither exercise the powers properly belonging to the other: nor shall any person exercise the powers of more than one of them, at the same time; except that the Justices of the County Courts shall be eligible to either House of Assembly.

The two Houses of Assembly shall, by joint ballot, appoint Judges of the Supreme Court of Appeals, and General Court, Judges in Chancery, Judges of Admiralty, Secretary, and the Attorney-General, to be commissioned by the Governor, and continue in office during good behaviour. In case of death, incapacity, or resignation, the Governor, with the advice of the Privy Council, shall appoint persons to succeed in office, to be approved or displaced by both Houses. These officers shall have fixed and adequate salaries, and, together with all others, holding lucrative offices, and all ministers of the gospel, of every denomination, be incapable of being elected members of either House of Assembly or the Privy Council.

The Governor, when he is out of office, and others, offending against the State, either by mal-administration, corruption, or other means, by which the safety of the State may be endangered, shall be impeachable by the House of Delegates. Such impeachment to be prosecuted by the Attorney-General, or such other person or persons, as the House may appoint in the General Court, according to the laws of the land. If found guilty, he or they shall be either forever disabled to hold any office under government, or be removed from such office *pro tempore*, or subjected to such pains or penalties as the laws shall direct.

If all or any of the Judges of the General Court should on good grounds (to be

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[1] This declaration of rights was framed by a convention, composed of forty-five members of the colonial house of burgesses, which met at Williamsburgh May 6, 1776, and adopted this declaration June 12, 1776.

[2] This constitution was framed by the convention which issued the preceding declaration of rights, and was adopted June 29, 1776. It was not submitted to the people for ratification. [This constitution continued till 1830. — ED.]

judged of by the House of Delegates) be accused of any of the crimes or offences above mentioned, such House of Delegates may, in like manner, impeach the Judge or Judges so accused, to be prosecuted in the Court of Appeals; and he or they, if found guilty, shall be punished in the same manner as is prescribed in the preceding clause. — 2 *Poore's Constitutions*, 1910.

CONSTITUTION OF NEW JERSEY. 1776.[1]

I. That the government of this Province shall be vested in a Governor, Legislative Council, and General Assembly.

VII. That the Council and Assembly jointly, at their first meeting after each annual election, shall, by a majority of votes, elect some fit person within the Colony, to be Governor for one year, who shall be constant President of the Council, and have a casting vote in their proceedings; and that the Council themselves shall choose a Vice-President who shall act as such in the absence of the Governor.

VIII. That the Governor, or, in his absence, the Vice-President of the Council, shall have the supreme executive power, be Chancellor of the Colony, and act as captain-general and commander in chief of all the militia, and other military force in this Colony; and that any three or more of the Council shall, at all times, be a privy-council, to consult them; and that the Governor be ordinary or surrogate-general.

IX. That the Governor and Council, (seven whereof shall be a quorum) be the Court of Appeals, in the last resort, in all causes of law, as heretofore; and that they possess the power of granting pardons to criminals, after condemnation, in all cases of treason, felony, or other offences.

XII. That the Judges of the Supreme Court shall continue in office for seven years: the Judges of the Inferior Court of Common Pleas in the several counties, Justices of the Peace, Clerks of the Supreme Court, Clerks of the Inferior Court of Common Pleas and Quarter Sessions, the Attorney-General, and Provincial Secretary, shall continue in office for five years: and the Provincial Treasurer shall continue in office for one year; and that they shall be severally appointed by the Council and Assembly, in manner aforesaid, and commissioned by the Governor, or, in his absence, the Vice-President of the Council. Provided always, that the said officers, severally, shall be capable of being re-appointed, at the end of the terms severally before limited; and that any of the said officers shall be liable to be dismissed, when adjudged guilty of misbehaviour, by the Council, on an impeachment of the Assembly.

XX. That the legislative department of this government may, as much as possible, be preserved from all suspicion of corruption, none of the Judges of the Supreme or other Courts, Sheriffs, or any other person or persons possessed of any post of profit under the government, other than Justices of the Peace, shall be entitled to a seat in the Assembly: but that, on his being elected, and taking his seat, his office or post shall be considered as vacant.

XXI. That all the laws of this Province, contained in the edition lately published by Mr. Allinson, shall be and remain in full force, until altered by the Legislature of this Colony (such only excepted, as are incompatible with this Charter) and shall be, according as heretofore, regarded in all respects, by all civil officers, and others, the good people of this Province.

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[1] This constitution was framed by a convention which assembled in accordance with the recommendation of the Continental Congress that the people of the colonies should form independent State governments, and which was in session, with closed doors, successively, at Burlington, Trenton, and New Brunswick, from May 26, 1776, until July 2, 1776, with intermissions. It was not submitted to the people, but its publication was ordered by the convention, July 3, 1776. [This constitution continued till 1844. — Ed.]

The legislature of New Jersey amended this constitution September 20, 1777, by substituting the words "State" and "States" for "colony" and "colonies."

XXII. That the common law of England, as well as so much of the statute law, as have been heretofore practised in this Colony, shall still remain in force, until they shall be altered by a future law of the Legislature; such parts only excepted, as are repugnant to the rights and privileges contained in this Charter; and that the inestimable right of trial by jury shall remain confirmed as a part of the law of this Colony, without repeal, forever.

Provided always, and it is the true intent and meaning of this Congress, that if a reconciliation between Great-Britain and these Colonies should take place, and the latter be taken again under the protection and government of the crown of Britain, this Charter shall be null and void — otherwise to remain firm and inviolable. — 2 *Poore's Constitutions*, 1311.

CONSTITUTION OF DELAWARE. 1776.[1]

The constitution, or system of government, agreed to and resolved upon by the representatives in full convention of the Delaware State, formerly styled "The government of the counties of New Castle, Kent, and Sussex, upon Delaware," the said representatives being chosen by the freemen of the said State for that express purpose.

ART. 12. The president and general assembly shall by joint ballot appoint three justices of the supreme court for the State, one of whom shall be chief justice, and a judge of admiralty, and also four justices of the courts of common pleas and orphans' courts for each county, one of whom in each court shall be styled "*chief justice*," (and in case of division on the ballot the president shall have an additional casting voice,) to be commissioned by the president under the great seal, who shall continue in office during good behavior; and during the time the justices of the said supreme court and courts of common pleas remain in office, they shall hold none other except in the militia. Any one of the justices of either of said courts shall have power, in case of the noncoming of his brethren, to open and adjourn the court. An adequate fixed but moderate salary shall be settled on them during their continuance in office. The president and privy council shall appoint the secretary, the attorney-general, registers for the probate of wills and granting letters of administration, registers in chancery, clerks of the courts of common pleas and orphans' courts, and clerks of the peace, who shall be commissioned as aforesaid, and remain in office during five years, if they behave themselves well; during which time the said registers in chancery and clerks shall not be justices of either of the said courts of which they are officers, but they shall have authority to sign all writs by them issued, and take recognizances of bail. The justices of the peace shall be nominated by the house of assembly; that is to say, they shall name twenty-four persons for each county, of whom the president, with the approbation of the privy council, shall appoint twelve, who shall be commissioned as aforesaid, and continue in office during seven years, if they behave themselves well; and in case of vacancies, or if the legislature shall think proper to increase the number, they shall be nominated and appointed in like manner. The members of the legislative and privy councils shall be justices of the peace for the whole State, during their continuance in trust; and the justices of the courts of common pleas shall be conservators of the peace in their respective counties.

ART. 17. There shall be an appeal from the supreme court of Delaware, in matters of law and equity, to a court of seven persons, to consist of the president for the time being, who shall preside therein, and six others, to be appointed, three by the legislative council, and three by the house of assembly, who shall continue in office during good behavior, and be commissioned by the president, under the great seal; which court shall be styled the "*court of appeals*," and have all the authority and powers heretofore given by law in the last resort to the King in council, under the old

[1] This constitution was framed by a convention which assembled at New Castle, August 27, 1776, in accordance with the recommendation of the Continental Congress that the people of the Colonies should form independent State governments. It was proclaimed September 21, 1776. [This constitution continued till 1792. — ED.]

government. The secretary shall be the clerk of this court; and vacancies therein occasioned by death or incapacity, shall be supplied by new elections, in manner aforesaid.

ART. 18. The justices of the supreme court and courts of common pleas, the members of the privy council, the secretary, the trustees of the loan office, and clerks of the court of common pleas, during their continuance in office, and all persons concerned in any army or navy contracts, shall be ineligible to either house of assembly; and any member of either house accepting of any other of the offices hereinbefore mentioned (excepting the office of a justice of the peace) shall have his seat thereby vacated, and a new election shall be ordered.

ART. 22. Every person who shall be chosen a member of either house, or appointed to any office or place of trust, before taking his seat, or entering upon the execution of his office, shall take the following oath, or affirmation, if conscientiously scrupulous of taking an oath, to wit:

"I, A B, will bear true allegiance to the Delaware State, submit to its constitution and laws, and do no act wittingly whereby the freedom thereof may be prejudiced."

And also make and subscribe the following declaration, to wit:

"I, A B, do profess faith in God the Father, and in Jesus Christ His only Son, and in the Holy Ghost, one God, blessed for evermore; and I do acknowledge the holy scriptures of the Old and New Testament to be given by divine inspiration."

And all officers shall also take an oath of office.

ART. 25. The common law of England, as well as so much of the statute law as has been heretofore adopted in practice in this State, shall remain in force, unless they shall be altered by a future law of the legislature; such parts only excepted as are repugnant to the rights and privileges contained in this constitution, and the declaration of rights, etc., agreed to by this convention.

ART. 30. No article of the declaration of rights and fundamental rules of this State, agreed to by this convention, nor the first, second, fifth, (except that part thereof that relates to the right of suffrage,) twenty-sixth, and twenty-ninth articles of this constitution, ought ever to be violated on any pretence whatever. No other part of this constitution shall be altered, changed, or diminished without the consent of five parts in seven of the assembly, and seven members of the legislative council. — 1 *Poore's Constitutions*, 273.

CONSTITUTION OF PENNSYLVANIA. 1776.[1]

A Declaration of the Rights of the Inhabitants of the State of Pennsylvania.

IV. That all power being originally inherent in, and consequently derived from, the people; therefore all officers of government, whether legislative or executive, are their trustees and servants, and at all times accountable to them.

VI. That those who are employed in the legislative and executive business of the State, may be restrained from oppression, the people have a right, at such periods as they may think proper, to reduce their public officers to a private station, and supply the vacancies by certain and regular elections.

XIV. That a frequent recurrence to fundamental principles, and a firm adherence to justice, moderation, temperance, industry, and frugality are absolutely necessary to preserve the blessings of liberty, and keep a government free: The people ought therefore to pay particular attention to these points in the choice of officers and representatives, and have a right to exact a due and constant regard to them, from their legislators and magistrates, in the making and executing such laws as are necessary for the good government of the state.

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[1] This constitution was framed by a convention (called in accordance with the expressed wish of the Continental Congress) which assembled at Philadelphia July 15, 1776, and completed its labors September 28, 1776. It was not submitted to the people for ratification. [This constitution continued till 1790. — ED.]

Plan or Frame of Government.

SECT. 2. The supreme legislative power shall be vested in a house of representatives of the freemen of the commonwealth or state of Pennsylvania.

SECT. 3. The supreme executive power shall be vested in a president and council.

SECT. 4. Courts of justice shall be established in the city of Philadelphia, and in every county of this state.

SECT. 15. To the end that laws before they are enacted may be more maturely considered, and the inconvenience of hasty determinations as much as possible prevented, all bills of public nature shall be printed for the consideration of the people, before they are read in general assembly the last time for debate and amendment; and, except on occasions of sudden necessity, shall not be passed into laws until the next session of assembly; and for the more perfect satisfaction of the public, the reasons and motives for making such laws shall be fully and clearly expressed in the preambles.[1]

SECT. 20. The president, and in his absence the vice-president, with the council, five of whom shall be a quorum, shall have power to appoint and commissionate judges, naval officers, judge of the admiralty, attorney general, and all other officers, civil and military, except such as are chosen by the general assembly or the people. . . . They shall sit as judges, to hear and determine on impeachments, taking to their assistance for advice only, the justices of the supreme court. And shall have power to grant pardons, and remit fines, in all cases whatsoever, except in cases of impeachment; and in cases of treason and murder, shall have power to grant reprieves, but not to pardon, until the end of the next sessions of assembly; but there shall be no remission or mitigation of punishments on impeachments, except by act of the legislature; they are also to take care that the laws be faithfully executed; they are to expedite the execution of such measures as may be resolved upon by the general assembly; and they may draw upon the treasury for such sums as shall be appropriated by the house. . . .

. SECT. 22. Every officer of state, whether judicial or executive, shall be liable to be impeached by the general assembly, either when in office, or after his resignation or removal for mal-administration: All impeachments shall be before the president or vice-president and council, who shall hear and determine the same.

SECT. 23. The judges of the supreme court of judicature shall have fixed salaries, be commissioned for seven years only, though capable of re-appointment at the end of that term, but removable for misbehaviour at any time by the general assembly; they shall not be allowed to sit as members in the continental congress, executive council, or general assembly, nor to hold any other office civil or military, nor to take or receive fees or perquisites of any kind.[2]

SECT. 24. The supreme court, and the several courts of common pleas of this commonwealth, shall, besides the powers usually exercised by such courts, have the powers of a court of chancery, so far as relates to the perpetuating testimony, obtaining evidence from places not within this state, and the care of the persons and estates of those who are *non compotes mentis*, and such other powers as may be found necessary by future general assemblies, not inconsistent with this constitution.

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[1] To the end that laws, before they are enacted, may be more maturely considered, and the inconveniency of hasty determination as much as possible prevented, all bills of public nature, shall be first laid before the Governor and Council, for their perusal and proposals of amendment, and shall be printed for the consideration of the people, before they are read in General Assembly, for the last time of debate and amendment; except temporary acts, which, after being laid before the Governor and Council, may (in case of sudden necessity) be passed into laws; and no other shall be passed into laws, until the next session of assembly. And for the more perfect satisfaction of the public, the reasons and motives for making such laws, shall be fully and clearly expressed and set forth in their preambles. — *Constitution of Vermont*, 1777, s. XIV. — ED.

[2] Omitted in Vermont Constitution. — ED.

SECT. 40. Every officer, whether judicial, executive or military, in authority under this commonwealth, shall take the following oath or affirmation of allegiance, and general oath of office before he enters on the execution of his office.

THE OATH OR AFFIRMATION OF ALLEGIANCE.

I ——— do swear (or affirm) that I will be true and faithful to the commonwealth of Pennsylvania: And that I will not directly or indirectly do any act or thing prejudicial or injurious to the constitution or government thereof, as established by the convention.

THE OATH OR AFFIRMATION OF OFFICE:

I ——— do swear (or affirm) that I will faithfully execute the office of ——— for the ——— of ——— and will do equal right and justice to all men, to the best of my judgment and abilities, according to law.

SECT. 46. The declaration of rights is hereby declared to be a part of the constitution of this commonwealth, and ought never to be violated on any pretence whatever.

SECT. 47. In order that the freedom of the commonwealth may be preserved inviolate forever, there shall be chosen by ballot by the freemen in each city and county respectively, on the second Tuesday in October, in the year one thousand seven hundred and eighty-three, and on the second Tuesday in October, in every seventh year thereafter, two persons in each city and county of this state, to be called the COUNCIL OF CENSORS; who shall meet together on the second Monday of November next ensuing their election; the majority of whom shall be a quorum in every case, except as to calling a convention, in which two-thirds of the whole number elected shall agree: And whose duty it shall be to enquire whether the constitution has been preserved inviolate in every part; and whether the legislative and executive branches of government have performed their duty as guardians of the people, or assumed to themselves, or exercised other or greater powers than they are intitled to by the constitution: They are also to enquire whether the public taxes have been justly laid and collected in all parts of this commonwealth, in what manner the public monies have been disposed of, and whether the laws have been duly executed. For these purposes they shall have power to send for persons, papers, and records; they shall have authority to pass public censures, to order impeachments, and to recommend to the legislature the repealing such laws as appear to them to have been enacted contrary to the principles of the constitution. These powers they shall continue to have, for and during the space of one year from the day of their election and no longer: The said council of censors shall also have power to call a convention, to meet within two years after their sitting, if there appear to them an absolute necessity of amending any article of the constitution which may be defective, explaining such as may be thought not clearly expressed, and of adding such as are necessary for the preservation of the rights and happiness of the people: But the articles to be amended, and the amendments proposed, and such articles as are proposed to be added or abolished, shall be promulgated at least six months before the day appointed for the election of such convention, for the previous consideration of the people, that they may have an opportunity of instructing their delegates on the subject.

Passed in Convention the 28th day of September, 1776, and signed by their order.

BENJ. FRANKLIN, *Prest.*[1]

2 *Poore's Constitutions*, 1540.

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[1] Vermont, through a convention, adopted a constitution which went into effect in July, 1777. It was amended and recast by the Council of Censors in 1786. This instrument of 1777 was almost exactly the same as the first constitution of Pennsylvania. It had the same provisions given above, excepting as mentioned in notes. In the Vermont Constitution of 1786, Chap. II. Art. IX., it was provided that "The representatives so chosen . . . shall also, in conjunction with the Council, annually, (or oftener if need be) elect Judges of the Supreme and several County and Probate

CONSTITUTION OF MARYLAND. 1776.[1]

A Declaration of Rights, and the Constitution and Form of Government, agreed to by the Delegates of Maryland, in free and full Convention assembled.

A Declaration of Rights, &c.

. . . We, the Delegates of Maryland, in free and full Convention assembled, taking into our most serious consideration the best means of establishing a good Constitution in this State, for the sure foundation and more permanent security thereof, declare,

I. That all government of right originates from the people, is founded in compact only, and instituted solely for the good of the whole.

IV. That all persons invested with the legislative or executive powers of government are the trustees of the public, and, as such, accountable for their conduct; wherefore, whenever the ends of government are perverted, and public liberty manifestly endangered, and all other means of redress are ineffectual, the people may, and of right ought, to reform the old or establish a new government. The doctrine of non-resistance, against arbitrary power and oppression, is absurd, slavish, and destructive of the good and happiness of mankind.

V. That the right in the people to participate in the Legislature, is the best security of liberty, and the foundation of all free government; for this purpose, elections ought to be free and frequent, and every man, having property in, a common interest with, and an attachment to the community, ought to have a right of suffrage.

VI. That the legislative, executive and judicial powers of government, ought to be forever separate and distinct from each other.

VII. That no power of suspending laws, or the execution of laws, unless by or derived from the Legislature, ought to be exercised or allowed.

XXX. That the independency and uprightness of Judges are essential to the impartial administration of justice, and a great security to the rights and liberties of the people; wherefore the Chancellor and Judges ought to hold commissions during good behaviour; and the said Chancellor and Judges shall be removed for misbehaviour, on conviction in a court of law, and may be removed by the Governor, upon the address of the General Assembly; *Provided*, That two-thirds of all the members of each House concur in such address. That salaries, liberal, but not profuse, ought to be secured to the Chancellor and the Judges, during the continuance of their commissions, in such manner, and at such times, as the Legislature shall hereafter direct, upon consideration of the circumstances of this State. No Chancellor or Judge ought to hold any other office, civil or military, or receive fees or perquisites of any kind.

XXXI. That a long continuance, in the first executive departments of power or trust, is dangerous to liberty; a rotation, therefore, in those departments, is one of the best securities of permanent freedom.

XXXV. That no other test or qualification ought to be required, on admission to any office of trust or profit, than such oath of support and fidelity to this State, and such oath of office, as shall be directed by this Convention, or the Legislature of this State, and a declaration of a belief in the Christian religion.

XLI. That the subsisting resolves of this and the several Conventions held for this Colony, ought to be in force as laws, unless altered by this Convention, or the Legislature of this State.

Courts, Sheriffs and Justices of the Peace: and also with the Council, may elect Major-Generals and Brigadier-Generals, from time to time, as often as there shall be occasion; and they shall have all other powers necessary for the Legislature of a free and sovereign State: but they shall have no power to add to, alter, abolish, or infringe, any part of this Constitution." — 2 *Poore's Constitutions*, 1870. — Ed.

[1] This constitution was framed by a convention which met at Annapolis August 14, 1776, and completed its labors November 11, 1776. It was not submitted to the people. [This constitution continued till 1851. — Ed.]

XLII. That this Declaration of Rights, or the Form of Government, to be established by this Convention, or any part or either of them, ought not to be altered, changed or abolished, by the Legislature of this State, but in such manner as this Convention shall prescribe and direct.

THE CONSTITUTION, OR FORM OF GOVERNMENT, &c.

I. THAT the Legislature consist of two distinct branches, a Senate and House of Delegates, which shall be styled, *The General Assembly of Maryland.*

XXV. That a person of wisdom, experience, and virtue, shall be chosen Governor, on the second Monday of November, seventeen hundred and seventy-seven, and on the second Monday in every year forever thereafter, by the joint ballot of both Houses. . . .

XL. That the Chancellor, all Judges, the Attorney-General, Clerks of the General Court, the Clerks of the County Courts, the Registers of the Land Office, and the Registers of Wills, shall hold their commissions during good behaviour, removable only for misbehaviour, on conviction in a Court of law.

XLVIII. That the Governor, for the time being, with the advice and consent of the Council, may appoint the Chancellor, and all Judges and Justices. . . .

LV. That every person, appointed to any office of profit or trust, shall, before he enters on the execution thereof, take the following oath; to wit: "I, A. B., do swear, that I do not hold myself bound in allegiance to the King of Great Britain, and that I will be faithful, and bear true allegiance to the State of Maryland;" and shall also subscribe a declaration of his belief in the Christian religion.

LVI. That there be a Court of Appeals, composed of persons of integrity and sound judgment in the law, whose judgment shall be final and conclusive, in all cases of appeal, from the General Court, Court of Chancery, and Court of Admiralty: that one person of integrity and sound judgment in the law, be appointed Chancellor: that three persons of integrity and sound judgment in the law, be appointed judges of the Court now called the Provincial Court; and that the same Court be hereafter called and known by the name of *The General Court;* which Court shall sit on the western and eastern shores, for transacting and determining the business of the respective shores, at such times and places as the future Legislature of this State shall direct and appoint.

LIX. That this Form of Government, and the Declaration of Rights, and no part thereof, shall be altered, changed, or abolished, unless a bill so to alter, change or abolish the same shall pass the General Assembly, and be published at least three months before a new election, and shall be confirmed by the General Assembly, after a new election of Delegates, in the first session after such new election; provided that nothing in this form of government, which relates to the eastern shore particularly, shall at any time hereafter be altered, unless for the alteration and confirmation thereof at least two-thirds of all the members of each branch of the General Assembly shall concur.

LX. That every bill passed by the General Assembly, when engrossed, shall be presented by the Speaker of the House of Delegates, in the Senate, to the Governor for the time being, who shall sign the same, and thereto affix the Great Seal, in the presence of the members of both Houses: every law shall be recorded in the General Court office of the western shore, and in due time printed, published, and certified under the Great Seal, to the several County Courts, in the same manner as hath been heretofore used in this State. — 1 *Poore's Constitutions,* 817.

CONSTITUTION OF NORTH CAROLINA. 1776.[1]

A Declaration of Rights, &c.

I. That all political power is vested in and derived from the people only.

IV. That the legislative, executive, and supreme judicial powers of government, ought to be forever separate and distinct from each other.

V. That all powers of suspending laws, or the execution of laws, by any authority, without consent of the Representatives of the people, is injurious to their rights, and ought not to be exercised.

XXI. That a frequent recurrence to fundamental principles is absolutely necessary, to preserve the blessings of liberty.

The Constitution, or Form of Government, &c.

I.[2] That the legislative authority shall be vested in two distinct branches, both dependent on the people, to wit, a *Senate* and *House of Commons*.

XI. That all bills shall be read three times in each House, before they pass into laws, and be signed by the Speakers of both Houses.

XIII.[3] That the General Assembly shall, by joint ballot of both houses, appoint Judges of the Supreme Courts of Law and Equity, Judges of Admiralty, and Attorney-General, who shall be commissioned by the Governor, and hold their offices during good-behaviour.

XV.[4] That the Senate and House of Commons, jointly at their first meeting after each annual election, shall by ballot elect a Governor for one year, who shall not be eligible to that office longer than three years, in six successive years. . . .

XVI. That the Senate and House of Commons, jointly, at their first meeting after each annual election, shall by ballot elect seven persons to be a Council of State for one year, who shall advise the Governor in the execution of his office; and that four members shall be a quorum; their advice and proceedings shall be entered in a journal, to be kept for that purpose only, and signed by the members present; to any part of which, any member present may enter his dissent. And such journal shall be laid before the General Assembly when called for by them.

XXI. That the Governor, Judges of the Supreme Court of Law and Equity, Judges of Admiralty, and Attorney-General, shall have adequate salaries during their continuance in office.

XXIII. That the Governor, and other officers, offending against the State, by violating any part of this Constitution, mal-administration, or corruption, may be prosecuted, on the impeachment of the General Assembly, or presentment of the Grand Jury of any court of supreme jurisdiction in this State.

XXIX. That no Judge of the Supreme Court of Law or Equity, or Judge of Admiralty, shall have a seat in the Senate, House of Commons, or Council of State.

XLIV. That the Declaration of Rights is hereby declared to be part of the Constitution of this State, and ought never to be violated, on any pretence whatsoever. — 2 *Poore's Constitutions*, 1409.

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[1] This constitution was framed by a "congress," "elected and chosen for that particular purpose," which assembled at Halifax November 12, 1776, and completed its labors December 18, 1776. It was not submitted to the people for ratification. [This constitution with amendments continued till 1861. — Ed.]

[2] See amendments.

[3] See amendments.

[4] See amendments.

CONSTITUTION OF GEORGIA. 1777.[1]

We, therefore, the representatives of the people, from whom all power originates, and for whose benefit all government is intended, by virtue of the power delegated to us, do ordain and declare, and it is hereby ordained and declared, that the following rules and regulations be adopted for the future government of this State:

ARTICLE I. The legislative, executive, and judiciary departments shall be separate and distinct, so that neither exercise the powers properly belonging to the other.

ART. II. The legislature of this State shall be composed of the representatives of the people, as is hereinafter pointed out; and the representatives shall be elected yearly, and every year, on the first Tuesday in December; and the representatives so elected shall meet the first Tuesday in January following, at Savannah, or any other place or places where the house of assembly for the time being shall direct.

On the first day of the meeting of the representatives so chosen, they shall proceed to the choice of a governor, who shall be styled "*honorable;*" and of an executive council, by ballot out of their own body, viz.: two from each county, except those counties which are not yet entitled to send ten members. One of each county shall always attend, where the governor resides, by monthly rotation, unless the members of each county agree for a longer or shorter period. This is not intended to exclude either member attending. The remaining number of representatives shall be called the house of assembly; and the majority of the members of the said house shall have power to proceed on business.

ART. VII. The house of assembly shall have power to make such laws and regulations as may be conducive to the good order and well-being of the State; provided such laws and regulations be not repugnant to the true intent and meaning of any rule or regulation contained in this constitution.

The house of assembly shall also have power to repeal all laws and ordinances they find injurious to the people; and the house shall choose its own speaker, appoint its own officers, settle its own rules of proceeding, and direct writs of election for supplying intermediate vacancies, and shall have power of adjournment to any time or times within the year.

ART. VIII. All laws and ordinances shall be three times read, and each reading shall be on different and separate days, except in cases of great necessity and danger; and all laws and ordinances shall be sent to the executive council after the second reading, for their perusal and advice.

ART. XIX. The governor shall, with the advice of the executive council, exercise the executive powers of government, according to the laws of this State and the constitution thereof, save only in the case of pardons and remission of fines, which he shall in no instance grant; but he may reprieve a criminal, or suspend a fine, until the meeting of the assembly, who may determine therein as they shall judge fit.

ART. XXXVI. There shall be established in each county a court, to be called a superior court, to be held twice in each year. . . .

ART. XL. All causes, of what nature soever, shall be tried in the supreme court, except as hereafter mentioned; which court shall consist of the chief-justice, and three or more of the justices residing in the county. In case of the absence of the chief-justice, the senior justice on the bench shall act as chief-justice, with the clerk of the county, attorney for the State, sheriff, coroner, constable, and the jurors; and in case of the absence of any of the aforementioned officers, the justices to appoint others in their room *pro tempore*. And if any plaintiff or defendant in civil causes shall be dissatisfied with the determination of the jury, then, and in that case, they shall be at

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[1] This constitution was framed by a convention which assembled at Savannah October 1, 1776, in accordance with the recommendation of the Continental Congress that the people of the Colonies should form independent State governments. It was unanimously agreed to February 5, 1777. [This constitution, with amendments, continued till 1789. — ED.]

liberty, within three days, to enter an appeal from that verdict, and demand a new trial by a special jury, to be nominated as follows, viz.: each party, plaintiff and defendant, shall choose six, six more names shall be taken indifferently out of a box provided for that purpose, the whole eighteen to be summoned, and their names to be put together into the box, and the first twelve that are drawn out, being present, shall be the special jury to try the cause, and from which there shall be no appeal.

ART. XLI. The jury shall be judges of law, as well as of fact, and shall not be allowed to bring in a special verdict; but if all or any of the jury have any doubts concerning points of law, they shall apply to the bench, who shall each of them in rotation give their opinion.

ART. XLII. The jury shall be sworn to bring in a verdict according to law, and the opinion they entertain of the evidence; provided it be not repugnant to the rules and regulations contained in this constitution.

ART. XLIII. The special jury shall be sworn to bring in a verdict according to law, and the opinion they entertain of the evidence; provided it be not repugnant to justice, equity, and conscience, and the rules and regulations contained in this constitution, of which they shall judge.

ART. XLIX. Every officer of the State shall be liable to be called to account by the house of assembly.

ART. LX. The principles of the *habeas-corpus* act shall be a part of this constitution.

ART. LXIII. No alteration shall be made in this constitution without petitions from a majority of the counties, and the petitions from each county to be signed by a majority of voters in each county within this State; at which time the assembly shall order a convention to be called for that purpose, specifying the alterations to be made, according to the petitions preferred to the assembly by the majority of the counties as aforesaid. — 1 *Poore's Constitutions*, 377.

CONSTITUTION OF NEW YORK. 1777.[1]

I. This convention, therefore, in the name and by the authority of the good people of this State, doth ordain, determine, and declare that no authority shall, on any pretence whatever, be exercised over the people or members of this State but such as shall be derived from and granted by them.

II. This convention doth further, in the name and by the authority of the good people of this State, ordain, determine, and declare that the supreme legislative power within this State shall be vested in two separate and distinct bodies of men; the one to be called the assembly of the State of New York, the other to be called the senate of the State of New York; who together shall form the legislature, and meet once at least in every year for the despatch of business.

III. And whereas laws inconsistent with the spirit of this constitution, or with the public good, may be hastily and unadvisedly passed: Be it ordained, that the governor for the time being, the chancellor, and the judges of the supreme court, or any two of them, together with the governor, shall be, and hereby are, constituted a council to revise all bills about to be passed into laws by the legislature; and for that purpose shall assemble themselves from time to time, when the legislature shall be convened; for which, nevertheless, they shall not receive any salary or consideration, under any pretence whatever. And that all bills which have passed the senate and assembly shall, before they become laws, be presented to the said council for their revisal and consideration; and if, upon such revision and consideration, it should appear improper

[1] This constitution was framed by a convention which assembled at White Plains, July 10, 1776, and, after repeated adjournments and changes of location, terminated its labors at Kingston, Sunday evening, April 20, 1777, when the constitution was adopted, with but one dissenting vote. It was not submitted to the people for ratification. [This constitution, with amendments, continued till 1821. — ED.]

to the said council, or a majority of them, that the said bill should become a law of this State, that they return the same, together with their objections thereto in writing, to the senate or house of assembly (in whichsoever the same shall have originated) who shall enter the objections sent down by the council at large in their minutes, and proceed to reconsider the said bill. But if, after such reconsideration, two-thirds of the said senate or house of assembly shall, notwithstanding the said objections, agree to pass the same, it shall, together with the objections, be sent to the other branch of the legislature, where it shall also be reconsidered, and, if approved by two-thirds of the members present, shall be a law.

And in order to prevent any unnecessary delays, be it further ordained, that if any bill shall not be returned by the council within ten days after it shall have been presented, the same shall be a law, unless the legislature shall, by their adjournment, render a return of the said bill within ten days impracticable; in which case the bill shall be returned on the first day of the meeting of the legislature after the expiration of the said ten days.[1]

XVII. And this convention doth further, in the name and by the authority of the good people of this State, ordain, determine, and declare that the supreme executive power and authority of this State shall be vested in a governor; and that statedly, once in every three years, and as often as the seat of government shall become vacant, a wise and discreet freeholder of this State shall be, by ballot, elected governor, by the freeholders of this State, qualified, as before described, to elect senators. . . .

XXIII. That all officers, other than those who, by this constitution, are directed to be otherwise appointed, shall be appointed in the manner following, to wit: The assembly shall, once in every year, openly nominate and appoint one of the senators from each great district, which senators shall form a council for the appointment of the said officers, of which the governor for the time being, or the lieutenant-governor, or the president of the senate, when they shall respectively administer the government, shall be president and have a casting voice, but no other vote; and with the advice and consent of the said council, shall appoint all the said officers; and that a majority of the said council be a quorum. And further, the said senators shall not be eligible to the said council for two years successively.

XXIV. . . . That the chancellor, the judges of the supreme court, and first judge of the county court in every county, hold their offices during good behavior or until they shall have respectively attained the age of sixty years.

XXXII. And this convention doth further, in the name and by the authority of the good people of this State, ordain, determine, and declare, that a court shall be instituted for the trial of impeachments, and the correction of errors, under the regulations which shall be established by the legislature; and to consist of the president of the senate, for the time being, and the senators, chancellor, and judges of the supreme court, or the major part of them; except that when an impeachment shall be prosecuted against the chancellor, or either of the judges of the supreme court, the person so impeached shall be suspended from exercising his office until his acquittal; and, in like manner, when an appeal from a decree in equity shall be heard, the chancellor shall inform the court of the reasons of his decree, but shall not have a voice in the final sentence. And if the cause to be determined shall be brought up by writ of error, on a question of law, on a judgment in the supreme court, the judges of that court shall assign the reasons of such their judgment, but shall not have a voice for its affirmance or reversal.

XXXV. . . . And this convention doth further ordain, that the resolves or resolutions of the congresses of the colony of New York, and of the convention of the State of New York, now in force, and not repugnant to the government established by

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[1] The whole number of bills passed by the legislature under this constitution was six thousand five hundred and ninety. The council of revision objected to one hundred and twenty-eight, of which seventeen were passed notwithstanding these objections. — *Hough.* [See Debates N. Y. Const. Conv. of 1821 for very interesting discussions as to the Council of Revision. — Ed.]

this constitution, shall be considered as making part of the laws of this State; subject, nevertheless, to such alterations and provisions as the legislature of this State may, from time to time, make concerning the same. — 2 *Poore's Constitutions*, 1328.

CONSTITUTION OF CONNECTICUT. 1776.[1]

An Act containing an Abstract and Declaration of the Rights and Privileges of the People of this State, and securing the same.

The People of this State, being by the Providence of God, free and independent, have the sole and exclusive Right of governing themselves as a free, sovereign, and independent State; and having from their Ancestors derived a free and excellent Constitution of Government whereby the Legislature depends on the free and annual Election of the People, they have the best Security for the Preservation of their civil and religious Rights and Liberties. And forasmuch as the free Fruition of such Liberties and Privileges as Humanity, Civility and Christianity call for, as is due to every Man in his Place and Proportion, without Impeachment and Infringement, hath ever been, and will be the Tranquility and Stability of Churches and Commonwealths; and the Denial thereof, the Disturbance, if not the Ruin of both.

Paragraph 1. *Be it enacted and declared by the Governor, and Council, and House of Representatives, in General Court assembled*, That the ancient Form of Civil Government, contained in the Charter from *Charles* the Second, King of *England*, and adopted by the People of this State, shall be and remain the Civil Constitution of this State, under the sole authority of the People thereof, independent of any King or Prince whatever. And that this Republic is, and shall forever be and remain, a free, sovereign and independent State, by the Name of the STATE OF CONNECTICUT.

2. *And be it further enacted and declared*, That no Man's Life shall be taken away: No Man's Honor or good Name shall be stained: No Man's Person shall be arrested, restrained, banished, dismembered, nor any Ways punished: No Man shall be deprived of his Wife or Children: No Man's Goods or Estate shall be taken away from him, nor any Ways indamaged under the Colour of Law, or Countenance of Authority; unless clearly warranted by the Laws of this State.

3. That all the free Inhabitants of this or any other of the United States of *America*, and Foreigners in Amity with this State, shall enjoy the same justice and Law within this State, which is general for the State, in all Cases proper for the Cognizance of the Civil Authority and Court of Judicature within the same, and that without Partiality or Delay.

4. And that no Man's Person shall be restrained, or imprisoned, by any authority whatsoever, before the Law hath sentenced him thereunto, if he can and will give sufficient Security, Bail, or Mainprize for his Appearance and good Behaviour in the mean Time, unless it be for Capital Crimes, Contempt in open Court, or in such Cases wherein some express Law doth allow of, or order the same.[2] — 1 *Poore's Constitutions*, 257.

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[1] This continued the charter of 1662 in force as the organic law of the State.

[2] The charter of Charles II. (1 Poore's Const. 252) made certain persons and "all such others as now are or hereafter shall be admitted and made free of the company and society of our Colony of Connecticut . . . a body corporate and politic, . . . to the end the affairs and business . . . concerning the same (colony) may be duly ordered and managed."

The company was to be directed by a Governor, Deputy-Governor, and twelve assistants, chosen out of the freemen of the company, "which said officers shall apply themselves to take care for the best disposing and ordering of the general business and affairs of and concerning the land and hereditaments hereinafter mentioned to be

RHODE ISLAND.

This State lived under the charter of Charles II. of 1663, until the year 1842, when a constitution was adopted of its own making. Several unsuccessful efforts to this end had previously been made. The charter was substantially like that of Connecticut.

PASSAGES FROM THE CONSTITUTION OF COLORADO. 1876.[1]

Preamble.

We, the people of Colorado, with profound reverence for the Supreme Ruler of the Universe, in order to form a more independent and perfect government, establish justice, insure tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this constitution for the State of Colorado.

Article I. Boundaries.

The boundaries of the State of Colorado shall be as follows: Commencing on the thirty-seventh parallel of north latitude, where the twenty-fifth meridian of longitude west from Washington crosses the same; thence north on said meridian to the forty-first parallel of north latitude; thence along said parallel west to the thirty-second meridian of longitude west from Washington; then south on said meridian to the thirty-seventh parallel of north latitude; thence along said thirty-seventh parallel of north latitude to the place of beginning.

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granted, and the plantation thereof, and the government of the people thereof." The Governor might call the company together at any time "to consult and advise of the business and affairs of the company." Twice a year, at least, there must be such a "general meeting," "assembly," or "court" of the freemen, or such as those of "the respective towns, cities, and places" should depute to act for them. These General Courts might admit other freemen or elect the Governor, Deputy-Governor, and assistants.

It was provided "that all, and every the subjects of us, our heirs, or successors, which shall go to inhabit within the said colony, and every of their children, which shall happen to be born there, or on the seas in going thither, or returning from thence, shall have and enjoy all liberties and immunities of free and natural subjects within any the dominions of us, our heirs, or successors, to all intents, constructions, and purposes whatsoever, as if they and every of them were born within the realm of England."

Power was given to the Governor, Deputy Governor, and assistants "to erect and make such judicatories, for the hearing, and determining of all actions, causes, matters, and things happening within the said colony, or plantation, and which shall be in dispute, and depending there, as they shall think fit, and convenient, and also from time to time to make, ordain, and establish all manner of wholesome, and reasonable laws, statutes, ordinances, directions, and instructions, not contrary to the laws of this realm of England, . . . ordaining and appointing, that all such laws, statutes and ordinances, instructions, impositions and directions as shall be so made by the Governor, Deputy-Governor, and assistants as aforesaid, and published in writing under their common seal, shall carefully and duly be observed, kept, performed, and put in execution, according to the true intent and meaning of the same, and these our letters patents, or the duplicate, or exemplification thereof, shall be to all and every such officers, superiors and inferiors from time to time, for the putting of the same orders, laws, statutes, ordinances, instructions, and directions in due execution, against us, our heirs and successors, a sufficient warrant and discharge."

Under this charter, adopted and supplemented in the brief enactment of 1776, the State of Connecticut lived until the year 1818. — Ed.

[1] See *ante*, 54. — Ed.

Article II. Bill of Rights.

Sec. 14. That private property shall not be taken for private use unless by consent of the owner, except for private ways of necessity, and except for reservoirs, drains, flumes, or ditches on or across the lands of others, for agricultural, mining, milling, domestic, or sanitary purposes.

Sec. 15. That private property shall not be taken or damaged, for public or private use, without just compensation. Such compensation shall be ascertained by a board of commissioners, of not less than three freeholders, or by a jury, when required by the owner of the property, in such manner as may be prescribed by law, and until the same shall be paid to the owner, or into court for the owner, the property shall not be needlessly disturbed, or the proprietary rights of the owner therein divested; and whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such without regard to any legislative assertion that the use is public.

Sec. 17. That no person shall be imprisoned for the purpose of securing his testimony in any case longer than may be necessary in order to take his deposition. If he can give security he shall be discharged; if he cannot give security, his deposition shall be taken by some judge of the Supreme, District, or County Court, at the earliest time he can attend, at some convenient place by him appointed for that purpose, of which time and place the accused and the attorney prosecuting for the people shall have reasonable notice. The accused shall have the right to appear in person and by counsel. If he have no counsel the judge shall assign him one in that behalf only. On the completion of such examination the witness shall be discharged on his own recognizance, entered in before said judge, but such deposition shall not be used if, in the opinion of the court, the personal attendance of the witness might be procured by the prosecution, or is procured by the accused. No exception shall be taken to such deposition as to matters of form.

Sec. 18. That no person shall be compelled to testify against himself in a criminal case, nor shall any person be twice put in jeopardy for the same offence. If the jury disagree, or if the judgment be arrested after verdict, or if the judgment be reversed for error in law, the accused shall not be deemed to have been in jeopardy.

Sec. 23. The right of trial by jury shall remain inviolate in criminal cases; but a jury in civil cases in all courts, or in criminal cases in courts not of record, may consist of less than twelve men, as may be prescribed by law. Hereafter a grand jury shall consist of twelve men, any nine of whom concurring may find an indictment: *Provided*, the General Assembly may change, regulate, or abolish the grand-jury system.

Article V. Legislative Department.

Sec. 6. Each member of the first General Assembly, as a compensation for his services, shall receive four dollars for each day's attendance, and fifteen cents for each mile necessarily travelled in going to and returning from the seat of government; and shall receive no other compensation, perquisite, or allowance whatsoever. No session of the General Assembly, after the first, shall exceed forty days. After the first session the compensation of the members of the General Assembly shall be as provided by law: *Provided*, That no General Assembly shall fix its own compensation.

Sec. 19. No Act of the General Assembly shall take effect until ninety days after its passage, unless in case of emergency (which shall be expressed in the preamble or body of the Act), the General Assembly shall, by a vote of two-thirds of all the members elected to each House, otherwise direct. No bill, except the general appropriation for the expenses of the government only, introduced in either House of the General Assembly after the first twenty-five days of the session shall become a law.

Sec. 20. No bill shall be considered or become a law unless referred to a committee, returned therefrom, and printed for the use of the members.

SEC. 21. No bill, except general appropriation bills, shall be passed containing more than one subject, which shall be clearly expressed in its title; but if any subject shall be embraced in any Act which shall not be expressed in the title, such Act shall be void only as to so much thereof as shall not be so expressed.

SEC. 22. Every bill shall be read at length, on three different days, in each House; all substantial amendments made thereto shall be printed for the use of the members, before the final vote is taken on the bill; and no bill shall become a law except by vote of a majority of all the members elected to each House, nor unless on its final passage the vote be taken by ayes and noes, and the names of those voting be entered on the journal.

SEC. 23. No amendment to any bill by one House shall be concurred in by the other, nor shall the report of any committee of conference be adopted in either House, except by a vote of a majority of the members elected thereto, taken by ayes and noes, and the names of those voting recorded upon the journal thereof.

SEC. 24. No law shall be revived, or amended, or the provisions thereof extended or conferred by reference to its title only, but so much thereof as is revived, amended, extended, or conferred shall be re-enacted and published at length.

SEC. 25. The General Assembly shall not pass local or special laws in any of the following enumerated cases, that is to say: For granting divorces; laying out, opening, altering, or working roads or highways; vacating roads, town-plats, streets, alleys, and public grounds; locating or changing county-seats; regulating county or township affairs; regulating the practice in courts of justice; regulating the jurisdiction and duties of justices of the peace, police magistrates, and constables; changing the rules of evidence in any trial or inquiry; providing for changes of venue in civil or criminal cases; declaring any person of age; for limitation of civil actions or giving effect to informal or invalid deeds; summoning or impanelling grand or petit juries; providing for the management of common schools; regulating the rate of interest on money; the opening or conducting of any election, or designating the place of voting; the sale or mortgage of real estate belonging to minors or others under disability; the protection of game or fish; chartering or licensing ferries or toll-bridges; remitting fines, penalties, or forfeitures; creating, increasing, or decreasing fees, percentage, or allowances of public officers; changing the law of descent; granting to any corporation, association, or individual the right to lay down railroad-tracks; granting to any corporation, association, or individual any special or exclusive privilege, immunity, or franchise whatever. In all other cases, where a general law can be made applicable, no special law shall be enacted.

SEC. 26. The presiding officer of each House shall, in the presence of the House over which he presides, sign all bills and joint resolutions passed by the General Assembly, after their titles shall have been publicly read, immediately before signing; and the fact of signing shall be entered on the journal.

SEC. 27. The General Assembly shall prescribe by law the number, duties, and compensation of the officers and employés of each House; and no payment shall be made from the State Treasury, or be in any way authorized to any person, except to an acting officer or employé elected or appointed in pursuance of law.

SEC. 28. No bill shall be passed giving any extra compensation to any public officer, servant or employé, agent or contractor, after services shall have been rendered or contract made, nor providing for the payment of any claim made against the State without previous authority of law.

SEC. 29. All stationery, printing, paper, and fuel used in the legislative and other departments of government, shall be furnished; and the printing and binding and distributing of the laws, journals, department reports, and other printing and binding; and the repairing and furnishing the halls and rooms used for the meeting of the General Assembly and its committees, shall be performed under contract, to be given to the lowest responsible bidder, below such maximum price and under such regulations as may be prescribed by law. No member or officer of any department of the government shall be in any way interested in any such contract; and all such contracts shall be subject to the approval of the Governor and State Treasurer.

SEC. 30. Except as otherwise provided in this Constitution, no law shall extend the term of any public officer, or increase or diminish his salary or emoluments after his election or appointment: *Provided*, This shall not be construed to forbid the General Assembly to fix the salary or emoluments of those first elected or appointed under this Constitution.

SEC. 31. All bills for raising revenue shall originate in the House of Representatives; but the Senate may propose amendments, as in case of other bills.

SEC. 32. The general appropriation bill shall embrace nothing but appropriations for the ordinary expenses of the executive, legislative, and judicial departments of the State, interest on the public debt, and for public schools. All other appropriations shall be made by separate bills, each embracing but one subject.

SEC. 33. No money shall be paid out of the treasury except upon appropriations made by law, and on warrant drawn by the proper officer in pursuance thereof.

SEC. 34. No appropriation shall be made for charitable, industrial, educational, or benevolent purposes to any person, corporation, or community not under the absolute control of the State, nor to any denominational or sectarian institution or association.

SEC. 35. The General Assembly shall not delegate to any special commission, private corporation, or association any power to make, supervise, or interfere with any municipal improvement, money, property, or effects, whether held in trust or otherwise, or to levy taxes, or to perform any municipal function whatever.

SEC. 36. No act of the General Assembly shall authorize the investment of trust-funds by executors, administrators, guardians, or other trustees, in the bonds or stock of any private corporation.

SEC. 38. No obligation or liability of any person, association, or corporation, held or owned by the State, or any municipal corporation therein, shall ever be exchanged, transferred, remitted, released, or postponed, or in any way diminished by the General Assembly, nor shall such liability or obligation be extinguished except by payment thereof into the proper treasury.

SEC. 39. Every order, resolution, or vote to which the concurrence of both Houses may be necessary, except on the question of adjournment, or relating solely to the transaction of business of the two Houses, shall be presented to the Governor, and before it shall take effect, be approved by him, or being disapproved, shall be repassed by two-thirds of both Houses, according to the rules and limitations prescribed in case of a bill.

SEC. 40. If any person elected to either House of the General Assembly shall offer or promise to give his vote or influence in favor of or against any measure or proposition, pending or proposed to be introduced into the General Assembly, in consideration or upon condition that any other person elected to the same General Assembly will give or will promise or assent to give his vote or influence in favor of or against any other measure or proposition, pending or proposed to be introduced in such General Assembly, the person making such offer or promise shall be deemed guilty of solicitation and bribery. If any member of the General Assembly shall give his vote or influence for or against any measure or proposition pending in such General Assembly, or offer, promise, or assent so to do, upon condition that any other member will give or will promise or assent to give his vote or influence in favor of or against any other measure or proposition pending or proposed to be introduced in such General Assembly, or in consideration that any other member hath given his vote or influence for or against any other measure or proposition in such General Assembly, he shall be deemed guilty of bribery; and any member of the General Assembly, or person elected thereto, who shall be guilty of either of such offences shall be expelled, and shall not be thereafter eligible to the same General Assembly; and, on the conviction thereof in the civil courts, shall be liable to such further penalty as may be prescribed by law.

SEC. 41. Any person who shall, directly or indirectly, offer, give, or promise any money or thing of value, testimonial, privilege, or personal advantage to any executive or judicial officer or member of the General Assembly to influence him in the performance of any of his public or official duties, shall be deemed guilty of bribery, and be punished in such manner as shall be provided by law.

SEC. 42. The offence of corrupt solicitation of members of the General Assembly, or of public officers of the State, or of any municipal division thereof, and any occupation or practice of solicitation of such members or officers to influence their official action, shall be defined by law, and shall be punished by fine and imprisonment.

SEC. 43. A member who has a personal or private interest in any measure or bill proposed or pending before the General Assembly, shall disclose the fact to the House of which he is a member, and shall not vote thereon.

ARTICLE VI. JUDICIAL DEPARTMENT. *Supreme Court.*

SEC. 6. The judges of the Supreme Court shall be elected by electors of the State at large, as hereinafter provided.

SEC. 7. The term of office of the judges of the Supreme Court, except as in this article otherwise provided, shall be nine years.

SEC. 8. The judges of the Supreme Court shall, immediately after the first election under this Constitution, be classified by lot, so that one shall hold his office for the term of three years, one for the term of six years, and one for the term of nine years. The lot shall be drawn by the judges, who shall for that purpose assemble at the seat of government, and they shall cause the result thereof to be certified to the Secretary of the Territory, and filed in his office. The judge having the shortest term to serve, not holding his office by appointment or election to fill a vacancy, shall be the chief-justice, and shall preside at all terms of the Supreme Court, and, in case of his absence, the judge having in like manner the next shortest term to serve shall preside in his stead.

District Courts. SEC. 18. The judges of the Supreme and District Courts shall each receive such salary as may be provided by law; and no such judge shall receive any other compensation, perquisite, or emolument for or on account of his office, in any form whatever, nor act as attorney or counsellor at law.

Miscellaneous. SEC. 27. The judges of Courts of Record, inferior to the Supreme Court, shall, on or before the first day in July in each year, report in writing to the judges of the Supreme Court such defects and omissions in the laws as their knowledge and experience may suggest, and the judges of the Supreme Court shall, on or before the first day of December of each year, report in writing to the Governor, to be by him transmitted to the General Assembly, together with his message, such defects and omissions in the Constitution and laws as they may find to exist, together with appropriate bills for curing the same.

ARTICLE VII. SUFFRAGE AND ELECTIONS.

SECTION 1. Every male person over the age of twenty-one years, possessing the following qualifications, shall be entitled to vote at all elections:

First. He shall be a citizen of the United States, or, not being a citizen of the United States, he shall have declared his intention, according to law, to become such citizen, not less than four months before he offers to vote.

Second. He shall have resided in the State six months immediately preceding the election at which he offers to vote, and in the county, city, town, ward, or precinct, such time as may be prescribed by law: *Provided*, That no person shall be denied the right to vote at any school-district election, nor to hold any school-district office, on account of sex.

SEC. 2. The General Assembly shall, at the first session thereof, and may at any subsequent session, enact laws to extend the right of suffrage to women of lawful age, and otherwise qualified according to the provisions of this article. No such enactment shall be of effect until submitted to the vote of the qualified electors at a general election, nor unless the same be approved by a majority of those voting thereon.

SEC. 3. The General Assembly may prescribe, by law, an educational qualification for electors, but no such law shall take effect prior to the year of our Lord one thousand eight hundred and ninety, and no qualified elector shall be thereby disqualified.

SEC. 4. For the purpose of voting and eligibility to office, no person shall be deemed to have gained a residence by reason of his presence, or lost it by reason of his absence, while in the civil or military service of the State, or of the United States, nor while a student at any institution of learning, nor while kept at public expense in any poor-house or other asylum, nor while confined in public prison.

SEC. 5. Voters shall in all cases, except treason, felony, or breach of the peace, be privileged from arrest during their attendance at elections, and in going to and returning therefrom.

SEC. 6. No person except a qualified elector shall be elected or appointed to any civil or military office in the State.

SEC. 9. In trials of contested elections, and for offences arising under the election-law, no person shall be permitted to withhold his testimony on the ground that it may criminate himself, or subject him to public infamy; but such testimony shall not be used against him in any judicial proceedings, except for perjury in giving such testimony.

SEC. 10. No person while confined in any public prison shall be entitled to vote; but every such person who was a qualified elector prior to such imprisonment, and who is released therefrom by virtue of a pardon, or by virtue of having served out his full term of imprisonment, shall, without further action, be invested with all the rights of citizenship, except as otherwise provided in this Constitution.

ARTICLE VIII. STATE INSTITUTIONS.

SEC. 2. The General Assembly shall have no power to change or to locate the seat of government of the State, but shall at its first session subsequent to the year of our Lord one thousand eight hundred and eighty, provide by law for submitting the question of the permanent location of the seat of government to the qualified electors of the State, at the general election then next ensuing, and a majority of all the votes upon said question, cast at said election, shall be necessary to determine the location thereof. Said General Assembly shall also provide that in case there shall be no choice of location at said election, the question of choice between the two places for which the highest number of votes shall have been cast, shall be submitted in like manner to the qualified electors of the State, at the next general election: *Provided*, That until the seat of government shall have been permanently located as herein provided, the temporary location thereof shall remain at the city of Denver.

SEC. 3. When the seat of government shall have been located as herein provided, the location thereof shall not thereafter be changed except by a vote of two-thirds of all the qualified electors of the State voting on that question, at a general election, at which the question of location of the seat of government shall have been submitted by the General Assembly.

SEC. 4. The General Assembly shall make no appropriation or expenditures for capitol buildings or grounds until the seat of government shall have been permanently located as herein provided.

SEC. 5. The following territorial institutions, to wit, The University at Boulder, the Agricultural College at Fort Collins, the School of Mines at Golden, the Institute for the Education of Mutes at Colorado Springs, shall, upon the adoption of this Constitution, become institutions of the State of Colorado, and the management thereof subject to the control of the State, under such laws and regulations as the General Assembly shall provide; and the location of said institutions, as well as all gifts, grants, and appropriations of money and property, real and personal, heretofore made to said several institutions, are hereby confirmed to the use and benefit of the same respectively *Provided*, This section shall not apply to any institution, the property, real or personal, of which is now vested in the trustees thereof, until such property be transferred by proper conveyance, together with the control thereof, to the officers provided for the management of said institution by this Constitution or by law.

ARTICLE IX. EDUCATION.

SEC. 2. The General Assembly shall, as soon as practicable, provide for the establishment and maintenance of a thorough and uniform system of free public schools throughout the State wherein all residents of the State between the ages of six and twenty-one years may be educated gratuitously. One or more public schools shall be maintained in each school-district within the State at least three months in each year; any school-district failing to have such school shall not be entitled to receive any portion of the school-fund for that year.

SEC. 7. Neither the General Assembly, nor any county, city, town, township, school-district, or other public corporation shall ever make any appropriation, or pay from any public fund or moneys whatever, anything in aid of any church or sectarian society, or for any sectarian purpose, or to help support or sustain any school, academy, seminary, college, university, or other literary or scientific institution controlled by any church or sectarian denomination whatsoever; nor shall any grant or donation of land, money, or other personal property ever be made by the State, or any such public corporation, to any church or for any sectarian purpose.

SEC. 8. No religious test or qualification shall ever be required of any person as a condition of admission into any public educational institution of the State, either as teacher or student; and no teacher or student of any such institution shall ever be required to attend or participate in any religious service whatever. No sectarian tenets or doctrines shall ever be taught in the public schools, nor shall any distinction or classification of pupils be made on account of race or color.

SEC. 10. It shall be the duty of the State Board of Land Commissioners to provide for the location, protection, sale, or other disposition of all the lands heretofore, or which may hereafter be, granted to the State by the General Government, under such regulations as may be prescribed by law, and in such manner as will secure the maximum possible amount therefor. No law shall ever be passed by the General Assembly granting any privileges to persons who may have settled upon any such public lands subsequent to the survey thereof by the General Government, by which the amount to be derived by the sale, or other disposition of such lands, shall be diminished, directly or indirectly. The General Assembly shall, at the earliest practicable period, provide by law that the several grants of land made by Congress to the State shall be judiciously located and carefully preserved and held in trust subject to disposal for the use and benefit of the respective objects for which said grants of land were made, and the General Assembly shall provide for the sale of said lands from time to time, and for the faithful application of the proceeds thereof in accordance with the terms of said grants.

ARTICLE X. REVENUE.

SEC. 3. All taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws, which shall prescribe such regulations as shall secure a just valuation for taxation of all property, real and personal: *Provided*, That mines and mining-claims, bearing gold, silver, and other precious metals (except the net proceeds and surface improvements thereof), shall be exempt from taxation for the period of ten years from the date of the adoption of this Constitution, and thereafter may be taxed as provided by law. Ditches, canals, and flumes owned and used by individuals or corporations for irrigating lands owned by such individuals or corporations, or the individual members thereof, shall not be separately taxed so long as they shall be owned and used exclusively for such purpose.

SEC. 5. Lots, with the buildings thereon, if said buildings are used solely and exclusively for religious worship, for schools, or for strictly charitable purposes, also cemeteries not used or held for private or corporate profit, shall be exempt from taxation, unless otherwise provided by general law.

SEC. 6. All laws exempting from taxation property other than that hereinbefore mentioned shall be void.

SEC. 7. The General Assembly shall not impose taxes for the purposes of any county, city, town, or other municipal corporation, but may, by law, vest in the corporate authorities thereof respectively the power to assess and collect taxes for all purposes of such corporation.

SEC. 8. No county, city, town, or other municipal corporation, the inhabitants thereof, nor the property therein, shall be released or discharged from their, or its, proportionate share of taxes to be levied for State purposes.

SEC. 9. The power to tax corporations and corporate property, real and personal, shall never be relinquished or suspended.

SEC. 10. All corporations in this State, or doing business therein, shall be subject to taxation for State, county, school, municipal, and other purposes, on the real and personal property owned or used by them within the territorial limits of the authority levying the tax.

SEC. 11. The rate of taxation on property, for State purposes, shall never exceed six mills on each dollar of valuation; and whenever the taxable property within the State shall amount to one hundred million dollars the rate shall not exceed four mills on each dollar of valuation; and whenever the taxable property within the State shall amount to three hundred million dollars the rate shall never thereafter exceed two mills on each dollar of valuation, unless a proposition to increase such rate, specifying the rate proposed, and the time during which the same shall be levied, be first submitted to a vote of such of the qualified electors of the State as in the year next preceding such election shall have paid a property-tax assessed to them within the State, and a majority of those voting thereon shall vote in favor thereof, in such manner as may be provided by law.

SEC. 12. The Treasurer shall keep a separate account of each fund in his hands, and shall, at the end of each quarter of the fiscal year, report to the Governor in writing, under oath, the amount of all moneys in his hands to the credit of every such fund, and the place where the same are kept or deposited, and the number and amount of every warrant received, and the number and amount of every warrant paid therefrom during the quarter. Swearing falsely to any such report shall be deemed perjury. The Governor shall cause every such report to be immediately published in at least one newspaper printed at the seat of government, and otherwise as the General Assembly may require. The General Assembly may provide by law further regulations for the safe-keeping and management of the public funds in the hands of the Treasurer; but notwithstanding any such regulation, the Treasurer and his sureties shall in all cases be held responsible therefor.

SEC. 13. The making of profit, directly or indirectly, out of State, county, city, town, or school-district money, or using the same for any purpose not authorized by law, by any public officer, shall be deemed a felony, and shall be punished as provided by law.

SEC. 14. Private property shall not be taken or sold for the payment of the corporate debt of municipal corporations.

SEC. 15. There shall be a State Board of Equalization, consisting of the Governor, State Auditor, State Treasurer, Secretary of State, and Attorney-General; also, in each county of this State, a County Board of Equalization, consisting of the Board of County Commissioners of said county. The duty of the State Board of Equalization shall be to adjust and equalize the valuation of real and personal property among the several counties of the State. The duty of the County Board of Equalization shall be to adjust and equalize the valuation of real and personal property within their respective counties. Each board shall also perform such other duties as may be prescribed by law.

SEC. 16. No appropriation shall be made, nor any expenditure authorized by the General Assembly, whereby the expenditure of the State, during any fiscal year, shall exceed the total tax then provided for by law and applicable for such appropriation or expenditure, unless the General Assembly making such appropriation shall provide for levying a sufficient tax, not exceeding the rates allowed in section eleven of this article, to pay such appropriation or expenditure within such fiscal year. This provision shall not apply to appropriations or expenditures to suppress insurrection, defend the State, or assist in defending the United States in time of war.

Article XI. Public Indebtedness.

Section I. Neither the State, nor any county, city, town, township, or school-district shall lend or pledge the credit or faith thereof, directly or indirectly, in any manner to, or in aid of, any person, company, or corporation, public or private, for any amount or for any purpose whatever, or become responsible for any debt, contract, or liability of any person, company, or corporation, public or private, in or out of the State.

Sec. 2. Neither the State, nor any county, city, town, township, or school-district shall make any donation or grant to, or in aid of, or become a subscriber to, or shareholder in, any corporation or company, or a joint owner with any person, company, or corporation, public or private, in or out of the State, except as to such ownership as may accrue to the State by escheat, or by forfeiture, by operation or provision of law; and except as to such ownership as may accrue to the State, or to any county, city, town, township, or school-district, or to either or any of them, jointly with any person, company, or corporation, by forfeiture or sale of real estate for non-payment of taxes, or by donation or devise for public use, or by purchase by or on behalf of any or either of them, jointly with any or either of them, under execution in cases of fine, penalties, or forfeiture of recognizance, breach of condition of official bond, or of bond to secure public moneys, or the performance of any contract in which they or any of them may be jointly or severally interested.

Sec. 3. The State shall not contract any debt by loan, in any form, except to provide for casual deficiencies of revenue, erect public buildings for use of the State, suppress insurrection, defend the State, or, in time of war, assist in defending the United States; and the amount of debt contracted in any one year to provide for deficiencies of the revenue shall not exceed one-fourth of a mill on each dollar of valuation of taxable property within the State, and the aggregate amount of such debt shall not at any time exceed three-fourths of a mill on each dollar of said valuation until the valuation shall equal one hundred millions of dollars, and thereafter such debt shall not exceed one hundred thousand dollars, and the debt incurred in any one year for erection of public buildings shall not exceed one-half mill on each dollar of said valuation, and the aggregate amount of such debt shall never at any time exceed the sum of fifty thousand dollars (except as provided in section five of this article); and in all cases the valuation in this section mentioned shall be that of the assessment last preceding the creation of said debt.

Sec. 4. In no case shall any debt above mentioned in this article be created, except by a law which shall be irrepealable, until the indebtedness therein provided for shall have been fully paid or discharged; such law shall specify the purposes to which the funds so raised shall be applied, and provide for the levy of a tax sufficient to pay the interest on, and extinguish the principal of, such debt within the time limited by such law for the payment thereof, which, in the case of debts contracted for the erection of public buildings and supplying deficiencies of revenue, shall not be less than ten nor more than fifteen years; and the funds arising from the collection of any such tax shall not be applied to any other purpose than that provided in the law levying the same; and when the debt thereby created shall be paid or discharged such tax shall cease, and the balance, if any, to the credit of the fund, shall immediately be placed to the credit of the general fund of the State.

Sec. 5. A debt for the purpose of erecting public buildings may be created by law, as provided for in section four of this article, not exceeding in the aggregate three mills on each dollar of said valuation: *Provided*, That before going into effect such law shall be ratified by the vote of a majority of such qualified electors of the State as shall vote thereon at a general election, under such regulations as the General Assembly may prescribe.

Sec. 6. No county shall contract any debt by loan in any form, except for the purpose of erecting necessary public buildings, making or repairing public roads and bridges; and such indebtedness contracted in any one year shall not exceed the rates upon the taxable property in such county following, to wit: counties in which the assessed valuation of taxable property shall exceed five millions of dollars, one

dollar and fifty cents on each thousand dollars thereof; counties in which such valuation shall be less than five millions of dollars, three dollars on each thousand dollars thereof; and the aggregate amount of indebtedness of any county, for all purposes, exclusive of debts contracted before the adoption of this Constitution, shall not at any time exceed twice the amount above herein limited, unless when, in manner provided by law, the question of incurring such debt shall, at a general election, be submitted to such of the qualified electors of such county as in the year last preceding such election shall have paid a tax upon property assessed to them in such county, and a majority of those voting thereon shall vote in favor of incurring the debt; but the bonds, if any be issued therefor, shall not run less than ten years; and the aggregate amount of debt so contracted shall not at any time exceed twice the rate upon the valuation last herein mentioned: *Provided*, That this section shall not apply to counties having a valuation of less than one million of dollars.

SEC. 7. No debt by loan in any form shall be contracted by any school-district for the purpose of erecting and furnishing school-buildings or purchasing grounds, unless the proposition to create such debt shall first be submitted to such qualified electors of the districts as shall have paid a school-tax therein in the year next preceding such election, and a majority of those voting thereon shall vote in favor of incurring such debt.

SEC. 8. No city or town shall contract any debt by loan in any form, except by means of an ordinance, which shall be irrepealable until the indebtedness therein provided for shall have been fully paid or discharged, specifying the purposes to which the funds to be raised shall be applied, and providing for the levy of a tax, not exceeding twelve mills on each dollar of valuation of taxable property within such city or town, sufficient to pay the annual interest and extinguish the principal of such debt within fifteen, but not less than ten, years from the creation thereof; and such tax, when collected, shall be applied only to the purposes in such ordinance specified until the indebtedness shall be paid or discharged; but no such debt shall be created unless the question of incurring the same shall, at a regular election for councilmen, aldermen, or officers of such city or town, be submitted to a vote of such qualified electors thereof as shall, in the year next preceding, have paid a property-tax therein, and a majority of those voting on the question, by ballot deposited in a separate ballot-box, shall vote in favor of creating such debt; but the aggregate amount of debt so created, together with the debt existing at the time of such election, shall not at any time exceed three per cent of the valuation last aforesaid. Debts contracted for supplying water to such city or town are excepted from the operation of this section. The valuation in this section mentioned shall be in all cases that of the assessment next preceding the last assessment before the adoption of such ordinance.

SEC. 9. Nothing contained in this article shall be so construed as to either impair or add to the obligation of any debt heretofore contracted by any county, city, town, or school-district in accordance with the laws of Colorado Territory, or prevent the contracting of any debt, or the issuing of bonds therefor, in accordance with said laws, upon any proposition for that purpose which may have been, according to said laws, submitted to a vote of the qualified electors of any county, city, town, or school-district before the day on which this Constitution takes effect.

ARTICLE XII. OFFICERS.

SECTION 1. Every person holding any civil office under the State or any municipality therein shall, unless removed according to law, exercise the duties of such office until his successor is duly qualified; but this shall not apply to members of the General Assembly, nor to members of any board or assembly two or more of whom are elected at the same time; the General Assembly may by law provide for suspending any officer in his functions pending impeachment or prosecution for misconduct in office.

SEC. 2. No person shall hold any office or employment of trust or profit, under the laws of the State or any ordinance of any municipality therein, without devoting his personal attention to the duties of the same.

SEC. 3. No person who is now or hereafter may become a collector or receiver of

public money, or the deputy or assistant of such collector or receiver, and who shall have become a defaulter in his office, shall be eligible to or assume the duties of any office of trust or profit in this State, under the laws thereof, or of any municipality therein, until he shall have accounted for and paid over all public money for which he may be accountable.

SEC. 4. No person hereafter convicted of embezzlement of public moneys, bribery, perjury, solicitation of bribery, or subornation of perjury, shall be eligible to the General Assembly, or capable of holding any office of trust or profit in this State.

SEC. 5. The District Court of each county shall, at each term thereof, specially give in charge to the grand jury, if there be one, the laws regulating the accountability of the County Treasurer, and shall appoint a committee of such grand jury, or of other reputable persons, not exceeding five, to investigate the official accounts and affairs of the treasurer of such county, and report to the court the condition thereof. The judge of the District Court may appoint a like committee in vacation at any time, but not oftener than once in every three months. The District Court of the county wherein the seat of government may be shall have the like power to appoint committees to investigate the official accounts and affairs of the State Treasurer and the Auditor of State.

SEC. 6. Any civil officer or member of the General Assembly who shall solicit, demand, or receive, or consent to receive, directly or indirectly, for himself or for another, from any company, corporation, or person, any money, office, appointment, employment, testimonial, reward, thing of value or enjoyment, or of personal advantage or promise thereof, for his vote, official influence, or action, or for withholding the same, or with an understanding that his official influence or action shall be in any way influenced thereby, or who shall solicit or demand any such money or advantage, matter, or thing aforesaid for another, as the consideration of his vote, official influence, or action, or for withholding the same, or shall give or withhold his vote, official influence, or action in consideration of the payment or promise of such money, advantage, matter, or thing to another, shall be held guilty of bribery, or solicitation of bribery, as the case may be, within the meaning of this Constitution, and shall incur the disabilities provided thereby for such offence, and such additional punishment as is or shall be prescribed by law.

ARTICLE XIV. COUNTIES.

SECTION 1. The several counties of the Territory of Colorado, as they now exist, are hereby declared to be counties of the State.

SEC. 2. The General Assembly shall have no power to remove the county-seat of any county, but the removal of county-seats shall be provided for by general law, and no county-seat shall be removed unless a majority of the qualified electors of the county, voting on the proposition at a general election, vote therefor; and no such proposition shall be submitted oftener than once in four years, and no person shall vote on such proposition who shall not have resided in the county six months and in the election-precinct ninety days next preceding such election.

SEC. 3. No part of the territory of any county shall be stricken off and added to an adjoining county without first submitting the question to the qualified voters of the county from which the territory is proposed to be stricken off; nor unless a majority of all the qualified voters of said county voting on the question shall vote therefor.

SEC 4. In all cases of the establishment of any new county, the new county shall be held to pay its ratable proportion of all then existing liabilities of the county or counties from which such new county shall be formed.

SEC. 5. When any part of a county is stricken off and attached to another county, the part stricken off shall be held to pay its ratable proportion of all then existing liabilities of the county from which it is taken.

COUNTY OFFICERS.

SEC. 11. There shall, at the first election at which county officers are chosen, and annually thereafter, be elected in each precinct one justice of the peace and one

constable, who shall each hold his office for the term of two years: *Provided*, That in precincts containing five thousand or more inhabitants, the number of justices and constables may be increased as provided by law.

SEC. 12. The General Assembly shall provide for the election or appointment of such other county, township, precinct, and municipal officers as public convenience may require; and their terms of office shall be as prescribed by law, not in any case to exceed two years.

SEC. 13. The General Assembly shall provide, by general laws, for the organization and classification of cities and towns. The number of such classes shall not exceed four, and the powers of each class shall be defined by general laws, so that all municipal corporations of the same class shall possess the same powers, and be subject to the same restrictions.

ARTICLE XV. CORPORATIONS.

SEC. 3. The General Assembly shall have the power to alter, revoke, or annul any charter of incorporation now existing and revocable at the adoption of this Constitution, or any that may hereafter be created, whenever in their opinion it may be injurious to the citizens of the State, in such manner, however, that no injustice shall be done to the corporators.

SEC. 4. All railroads shall be public highways, and all railroad companies shall be common carriers. Any association or corporation organized for the purpose shall have the right to construct and operate a railroad between any designated points within this State, and to connect at the State line with railroads of other States and Territories. Every railroad company shall have the right with its road to intersect, connect with, or cross any other railroad.

SEC. 5. No railroad corporation, or the lessees or managers thereof, shall consolidate its stock, property, or franchises with any other railroad corporation owning or having under its control a parallel or competing line.

SEC. 6. All individuals, associations, and corporations shall have equal rights to have persons and property transported over any railroad in this State, and no undue or unreasonable discrimination shall be made in charges or in facilities for transportation of freight or passengers within the State, and no railroad company, nor any lessee, manager, or employé thereof, shall give any preference to individuals, associations, or corporations in furnishing cars or motive-power.

SEC. 7. No railroad or other transportation company in existence at the time of the adoption of this Constitution shall have the benefit of any future legislation without first filing in the office of the Secretary of State an acceptance of the provisions of this Constitution in binding form.

SEC. 8. The right of eminent domain shall never be abridged, nor so construed as to prevent the General Assembly from taking the property and franchises of incorporated companies and subjecting them to public use, the same as the property of individuals; and the police powers of the State shall never be abridged, or so construed as to permit corporations to conduct their business in such manner as to infringe the equal rights of individuals or the general well-being of the State.

SEC. 9. No corporation shall issue stocks or bonds, except for labor done, services performed, or money or property actually received, and all fictitious increase of stock and indebtedness shall be void. The stock of corporations shall not be increased except in pursuance of general law, nor without the consent of the persons holding a majority of the stock, first obtained at a meeting held after at least thirty days' notice given in pursuance of law.

SEC. 10. No foreign corporation shall do any business in this State without having one or more known places of business, and an authorized agent or agents in the same upon whom process may be served.

SEC. 11. No street railroad shall be constructed within any city, town, or incorporated village without the consent of the local authorities having the control of the street or highway proposed to be occupied by such street-railroad.

SEC. 12. The General Assembly shall pass no law for the benefit of a railroad or other corporation, or any individual or association of individuals, retrospective in its

operation, or which imposes on the people of any county or municipal subdivision of the State a new liability in respect to transactions or considerations already past.

SEC. 13. Any association or corporation, or the lessees or managers thereof, organized for the purpose, or any individual, shall have the right to construct and maintain lines of telegraph within this State, and to connect the same with other lines; and the General Assembly shall, by general law of uniform operation, provide reasonable regulations to give full effect to this section. No telegraph company shall consolidate with, or hold a controlling interest in, the stock or bonds of any other telegraph company owning or having the control of a competing line, or acquire, by purchase or otherwise, any other competing line of telegraph.

SEC. 14. If any railroad, telegraph, express, or other corporation organized under any of the laws of this State shall consolidate, by sale or otherwise, with any railroad, telegraph, express, or other corporation organized under any laws of any other State or Territory, or of the United States, the same shall not thereby become a foreign corporation, but the courts of this State shall retain jurisdiction over that part of the corporate property within the limits of the State in all matters which may arise, as if said consolidation had not taken place.

SEC. 15. It shall be unlawful for any person, company, or corporation to require of its servants or employés, as a condition of their employment or otherwise, any contract or agreement whereby such person, company, or corporation shall be released or discharged from liability or responsibility on account of personal injuries received by such servants or employés while in the service of such person, company, or corporation by reason of the negligence of such person, company, or corporation, or the agents or employés thereof; and such contracts shall be absolutely null and void.

ARTICLE XVI. MINING AND IRRIGATION.

Mining.

SEC. 2. The General Assembly shall provide by law for the proper ventilation of mines, the construction of escapement shafts, and such other appliances as may be necessary to protect the health and secure the safety of the workmen therein, and shall prohibit the employment in the mines of children under twelve years of age.

SEC. 3. The General Assembly may make such regulations from time to time as may be necessary for the proper and equitable drainage of mines.

SEC. 4. The General Assembly may provide that the science of mining and metallurgy be taught in one or more of the institutions of learning under the patronage of the State.

Irrigation.

SEC. 5. The water of every natural stream not heretofore appropriated within the State of Colorado is hereby declared to be the property of the public; and the same is dedicated to the use of the people of the State, subject to appropriation as hereinafter provided.

SEC. 6. The right to divert the unappropriated waters of any natural stream to beneficial uses shall never be denied. Priority of appropriation shall give the better right as between those using the water for the same purpose; but when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall have the preference over those claiming for any other purpose, and those using the water for agricultural purposes shall have preference over those using the same for manufacturing purposes.

SEC. 7. All persons and corporations shall have the right of way across public, private, and corporate lands for the construction of ditches, canals, and flumes for the purpose of conveying water for domestic purposes, for the irrigation of agricultural lands, and for mining and manufacturing purposes, and for drainage, upon payment of just compensation.

SEC. 8. The General Assembly shall provide by law that the board of county commissioners, in their respective counties, shall have power, when application is made to them by either party interested, to establish reasonable maximum rates to be charged for the use of water, whether furnished by individuals or corporations.

ARTICLE XVII. MILITIA.

SEC. 4. The General Assembly shall provide for the safe-keeping of the public arms, military records, relics, and banners of the State.

SEC. 5. No person having conscientious scruples against bearing arms shall be compelled to do militia duty in time of peace: *Provided*, Such person shall pay an equivalent for such exemption.

ARTICLE XVIII. MISCELLANEOUS.

SECTION 1. The General Assembly shall pass liberal homestead and exemption laws.

SEC. 2. The General Assembly shall have no power to authorize lotteries or gift enterprises for any purpose, and shall pass laws to prohibit the sale of lottery or gift-enterprise tickets in this State.

SEC. 3. It shall be the duty of the General Assembly to pass such laws as may be necessary and proper to decide differences by arbitrators, to be appointed by mutual agreement of the parties to any controversy, who may choose that mode of adjustment. The powers and duties of such arbitrators shall be as prescribed by law.

SEC. 5. The General Assembly shall prohibit by law the importation into this State, for the purpose of sale, of any spurious, poisonous, or drugged spirituous liquors, or spirituous liquors adulterated with any poisonous or deleterious substance, mixture, or compound; and shall prohibit the compounding or manufacture within this State, except for chemical or mechanical purposes, of any of said liquors, whether they be denominated spirituous, vinous, malt, or otherwise; and shall also prohibit the sale of any such liquors to be used as a beverage; and any violation of either of said prohibitions shall be punished by fine and imprisonment. The General Assembly shall provide by law for the condemnation and destruction of all spurious, poisonous, or drugged liquors herein prohibited.

SEC. 6. The General Assembly shall enact laws in order to prevent the destruction of, and to keep in good preservation, the forests upon the lands of the State, or upon lands of the public domain, the control of which shall be conferred by Congress upon the State.

SEC. 7. The General Assembly may provide that the increase in the value of private lands, caused by the planting of hedges, orchards, and forests thereon, shall not, for a limited time, to be fixed by law, be taken into account in assessing such lands for taxation.

SEC. 8. The General Assembly shall provide for the publication of the laws passed at each session thereof; and, until the year 1900, they shall cause to be published in Spanish and German a sufficient number of copies of said laws to supply that portion of the inhabitants of the State who speak those languages, and who may be unable to read and understand the English language.

ARTICLE XIX. FUTURE AMENDMENTS.

SECTION 1. The General Assembly may, at any time, by a vote of two-thirds of the members elected to each House, recommend to the electors of the State to vote at the next general election for or against a convention to revise, alter, and amend this Constitution; and if a majority of those voting on the question shall declare in favor of such convention, the General Assembly shall, at its next session, provide for the calling thereof. The number of members of the convention shall be twice that of the Senate, and they shall be elected in the same manner, at the same places, and in the same districts. The General Assembly shall, in the act calling the convention, designate the day, hour, and place of its meeting; fix the pay of its members and officers, and provide for the payment of the same, together with the necessary expenses of the convention. Before proceeding the members shall take an oath to support the Constitution of the United States and of the State of Colorado, and to faithfully discharge their duties as members of the convention. The qualifications of members shall be the same as of members of the Senate, and vacancies occurring shall be filled in the

manner provided for filling vacancies in the General Assembly. Said convention shall meet within three months after such election, and prepare such revisions, alterations, or amendments to the Constitution as may be deemed necessary, which shall be submitted to electors for their ratification or rejection at an election appointed by the convention for that purpose, not less than two nor more than six months after the adjournment thereof; and unless so submitted and approved by a majority of the electors voting at the election, no such revision, alteration, or amendment shall take effect.

SEC. 2. Any amendment or amendments to this Constitution may be proposed in either House of the General Assembly, and if the same shall be voted for by two-thirds of all the members elected to each House, such proposed amendments, together with the ayes and noes of each House thereon, shall be entered in full on their respective journals; and the Secretary of State shall cause the said amendment or amendments to be published in full in at least one newspaper in each county, (if such there be,) for three months previous to the next general election for members to the General Assembly; and at said election the said amendment or amendments shall be submitted to the qualified electors of the State for their approval or rejection, and such as are approved by a majority of those voting thereon shall become part of this Constitution; but the General Assembly shall have no power to propose amendments to more than one article of this Constitution at the same session.

[The instrument closes with a long "Schedule," of the sort which was appended to the Pennsylvania Constitution of 1790, providing for certain details, "that no inconvenience may arise by reason of the change in the form of government."] — 2 *Poore's Constitutions*, 219.

PASSAGES FROM THE CONSTITUTION OF COLOMBIA.[1]

Title V. Art. 59. — The President and the ministers, and in each particular transaction the President with the ministers of the respective departments, shall constitute the government.

Title VII. Art. 81. — No legislative Act shall become a law unless:

I. It shall have passed three readings and been adopted in each House, on three different days, by a majority of the members thereof.

II. It shall have obtained the approval of the government.

Ib. Art. 83. — The government, by means of its ministers, may take part in legislative debates.

Ib. Art. 84. — The judges of the Supreme Court shall be entitled to be heard in the discussion of bills relating to civil matters and judicial procedure.

Ib. Art. 85. — After a bill shall have passed both Houses, it shall be sent to the government, and if approved by the government, it shall be promulgated as a law.

[The President may return a bill with objections.]

Ib. Art. 88. — The President of the Republic shall approve, without power to present new objections, any bill which shall have been reconsidered and adopted by two-thirds of the members in each House.

Ib. Art. 90 — If a bill should be objected to on the ground that it is unconstitutional, it shall be excepted from the provision of Article 88. In this case, if the House insist, the bill shall pass to the Supreme Court, in order that this body, within six days, may decide upon its constitutionality. If the decision of the court should be favorable to the bill, the President shall give it his approval. If the decision should be unfavorable, the bill shall fail and be removed from the calendar.

Title XV. Art. 151. — The Supreme Court shall exercise the following functions . . . IV. To decide finally, upon the constitutionality of legislative Acts, which may have been objected to by the government as unconstitutional.

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[1] From the Supplement (January, 1893) to the Annals of the American Academy of Political and Social Science, in Philadelphia. Translated by Professor Bernard Moses. — ED.

PART II.

CHAPTER IV.

CITIZENSHIP. — FUNDAMENTAL CIVIL AND POLITICAL RIGHTS. — THE LATER AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

BARRON *v.* MAYOR, ETC. OF BALTIMORE.

SUPREME COURT OF THE UNITED STATES. 1833.

[7 *Pet.* 243; 10 *Curtis's Decisions*, 464.]

ERROR to the Court of Appeals of the western shore of the State of Maryland.

Case by the plaintiff in error against the city of Baltimore, to recover damages for injuries to the wharf-property of the plaintiff, arising from the acts of the corporation.

The city, in the asserted exercise of its corporate authority over the harbor, the paving of streets, and regulating grades for paving, and over the health of Baltimore, diverted from their accustomed and natural course, certain streams of water, which flow from the range of hills bordering the city, and diverted them, so that they made deposits of sand and gravel near the plaintiff's wharf, and thereby rendered the water shallow, and prevented the access of vessels. The decision of Baltimore County Court was against the defendants, and a verdict for $4,500 was rendered for the plaintiff. The Court of Appeals reversed the judgment of Baltimore County Court, and did not remand the case to that court for a further trial. From this judgment the defendant in the Court of Appeals prosecuted a writ of error to this court.

Mayer, for the plaintiffs.

Taney and *Scott*, *contra*, were stopped by the court.

MARSHALL, C. J., delivered the opinion of the court.

The judgment brought up by this writ of error having been rendered by the court of a State, this tribunal can exercise no jurisdiction over it, unless it be shown to come within the provisions of the 25th section of the Judicial Act. 1 Stats. at Large, 85.

The plaintiff in error contends that it comes within that clause in the

fifth amendment to the Constitution, which inhibits the taking of private property for public use, without just compensation. He insists that this amendment, being in favor of the liberty of the citizen, ought to be so construed as to restrain the legislative power of a State, as well as that of the United States. If this proposition be untrue, the court can take no jurisdiction of the cause.

The question thus presented is, we think, of great importance, but not of much difficulty.

The Constitution was ordained and established by the people of the United States for themselves, for their own government, and not for the government of the individual States. Each State established a Constitution for itself, and, in that Constitution, provided such limitations and restrictions on the powers of its particular government as its judgment dictated. The people of the United States framed such a government for the United States as they supposed best adapted to their situation, and best calculated to promote their interests. The powers they conferred on this government were to be exercised by itself; and the limitations on power, if expressed in general terms, are naturally, and, we think, necessarily applicable to the government created by the instrument. They are limitations of power granted in the instrument itself; not of distinct governments, framed by different persons and for different purposes.

If these propositions be correct, the fifth amendment must be understood as restraining the power of the general government, not as applicable to the States. In their several constitutions they have imposed such restrictions on their respective governments as their own wisdom suggested; such as they deemed most proper for themselves. It is a subject on which they judge exclusively, and with which others interfere no further than they are supposed to have a common interest.

The counsel for the plaintiff in error insists that the Constitution was intended to secure the people of the several States against the undue exercise of power by their respective State governments; as well as against that which might be attempted by their general government. In support of this argument he relies on the inhibitions contained in the 10th section of the 1st article.

We think that section affords a strong if not a conclusive argument in support of the opinion already indicated by the court.

The preceding section contains restrictions which are obviously intended for the exclusive purpose of restraining the exercise of power by the departments of the general government. Some of them use language applicable only to Congress; others are expressed in general terms. The third clause, for example, declares that "no bill of attainder or *ex post facto* law shall be passed." No language can be more general; yet the demonstration is complete that it applies solely to the government of the United States. In addition to the general arguments furnished by the instrument itself, some of which have been already suggested, the succeeding section, the avowed purpose of which is to

restrain State legislation, contains in terms the very prohibition. It declares that "no State shall pass any bill of attainder or *ex post facto* law." This provision, then, of the 9th section, however comprehensive its language, contains no restriction on State legislation.

The 9th section having enumerated, in the nature of a bill of rights, the limitations intended to be imposed on the powers of the general government, the 10th proceeds to enumerate those which were to operate on the State legislatures. These restrictions are brought together in the same section, and are by express words applied to the States. "No State shall enter into any treaty," &c. Perceiving that in a constitution framed by the people of the United States for the government of all, no limitation of the action of government on the people would apply to the State government, unless expressed in terms; the restrictions contained in the 10th section are in direct words so applied to the States.

It is worthy of remark, too, that these inhibitions generally restrain State legislation on subjects intrusted to the general government, or in which the people of all the States feel an interest.

A State is forbidden to enter into any treaty, alliance, or confederation. If these compacts are with foreign nations, they interfere with the treaty-making power, which is conferred entirely on the general government; if with each other, for political purposes, they can scarcely fail to interfere with the general purpose and intent of the Constitution. To grant letters of marque and reprisal, would lead directly to war; the power of declaring which is expressly given to Congress. To coin money is also the exercise of a power conferred on Congress. It would be tedious to recapitulate the several limitations on the powers of the States which are contained in this section. They will be found, generally, to restrain State legislation on subjects intrusted to the government of the Union, in which the citizens of all the States are interested. In these alone were the whole people concerned. The question of their application to States is not left to construction. It is averred in positive words.

If the original Constitution, in the 9th and 10th sections of the 1st article, draws this plain and marked line of discrimination between the limitations it imposes on the powers of the general government, and on those of the States; if in every inhibition intended to act on State power, words are employed which directly express that intent, — some strong reason must be assigned for departing from this safe and judicious course in framing the amendments, before that departure can be assumed.

We search in vain for that reason.

Had the people of the several States, or any of them, required changes in their constitutions; had they required additional safeguards to liberty from the apprehended encroachments of their particular governments; the remedy was in their own hands, and would have been applied by themselves. A convention would have been assembled by

the discontented State, and the required improvements would have been made by itself. The unwieldy and cumbrous machinery of procuring a recommendation from two thirds of Congress, and the assent of three fourths of their sister States, could never have occurred to any human being as a mode of doing that which might be effected by the State itself. Had the framers of these amendments intended them to be limitations on the powers of the State governments, they would have imitated the framers of the original Constitution, and have expressed that intention. Had Congress engaged in the extraordinary occupation of improving the constitutions of the several States by affording the people additional protection from the exercise of power by their own governments in matters which concerned themselves alone, they would have declared this purpose in plain and intelligible language.

But it is universally understood, it is a part of the history of the day, that the great revolution which established the Constitution of the United States was not effected without immense opposition. Serious fears were extensively entertained that those powers which the patriot statesmen, who then watched over the interests of our country, deemed essential to union, and to the attainment of those invaluable objects for which union was sought, might be exercised in a manner dangerous to liberty. In almost every convention by which the Constitution was adopted, amendments to guard against the abuse of power were recommended. These amendments demanded security against the apprehended encroachments of the general government, not against those of the local governments.

In compliance with a sentiment thus generally expressed to quiet fears thus extensively entertained, amendments were proposed by the required majority in Congress, and adopted by the States. These amendments contain no expression indicating an intention to apply them to the State governments. This court cannot so apply them.

We are of opinion that the provision in the fifth amendment to the Constitution, declaring that private property shall not be taken for public use without just compensation, is intended solely as a limitation on the exercise of power by the government of the United States, and is not applicable to the legislation of the States. We are therefore of opinion, that there is no repugnancy between the several Acts of the General Assembly of Maryland, given in evidence by the defendants at the trial of this cause, in the court of that State, and the Constitution of the United States. This court, therefore, has no jurisdiction of the cause; and it is dismissed.

CORFIELD *v.* CORYELL

CIRCUIT COURT OF THE UNITED STATES FOR PENNSYLVANIA. 1825.

[4 *Wash. C. C.* 371.]

THIS was an action of trespass for seizing, taking, and carrying away, and converting to the defendant's use, a certain vessel, the property of the plaintiff, called the "Hiram." Plea not guilty, with leave to justify. The case, as proved at the trial, was as follows: . . . [Here it is stated that the plaintiff was owner of the "Hiram," a vessel licensed as a coaster, which, being let to one Keene, proceeded from Philadelphia in May, 1821, to certain oyster beds in the waters of New Jersey, and was there seized while dredging for oysters; and was condemned and sold by judicial proceedings under the laws of New Jersey. The defendant acted as "prize master" in the seizure.]

WASHINGTON, J., after stating to the jury the great importance of many of the questions involved in this cause, recommended to them to find for the plaintiff, and assess the damages; subject to the opinion of the court upon the law argument of the facts in the cause.

Verdict for $560, subject, &c.

This case was argued, on the points of law agreed by the counsel to arise on the facts, at the October term, 1824, and was taken under advisement until April term, 1825, when the following opinion was delivered:

WASHINGTON, J., delivered the opinion of the court. The points reserved present, for the consideration of the court, many interesting and difficult questions, which will be examined in the shape of objections made by the plaintiff's counsel to the seizure of the "Hiram," and the proceedings of the magistrates of Cumberland County, upon whose sentence the defendant rests his justification of the alleged trespass. These objections are, —

First. That the Act of the Legislature of New Jersey of the 9th of June, 1820, under which this vessel, found engaged in taking oysters in Morris River Cove by means of dredges, was seized, condemned, and sold, is repugnant to the Constitution of the United States in the following particulars:

1. To the eighth section of the first article, which grants to Congress the power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes.

2. To the second section of the fourth article, which declares, that the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.

3. To the second section of the third article, which declares, that the judicial power of the United States should extend to all cases of admiralty and maritime jurisdiction.

In case the Act should be considered as not being exposed to these constitutional objections, it is then insisted,

Secondly. That the *locus in quo* was not within the territorial limits of New Jersey. But if it was, then

Thirdly. It was not within the jurisdiction of the magistrates of Cumberland County.

Fourthly. We have to consider the objection made by the defendant's counsel to the form of this action.

The first section of the Act of New Jersey declares, that, from and after the 1st of May, till the 1st of September in every year, no person shall rake on any oyster bed in this State, or gather any oysters on any banks or beds within the same, under a penalty of $10.

Second section. No person residing in, or out of this State, shall, at any time, dredge for oysters in any of the rivers, bays, or waters of the State, under the penalty of $50.

The third section prescribes the manner of proceeding, in cases of violations of the preceding sections.

The two next sections have nothing to do with the present case.

The sixth section enacts, that it shall not be lawful for any person, who is not, at the time, an actual inhabitant and resident of this State, to gather oysters in any of the rivers, bays, or waters in this State, on board of any vessel, not wholly owned by some person, inhabitant of, or actually residing in this State; and every person so offending, shall forfeit $10, and shall also forfeit the vessel employed in the commission of such offence, with all the oysters, rakes, &c., belonging to the same.

The seventh section provides, that it shall be lawful for any person to seize and secure such vessel, and to give information to two justices of the county where such seizure shall be made, who are required to meet for the trial of the said case, and to determine the same; and in case of condemnation, to order the said vessel, &c. to be sold.

The first question then is, whether this Act, or either section of it, is repugnant to the power granted to Congress to regulate commerce? . . .

2. The next question is, whether this Act infringes that section of the Constitution which declares that "the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States"?

The inquiry is, what are the privileges and immunities of citizens in the several States? We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several States which compose this Union, from the time of their becoming free, independent, and sovereign. What these fundamental principles are, it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every

kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole. The right of a citizen of one State to pass through, or to reside in any other State, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of *habeas corpus;* to institute and maintain actions of any kind in the courts of the State; to take, hold and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the State; may be mentioned as some of the particular privileges and immunities of citizens, which are clearly embraced by the general description of privileges deemed to be fundamental; to which may be added, the elective franchise, as regulated and established by the laws or constitution of the State in which it is to be exercised. These, and many others which might be mentioned, are, strictly speaking, privileges and immunities, and the enjoyment of them by the citizens of each State, in every other State, was manifestly calculated (to use the expressions of the preamble of the corresponding provision in the old Articles of Confederation) "the better to secure and perpetuate mutual friendship and intercourse among the people of the different States of the Union."

But we cannot accede to the proposition which was insisted on by the counsel, that, under this provision of the Constitution, the citizens of the several States are permitted to participate in all the rights which belong exclusively to the citizens of any other particular State, merely upon the ground that they are enjoyed by those citizens; much less, that in regulating the use of the common property of the citizens of such State, the legislature is bound to extend to the citizens of all the other States the same advantages as are secured to their own citizens.

A several fishery, either as the right to it respects running fish, or such as are stationary, such as oysters, clams, and the like, is as much the property of the individual to whom it belongs, as dry land, or land covered by water; and is equally protected by the laws of the State against the aggressions of others, whether citizens or strangers. Where those private rights do not exist to the exclusion of the common right, that of fishing belongs to all the citizens or subjects of the State. It is the property of all; to be enjoyed by them in subordination to the laws which regulate its use. They may be considered as tenants in common of this property; and they are so exclusively entitled to the use of it, that it cannot be enjoyed by others without the tacit consent, or the express permission of the sovereign who has the power to regulate its use.

This power in the Legislature of New Jersey to exclude the citizens of the other States from a participation in the right of taking oysters within the waters of that State, was denied by the plaintiff's counsel, upon principles of public law, independent of the provision of the Constitution which we are considering, upon the ground that they are incapable of being appropriated until they are caught. This argu-

ment is unsupported, we think, by authority. Rutherfoth, b. 1, ch. 5, sect. 4 and 5, who quotes Grotius as his authority, lays it down, that, although wild beasts, birds, and fishes, which have not been caught, have never in fact been appropriated, so as to separate them from the common stock to which all men are equally entitled, yet where the exclusive right in the water and soil which a person has occasion to use in taking them is vested in others, no other person can claim the liberty of hunting, fishing, or fowling, on lands, or waters, which are so appropriated. "The sovereign," says Grotius, b. 2, ch. 2, sect. 5, "who has dominion over the land, or waters, in which the fish are, may prohibit foreigners [by which expression we understand him to mean others than subjects or citizens of the State] from taking them."

That this exclusive right of taking oysters in the waters of New Jersey has never been ceded by that State, in express terms, to the United States, is admitted by the counsel for the plaintiff; and having shown, as we think we have, that this right is a right of property, vested either in certain individuals, or in the State, for the use of the citizens thereof; it would, in our opinion, be going quite too far to construe the grant of privileges and immunities of citizens, as amounting to a grant of a co-tenancy in the common property of the State, to the citizens of all the other States. Such a construction would, in many instances, be productive of the most serious public inconvenience and injury, particularly, in regard to those kinds of fish, which, by being exposed to too general use, may be exhausted. The oyster beds belonging to a State may be abundantly sufficient for the use of the citizens of that State, but might be totally exhausted and destroyed if the legislature could not so regulate the use of them as to exclude the citizens of the other States from taking them, except under such limitations and restrictions as the laws may prescribe.[1] . . .

Fourthly. . . . The objections to this form of action are fatal. . . . The "Hiram" then, having been lawfully in possession of Keene, under a contract of hiring for a month, which had not expired at the time the alleged trespass was committed, the action cannot be supported.

Let judgment be entered for the defendant.

Charles J. Ingersoll and *J. R. Ingersoll*, for plaintiffs.

M'Ilvaine and *Condy*, for defendants.

[1] And so *McCready* v. *Va.*, 94 U. S. 391. See also *Conner* v. *Elliott*, 18 How. 591; *Paul* v. *Va.*, 8 Wall. 168; *Ward* v. *Md.*, 12 Wall. 418; *Slaughter House Cases*, 16 Wall. 36; *Lemmon* v. *People*, 20 N. Y. 502, 607. — Ed.

ROBY *v.* SMITH ET AL.

SUPREME COURT OF INDIANA. 1891.

[131 *Ind.* 342.]

FROM the Steuben Circuit Court. *D. R. Best*, *E. A. Bratton*, and *W. F. Elliott* for appellant. *J. A. Woodhull* and *W. A. Brown* for appellees.

MILLER, J. This action was brought by the appellant, Frank S. Roby, trustee, to foreclose a mortgage on real estate situate in Steuben County, in this State. . . . Demurrers filed by each of the defendants were sustained to the complaint, and final judgment rendered on demurrer for the defendants.

The ruling upon the demurrer is the only question in the record. The correctness of this ruling depends upon the validity and construction to be given to section 2988, R. S. 1881, in force since May 3, 1879, which is as follows: "It shall be unlawful for any person, association, or corporation to nominate or appoint any person a trustee in any deed, mortgage, or other instrument in writing (except wills), for any purpose whatever, who shall not be at the time a *bona fide* resident of the State of Indiana; and it shall be unlawful for any person who is not a *bona fide* resident of the State to act as such trustee. And if any person, after his appointment as such trustee, shall remove from the State, then his rights, powers, and duties as such trustee shall cease, and the proper court shall appoint his successor, pursuant to the provisions of the Act to which this is supplemental." The constitutionality of this Act is vigorously assailed by counsel for the appellant. It is claimed that this Act limits the constitutional rights of citizens of this State to select and appoint their own agents in the control and management of their own property, which is one of the inherent and inalienable rights of a citizen. The facts of this case do not require us to enter into a discussion of this question. The contract was entered into in the State of Michigan, by and between citizens of that State, to secure an indebtedness expressly payable in that State. It was to all intents and purposes a Michigan contract, except that, the land being situate within this State, the mortgage, which is a qualified conveyance of real estate, is subject to the law of the State, so far as it affects the validity and enforcement of the lien. 1 Jones, Mortg. § 662. The rights of the citizens of this State to appoint non-resident trustees are not involved in this case.

Another question involved in the consideration of the constitutionality of the Act under consideration may be excluded from the present discussion: that is, the right of a non-resident trustee to prosecute in the courts of this State actions affecting the trust property. We infer from the last clause of the section that it was the purpose of the legislature in enacting this statute to compel trustees to reside within the State in order to bring them within the process and subject to the control of the

State courts. In the present action the suit was brought by a resident trustee, who owed his appointment to the order of the court, and not to the act of the parties.

We have remaining for determination the question, does or does not this Act, as applied to the facts disclosed in the record, impair the privileges and immunities of citizens of another State, or of the United States, as guaranteed in article 4, § 2, and the Fourteenth Amendment of the Constitution of the United States? The constitutionality of this Act has never been passed upon by this court, although the question seems more than once to have been in the mind of the court. In holding that this Act did not apply to trustees appointed prior to the passage of the Act, the court in *Thompson* v. *Edwards*, 85 Ind. 414, said: "Waiving all discussions as to the power of the legislature to enact such a statute as applicable to trustees to be thereafter appointed, it is manifest," etc. In *Bryant* v. *Richardson*, 126 Ind. 145–153, it is said that it "may well be doubted" if that portion of this statute which applies to natural persons, and seeks to prohibit them from naming a person who is a non-resident of the State to act as a trustee for them, is valid. In *Farmers' Loan & Trust Co.* v. *Chicago & A. Ry. Co.*, 27 Fed. Rep. 146, GRESHAM, J., said of this statute: "It is a statute which denies to residents of other States the right to take and hold in trust, otherwise than by last will and testament, real and personal property in Indiana. The right is asserted to deny to persons, associations, or corporations, within or without the State, power to convey to any person in trust, not a resident of Indiana, real or personal property within the State. This is a plain discrimination against the residents of other States. If Indiana may disqualify a resident of another State from acting as trustee in a trust deed or mortgage which conveys real or personal property as security for a debt due to himself alone, or for debts due himself and other creditors, it would seem that the State might prohibit citizens of other States from holding property within the State, and to that extent from doing business within the State. No State can do the latter. A person may, and frequently does, acquire a property interest by a conveyance to him in trust. A citizen of the United States cannot be denied the right to take and hold absolutely real and personal property in any State of the Union, nor can he be denied the right to accept the conveyance of such property in trust for his sole benefit, or for the benefit of himself and others. This right is incident to national citizenship." Section 2, of article 4, of the Constitution of the United States, declares that "the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States." "Attempt will not be made," say the Supreme Court of the United States in *Ward* v. *Maryland*, 12 Wall. 418, "to define the words 'privilege and immunities,' or specify the rights which they are intended to secure and protect, beyond what may be necessary to the decision of the case before the court. Beyond doubt, those words are words of very comprehensive meaning; but it will be sufficient to say

that the clause plainly and unmistakably secures and protects the rights of a citizen of one State to pass into any other State of the Union for the purpose of engaging in lawful commerce, trade, or business, without molestation, to acquire personal property, to take and hold real estate." In that case, one of the trustees, at the time of the creation of the trust, was a resident of the State. The resident trustee having died, the action was prosecuted by the surviving and non-resident trustee. The fact that the language above cited was not strictly essential to the determination of the case before the court may impair the force of the decision as an authority, but it does not detract from the potency of its reasoning.

Reluctant as we are to hold a statute regularly enacted by the General Assembly unconstitutional, we cannot avoid the conclusion that the Act under consideration is in conflict with those provisions of the Constitution of the United States which guarantee to the citizens of each State, and of the United States, all the privileges and immunities of citizens of the several States. The judgment is reversed, with costs, and cause remanded for further proceedings in accordance with this opinion.

ELLIOTT, C. J., did not sit, and took no part in the decision of this case.

IN *Minor* v. *Happersett*, 21 Wall. 162 (1874), on error to the Supreme Court of Missouri, it was declared by the Supreme Court of the United States (WAITE, C. J.) that the Fourteenth Amendment did not secure to women the right of suffrage. "The question is presented," said the court, "in this case, whether, since the adoption of the Fourteenth Amendment, a woman, who is a citizen of the United States and of the State of Missouri, is a voter in that State, notwithstanding the provision of the Constitution and laws of the State, which confine the right of suffrage to men alone. We might, perhaps, decide the case upon other grounds, but this question is fairly made. From the opinion we find that it was the only one decided in the court below, and it is the only one which has been argued here. The case was undoubtedly brought to this court for the sole purpose of having that question decided by us, and in view of the evident propriety there is of having it settled, so far as it can be by such a decision, we have concluded to waive all other considerations, and proceed at once to its determination. . . .

"To determine, then, who were citizens[1] of the United States before

[1] In the usage of English-speaking people, the word "citizen," in the sense of membership of the State, is quite modern. "The term 'citizen,'" said Mr. Justice Daniel, in a dissenting opinion in *Rundle* v. *Delaware Canal Co.*, 14 Howard, 80, 97 (1852), "will be found rarely occurring in the writers of English law." The word is, indeed, familiar enough in our older reports, law-books, and general literature as designating the member of a borough. For instance, in *R.* v. *Hanger*, 1 Rolle 138 (1614–15), the rights of "*un cittizen de London*," are elaborately considered by Coke, C. J., with many references to the Year Books. "*Sont* 5 *sorts de Citizens*," he says, etc. So Blackstone (1 Com. 174): "As for the [parliamentary] electors of citizens and burgesses,

the adoption of the amendment it is necessary to ascertain what persons originally associated themselves together to form the nation, and what were afterwards admitted to membership.

"Looking at the Constitution itself, we find that it was ordained and established by 'the people of the United States' (Preamble, 1 Stat. at Large, 10); and then going further back, we find that these were the people of the several States that had before dissolved the political bands which connected them with Great Britain, and assumed a separate and equal station among the powers of the earth (Declaration of Independence, 1 Stat. at Large, 1), and that had by Articles of Confederation and Perpetual Union, in which they took the name of 'the United States of America,' entered into a firm league of friendship with each other for their common defence, the security of their liberties and their mutual and general welfare, binding themselves to assist each other against all force offered to or attack made upon them, or any of them, on account of religion, sovereignty, trade, or any other pretence whatever. Articles of Confederation, § 3; 1 Stat. at Large, 4.

"Whoever, then, was one of the people of either of these States when

these are supposed to be the mercantile part or trading interest of the kingdom." And in Shakespeare (*As You Like It*, Act II., sc. 1), when the banished Duke, having proposed to "go and kill us venison," adds, —

> "And yet it irks me the poor dappled fools,
> Being native burghers in this desert city,
> Should in their own confines," etc., —

we hear just afterwards of Jaques moralizing in the forest over a wounded deer, "left and abandoned of his velvet friends": —

> "Ay, quoth Jaques,
> Sweep on, you fat and greasy citizens."

The proper English meaning of the term "citizen" imported membership of a borough or local municipal corporation. The usual word for a man's political relation to the monarch or the State was "subject." In France, the corresponding phrase *citoyen, concitoyen*, seems to have long been familiar, in the modern sense of the word "citizen."

The word "citizen" is not found in any of our State constitutions before that of Massachusetts (1780); and it was not in the rejected Massachusetts Constitution of 1778. In the Declaration of Independence (1776), we read it once: "He has constrained our fellow-citizens," etc., and once in the Articles of Confederation (1781). In the treaty with France of 1778, the usual phrase is "subjects," "people," or "inhabitants;" but "citizens" does occur as applicable to the United States. In the treaty with Great Britain of 1782, it is used in a marked way: "There shall be a . . . peace between his British majesty and the said States, and between the subjects of the one and the citizens of the other."

In the Massachusetts Constitution (1780), the word occurs, but more sparingly than would be expected in a similar document now. In the Federal Constitution, prepared in 1787, it is freely used.

It seems, then, to have been the events which happened in this country in the eighth and ninth decades of the last century which first brought the word "citizen," in our modern sense of it, into familiar English speech. See *Minor* v. *Happersett*, 21 Wall. 162, 166. For interesting indications of a certain perplexity felt in Europe, in 1784, as to our understanding of the term, see 8 Works of John Adams, 213.

Compare Blackstone, *infra*, p. 464, note. — Ed.

the Constitution of the United States was adopted, became *ipso facto* a citizen, — a member of the nation created by its adoption. He was one of the persons associating together to form the nation, and was, consequently, one of its original citizens. As to this there has never been a doubt. Disputes have arisen as to whether or not certain persons or certain classes of persons were part of the people at the time, but never as to their citizenship if they were.

"Additions might always be made to the citizenship of the United States in two ways, — first, by birth, and second, by naturalization. This is apparent from the Constitution itself, for it provides (Article 2, § 1) that 'no person except a natural-born citizen, or a citizen of the United States at the time of the adoption of the Constitution, shall be eligible to the office of President' (Article 1, § 8), and that Congress shall have power 'to establish a uniform rule of naturalization.' Thus new citizens may be born or they may be created by naturalization.

"The Constitution does not, in words, say who shall be natural-born citizens. Resort must be had elsewhere to ascertain that. At common law, with the nomenclature of which the framers of the Constitution were familiar, it was never doubted that all children born in a country of parents who were its citizens became themselves, upon their birth, citizens also. These were natives, or natural-born citizens, as distinguished from aliens or foreigners. Some authorities go further and include as citizens children born within the jurisdiction without reference to the citizenship of their parents. As to this class there have been doubts, but never as to the first. For the purposes of this case it is not necessary to solve these doubts. It is sufficient for everything we have now to consider that all children born of citizen parents within the jurisdiction are themselves citizens. The words 'all children' are certainly as comprehensive, when used in this connection, as 'all persons,' and if females are included in the last they must be in the first. That they are included in the last is not denied. In fact, the whole argument of the plaintiffs proceeds upon that idea.

"Under the power to adopt a uniform system of naturalization Congress, as early as 1790, provided 'that any alien, being a free white person,' might be admitted as a citizen of the United States, and that the children of such persons so naturalized, dwelling within the United States, being under twenty-one years of age at the time of such naturalization, should also be considered citizens of the United States, and that the children of citizens of the United States that might be born beyond the sea, or out of the limits of the United States, should be considered as natural-born citizens. 1 Stat. at Large, 103. These provisions thus enacted have, in substance, been retained in all the naturalization laws adopted since. In 1855, however, the last provision was somewhat extended, and all persons theretofore born, or thereafter to be born, out of the limits of the jurisdiction of the United States, whose fathers were, or should be at the time of their birth, citizens of the United States, were declared to be citizens also. 10 Stat. at Large, 604.

"As early as 1804 it was enacted by Congress that when any alien who had declared his intention to become a citizen in the manner provided by law died before he was actually naturalized, his widow and children should be considered as citizens of the United States, and entitled to all rights and privileges as such upon taking the necessary oath (2 Stat. at Large, 293); and in 1855 it was further provided that any woman who might lawfully be naturalized under the existing laws, married, or who should be married, to a citizen of the United States, should be deemed and taken to be a citizen. 10 Stat. at Large, 604. . . .

"If the right of suffrage is one of the necessary privileges of a citizen of the United States, then the Constitution and laws of Missouri confining it to men are in violation of the Constitution of the United States, as amended, and consequently void. The direct question is, therefore, presented whether all citizens are necessarily voters. . . .

"It is clear, therefore, we think, that the Constitution has not added the right of suffrage to the privileges and immunities of citizenship as they existed at the time it was adopted. This makes it proper to inquire whether suffrage was co-extensive with the citizenship of the States at the time of its adoption. If it was, then it may with force be argued that suffrage was one of the rights which belonged to citizenship, and in the enjoyment of which every citizen must be protected. But if it was not, the contrary may with propriety be assumed.

"When the Federal Constitution was adopted, all the States, with the exception of Rhode Island and Connecticut, had constitutions of their own. These two continued to act under their charters from the Crown. Upon an examination of those constitutions, we find that in no State were all citizens permitted to vote. Each State determined for itself who should have that power. Thus, in New Hampshire, 'every male inhabitant of each town and parish with town privileges, and places unincorporated in the State, of twenty-one years of age and upwards, excepting paupers and persons excused from paying taxes at their own request,' were its voters; in Massachusetts, 'every male inhabitant of twenty-one years of age and upwards, having a freehold estate within the commonwealth of the annual income of three pounds, or any estate of the value of sixty pounds;' in Rhode Island, 'such as are admitted free of the company and society' of the colony; in Connecticut, such persons as had 'maturity in years, quiet and peaceable behavior, a civil conversation, and forty shillings freehold or forty pounds personal estate,' if so certified by the selectmen; in New York, 'every male inhabitant of full age who shall have personally resided within one of the counties of the State for six months immediately preceding the day of election, . . . if during the time aforesaid he shall have been a freeholder, possessing a freehold of the value of twenty pounds within the county, or have rented a tenement therein of the yearly value of forty shillings, and been rated and actually paid taxes to the State;' in New Jersey, 'all inhabitants . . . of full age who are

worth fifty pounds, proclamation money, clear estate in the same, and have resided in the county in which they claim a vote for twelve months immediately preceding the election;' in Pennsylvania, 'every freeman of the age of twenty-one years, having resided in the State two years next before the election, and within that time paid a State or county tax which shall have been assessed at least six months before the election;' in Delaware and Virginia, 'as exercised by law at present;' in Maryland, 'all freemen above twenty-one years of age having a freehold of fifty acres of land in the county in which they offer to vote and residing therein, and all freemen having property in the State above the value of thirty pounds current money, and having resided in the county in which they offer to vote one whole year next preceding the election;' in North Carolina, for Senators, 'all freemen of the age of twenty-one years who have been inhabitants of any one county within the State twelve months immediately preceding the day of election, and possessed of a freehold within the same county of fifty acres of land for six months next before and at the day of election,' and for members of the House of Commons, 'all freemen of the age of twenty-one years who have been inhabitants in any one county within the State twelve months immediately preceding the day of any election, and shall have paid public taxes;' in South Carolina, 'every free white man of the age of twenty-one years, being a citizen of the State and having resided therein two years previous to the day of election, and who hath a freehold of fifty acres of land, or a town lot of which he hath been legally seised and possessed at least six months before such election, or (not having such freehold or town lot) hath been a resident within the election district in which he offers to give his vote six months before said election, and hath paid a tax the preceding year of three shillings sterling towards the support of the government;' and in Georgia, such 'citizens and inhabitants of the State as shall have attained to the age of twenty-one years, and shall have paid tax for the year next preceding the election, and shall have resided six months within the county.'

"In this condition of the law in respect to suffrage in the several States it cannot for a moment be doubted that if it had been intended to make all citizens of the United States voters, the framers of the Constitution would not have left it to implication. So important a change in the condition of citizenship as it actually existed, if intended, would have been expressly declared. . . .

"The Constitution was submitted to the States for adoption in 1787, and was ratified by nine States in 1788, and finally by the thirteen original States in 1790. Vermont was the first new State admitted to the Union, and it came in under a constitution which conferred the right of suffrage only upon men of the full age of twenty-one years, having resided in the State for the space of one whole year next before the election, and who were of quiet and peaceable behavior. This was in 1791. The next year, 1792, Kentucky followed with a constitution

confining the right of suffrage to free male citizens of the age of twenty-one years, who had resided in the State two years, or in the county in which they offered to vote one year next before the election. Then followed Tennessee, in 1796, with voters of freemen of the age of twenty-one years and upwards, possessing a freehold in the county wherein they may vote, and being inhabitants of the State, or freemen being inhabitants of any one county in the State six months immediately preceding the day of election. But we need not particularize further. No new State has ever been admitted to the Union which has conferred the right of suffrage upon women, and this has never been considered a valid objection to her admission. On the contrary, as is claimed in the argument, the right of suffrage was withdrawn from women as early as 1807 in the State of New Jersey, without any attempt to obtain the interference of the United States to prevent it. Since then the governments of the insurgent States have been reorganized under a requirement that before their representatives could be admitted to seats in Congress they must have adopted new constitutions, republican in form. In no one of these constitutions was suffrage conferred upon women, and yet the States have all been restored to their original position as States in the Union.

"Besides this, citizenship has not in all cases been made a condition precedent to the enjoyment of the right of suffrage. Thus, in Missouri, persons of foreign birth, who have declared their intention to become citizens of the United States, may, under certain circumstances, vote. The same provision is to be found in the constitutions of Alabama, Arkansas, Florida, Georgia, Indiana, Kansas, Minnesota, and Texas. . . .

"Being unanimously of the opinion that the Constitution of the United States does not confer the right of suffrage upon any one, and that the constitutions and laws of the several States which commit that important trust to men alone are not necessarily void, we

Affirm the judgment."

NOTE.

NATIVES, ALIENS, CITIZENS.

"The first and most obvious division of the people is into aliens and natural-born subjects. Natural-born subjects are such as are born within the dominions of the crown of England; that is, within the ligeance, or, as it is generally called, the allegiance of the king; and aliens, such as are born out of it. Allegiance is the tie, or *ligamen*, which binds the subject to the king, in return for that protection which the king affords the subject. The thing itself, or substantial part of it, is founded in reason and the nature of government; the name and the form are derived to us from our Gothic ancestors. Under the feudal system, every owner of lands held them in subjection to some superior or lord, from whom or whose ancestors the tenant or vassal had received them; and there was a mutual trust or confidence subsisting between the lord and vassal, that the lord should protect the vassal in the enjoyment of the territory he had granted him, and, on the other hand, that the vassal should be faithful to the lord, and defend him against all his enemies. . . .

"But, besides these express engagements, the law also holds that there is an implied, original, and virtual allegiance, owing from every subject to his sovereign, antecedently to any express promise; and although the subject never swore any faith or allegiance in form. For as the king, by the very descent of the crown, is fully invested with all the rights, and bound to all the duties, of sovereignty, before his coronation; so the subject is bound to his prince by an intrinsic allegiance, before the superinduction of those outward bonds of oath, homage, and fealty; which were only instituted to remind the subject of this his previous duty, and for the better securing its performance. . . .

"Allegiance, both express and implied, is however distinguished by the law into two sorts or species, the one natural, the other local; the former being also perpetual, the latter temporary. Natural allegiance is such as is due from all men born within the king's dominions immediately upon their birth. For, immediately upon their birth, they are under the king's protection: at a time, too, when (during their infancy) they are incapable of protecting themselves. Natural allegiance is therefore a debt of gratitude; which cannot be forfeited, cancelled, or altered by any change of time, place, or circumstance, nor by anything but the united concurrence of the legislature. An Englishman who removes to France, or to China, owes the same allegiance to the King of England there as at home, and twenty years hence as well as now. . . .

"Local allegiance is such as is due from an alien or stranger born, for so long time as he continues within the king's dominion and protection: and it ceases the instant such stranger transfers himself from this kingdom to another. . . .

"When I say, that an alien is one who is born out of the king's dominions, or allegiance, this also must be understood with some restrictions. The common law, indeed, stood absolutely so, with only a very few exceptions; so that a particular Act of Parliament became necessary after the Restoration, 'for the naturalization of children of his Majesty's English subjects, born in foreign countries during the late troubles.' And this maxim of the law proceeded upon a general principle, that every man owes natural allegiance where he is born, and cannot owe two such allegiances, or serve two masters, at once. Yet the children of the king's ambassadors born abroad were always held to be natural subjects: for as the father, though in a foreign country, owes not even a local allegiance to the prince to whom he is sent; so, with regard to the son also, he was held (by a kind of *postliminium*) to be born under the King of England's allegiance, represented by his father the ambassador. . . .

"A denizen is an alien born, but who has obtained *ex donatione regis* letters-patent to make him an English subject: a high and incommunicable branch of the royal prerogative. A denizen is in a kind of middle state, between an alien and natural-born subject, and partakes of both of them. . . .

"Naturalization cannot be performed but by Act of Parliament: for by this an alien is put in exactly the same state as if he had been born in the king's ligeance; except only that he is incapable, as well as a denizen, of being a member of the Privy Council, or Parliament, holding offices, grants, &c. . . .

"These are the principal distinctions between aliens, denizens, and natives: distinctions, which it hath been frequently endeavored since the commencement of this century to lay almost totally aside, by one general Naturalization Act for all foreign Protestants. An attempt which was once carried into execution by the statute 7 Ann. c. 5; but this, after three years' experience of it, was repealed by the statute 10 Ann. c. 5, except one clause, which was just now mentioned, for naturalizing the children of English parents born abroad." — 1 BLACKSTONE'S *Com.* 366.

See also SIR THOMAS SMITH'S *Com. of England*, book i. cc. 16, 22–24 (1565).

"I. NATIVES AND ALIENS. . . . We have to consider (1) the difference between natives, or members of the State or nation, and foreigners; (2) the difference between citizens and other members of the nation. We need not consider the different grades within the citizen body till we discuss the Constitution in detail. . . .

"Nationality may be determined by —

"(*a*) Place of birth (*Geburtsort*). This is in the main the later mediæval view, and is still the principle of English law, which distinguishes 'natural-born' subjects from

'aliens.' Birth on an English ship or in an English embassy is equivalent to birth in England. But the principle has been so far modified that the children of Englishmen, born abroad, become English citizens: and naturalization has become much easier. The law of the United States goes on the same principles.

"(*b*) Domicil. This form of the territorial principle is more in keeping with modern ideas, because it lays stress not on the casual place of birth, but on the permanent domicil of the parents, and subsequently of the man himself. But here differences arise, according as settlement is made easy or difficult. This was the principle partially followed by Austria in earlier times and by individual German States. But there, too, it was modified by the forms of a personal grant of native rights.

"(*c*) Midway between these comes the Swiss principle of membership in the commune, which forms the basis of membership of the Canton (*Cantonsbürgerrecht*), and of the Swiss confederation (*Schweizerbürgerrecht*). The rights in the commune depend not on place of birth or domicil, but on descent from parents who are citizens of the commune, even though they live outside it. It is not unlike the old Roman municipal law, which was also based on *origo* from a particular *municipium*.

"(*d*) Modern States, generally, recognize nationality as a personal relation, not mainly dependent on place of birth or domicil, but on descent from members of the nation and personal reception into its membership. Place of birth and domicil come in to complete the notion.

"This, in the main, is the principle for France, Prussia, and the German Empire. This system best corresponds to modern political ideas, which regard the personal relation to the nation as the essential germ of the conception of the State.

"But the different systems tend to approach and supplement one another. Descent, birthplace, domicil and naturalization, marriage and legitimation, thus all combine, directly or indirectly, to constitute the qualification for citizenship. . . .

"It is quite possible for one person to have the rights of a native (*Heimatsrechte*) in two States at once, and modern conditions indeed encourage this. In the rare case of a conflict of duties it may be hard to reconcile them. It is not always a safe principle that the earlier right should take precedence, especially where it is dormant, while the later right is actual. In such cases the first duty, *e. g.*, of military service, is to the country in which a man is living. . . .

"In private law the distinction between citizen and alien used to be far more important than now. The spheres of private and public law are now much more sharply distinguished, and hence nationality, which is essentially a political idea, has no place in private law. As a rule natives and aliens are alike regarded as both possessing full rights in private law. . . .

"But in the sphere of public law the distinction between citizen and alien remains in full force. The following rights, except in case of special grant, are confined to natives: —

"(*a*) The right of permanent residence in the country. A native cannot be handed over to a foreign State, or banished, without grave political reasons.

"(*b*) The right to the protection of his State, even if he is staying abroad.

"(*c*) The exercise of the franchise and of the rights of a full citizen.

"(*d*) The right to hold a public office.

"(*e*) Sometimes such general political rights as those of association, petition, or free publication. This does not mean that foreigners are absolutely excluded from these rights, but that they only enjoy them on sufferance.

". . . II. CITIZENS. The body of full citizens rise above the general mass of the members of a country or nation. Full citizenship implies membership in the nation, but, more than that, it implies complete political rights: it is thus the fullest expression of the relation of the individual to the State.

"Its conditions have varied from time to time: in ancient Greece and Rome it depended on citizenship in the governing city, in the Middle Ages on freedom (*Volksfreiheit*), and later on the rights of a privileged class, and on landed property. In modern States it has often become almost coextensive with membership in the nation (*Volksgenossenschaft*).

"The following limitations are now generally recognized: —

"1. Women are excluded (see above, ch. xx.).

"2. Minors are excluded, on the ground that the exercise of political rights demands mature judgment.

"Some modern States fix the majority for political purposes at a different age from that of private law. There is some reason for fixing it later, for it is easier to judge clearly on ordinary matters than on politics. In France, England, North America and Italy political and civil majority are both fixed at twenty-one, and in some German States also, *e.g.*, Bavaria; but in Prussia, the German Empire, Spain and Portugal, the qualification for a vote is twenty-five years, in Austria twenty-four. In Switzerland some cantons fix the political majority earlier than the civil, generally at the completion of the twentieth year.

"3. Various persons are excluded whose civil status has been impaired or lost — *e.g.*, criminals, declared spendthrifts, bankrupts, or persons in receipt of poor-relief.

"Many States require further qualifications: —

"4. A certain degree of outward independence, variously defined in different States. In earlier German law the qualification was occupation of land or separate household ('a hearth of one's own'): in recent German law independent occupation and active membership in a commune. The former view has prevailed in England and some States of North America, the latter has found a place in modern German constitutions. It excludes all hired servants, often too the workers in factories, at least the lower class of them, and most journeymen craftsmen.

"Other modern States have moved in the direction of universal suffrage, and relaxed or abolished this qualification. Such are the Swiss constitutions since 1830, the constitutions of the French Republics of 1848 and 1870; of the French Empire, the North-German Confederation of 1867, the German Empire of 1871, and the Greek Constitution of 1864. The United States are following the same democratic tendency of the age.

"5. In some States citizen rights are conditional on the possession of a certain amount of property. It is quite right to make property an important factor in the distribution of voting power, but it is a violation of the idea of the State to exclude a man from the rights of a citizen on the ground of insufficient property, provided that he is morally and mentally capable of taking part in public duties, and is in an independent position. If property is interpreted to mean income or earnings, and the limit is put at a modest subsistence, there is no objection to it, but it is then equivalent to the preceding qualification. The result is the same in constitutions such as those of the United States, the Bavarian of 1848, and to some extent those of Austria and Prussia, where the franchise depends on payment of direct taxes.

"6. In Christian States, till lately, a profession of Christianity was required. Jews, Mohammedans and others, though tolerated, were excluded from political rights During the Middle Ages religion and law, Church and State, were closely associated. Exclusion from the religious society meant exclusion from the political. Toleration was the utmost that unbelievers could hope for. Even within the Christian pale difference of faith carried with it political consequences. In some countries only Catholics, in others only Protestants, acquired full rights. The peace of Westphalia put Catholics and Protestants, in Germany, on an equality of civil rights, but not for political.

"The German Confederation of 1815 established political equality for the recognized religious parties in Germany, Catholics, Lutherans, and Calvinists (*Reformirten*), but left the position of other sects uncertain.

"In modern States there is a decided tendency to make the exercise of political rights entirely independent of religious creed. This is by no means entirely due to religious indifference. When the American Congress of 1789 forbade the passing of any law establishing a dominant religion, it did not mean that it was indifferent to the power of Christianity, nor did it intend to hinder the State in its duty of supporting Christian institutions." . . . — BLUNTSCHLI, *Theory of the State*, Clarendon Press Translation (1885), 195. — ED.

IN *Pembina Mining and Milling Co.* v. *Pa.* 125 U. S. 181 (1887), the question was on the validity of a Pennsylvania statute requiring an annual license fee from a foreign corporation which "does not invest and use its capital in this Commonwealth." In holding it good, FIELD, J., for the court, said: "The clauses of the Federal Constitution, with which it was urged in the State Supreme Court that the statute conflicts, are the one vesting in Congress the power to regulate foreign and interstate commerce, the one declaring that the citizens of each State are entitled to the privileges and immunities of citizens in the several States, and the one embodied in the Fourteenth Amendment declaring that no State shall deny to any person within its jurisdiction the equal protection of the laws.

"1. It is not perceived in what way the statute impinges upon the commercial clause of the Federal Constitution. . . .

"2. Nor does the clause of the Constitution declaring that the 'citizens of each State shall be entitled to all privileges and immunities of citizens in the several States' have any bearing upon the question of the validity of the license tax in question. Corporations are not citizens within the meaning of that clause. This was expressly held in *Paul* v. *Virginia*. In that case it appeared that a statute of Virginia, passed in February, 1866, declared that no insurance company not incorporated under the laws of the State should carry on business within her limits without previously obtaining a license for that purpose, and that no license should be received by the corporation until it had deposited with the treasurer of the State bonds of a designated character and amount, the latter varying according to the extent of the capital employed. No such deposit was required of insurance companies incorporated by the State for carrying on their business within her limits. A subsequent statute of Virginia made it a penal offence for a person to act in the State as an agent of a foreign insurance company without such license. One Samuel Paul, having acted in the State as an agent for a New York insurance company without a license, was indicted and convicted in a Circuit Court of Virginia, and sentenced to pay a fine of $50. On error to the Court of Appeals of the State the judgment was affirmed, and to review that judgment the case was brought to this court. Here it was contended, as in the present case, that the statute of Virginia was invalid by reason of its discriminating provisions between her corporations and corporations of other States; that in this particular it was in conflict with the clause of the Constitution mentioned, that the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States. But the court answered, that corporations are not citizens within the meaning of the clause; that the term citizens, as used in the clause, applies only to natural persons, members of the body politic owing allegiance to the State, not to artificial persons created by the legislature, and possessing only such attributes as the legislature has prescribed; that the privileges and immunities secured to citizens of each State in the several States by the

clause in question are those privileges and immunities which are common to the citizens in the latter States under their Constitution and laws by virtue of their citizenship; that special privileges enjoyed by citizens in their own States are not secured in other States by that provision; that it was not intended that the laws of one State should thereby have any operation in other States; that they can have such operation only by the permission, express or implied, of those States; that special privileges which are conferred must be enjoyed at home, unless the assent of other States to their enjoyment therein be given; and that a grant of corporate existence was a grant of special privileges to the corporators, enabling them to act for certain specified purposes as a single individual, and exempting them, unless otherwise provided, from individual liability, which could therefore be enjoyed in other States only by their assent. In the subsequent case of *Ducat* v. *Chicago*, 10 Wall. 410, the court followed this decision, and observed that the power of the State to discriminate between her own domestic corporations and those of other States, desirous of transacting business within her jurisdiction, was clearly established by it and the previous case of *Augusta* v. *Earle*, 13 Pet. 519, and added that 'as to the nature or degree of discrimination, it belongs to the State to determine, subject only to such limitations on her sovereignty as may be found in the fundamental law of the Union.' *Philadelphia Fire Association* v. *New York*, 119 U. S. 110, 120.

"3. The application of the Fourteenth Amendment of the Constitution to the statute imposing the license tax in question is not more apparent than the application of the clause of the Constitution [as] to the rights of citizens of one State to the privileges and immunities of citizens in other States. The inhibition of the amendment that no State shall deprive any person within its jurisdiction of the equal protection of the laws was designed to prevent any person or class of persons from being singled out as a special subject for discriminating and hostile legislation. Under the designation of person there is no doubt that a private corporation is included. Such corporations are merely associations of individuals united for a special purpose, and permitted to do business under a particular name, and have a succession of members without dissolution. As said by Chief Justice Marshall, 'The great object of a corporation is to bestow the character and properties of individuality on a collective and changing body of men.' *Providence Bank* v. *Billings*, 4 Pet. 514, 562. The equal protection of the laws which these bodies may claim is only such as is accorded to similar associations within the jurisdiction of the State. The plaintiff in error is not a corporation within the jurisdiction of Pennsylvania. The office it hires is within such jurisdiction, and on condition that it pays the required license tax it can claim the same protection in the use of the office that any other corporation having a similar office may claim. It would then have the equal protection of the law so far as it had anything within the jurisdiction of the State, and the constitutional amendment

requires nothing more. The State is not prohibited from discriminating in the privileges it may grant to foreign corporations as a condition of their doing business or hiring offices within its limits, provided always such discrimination does not interfere with any transaction by such corporations of interstate or foreign commerce. It is not every corporation, lawful in the State of its creation, that other States may be willing to admit within their jurisdiction or consent that it have offices in them; such, for example, as a corporation for lotteries. And even where the business of a foreign corporation is not unlawful in other States the latter may wish to limit the number of such corporations, or to subject their business to such control as would be in accordance with the policy governing domestic corporations of a similar character. The States may, therefore, require for the admission within their limits of the corporations of other States, or of any number of them, such conditions as they may choose, without acting in conflict with the concluding provision of the first section of the Fourteenth Amendment. As to the meaning and extent of that section of the amendment see *Barbier* v. *Connolly*, 113 U. S. 27; *Soon Hing* v. *Crowley*, 113 U. S. 703; *Missouri* v. *Lewis*, 101 U. S. 22, 30; *Missouri Pacific Railway Co.* v. *Humes*, 115 U. S. 512; *Yick Wo* v. *Hopkins*, 118 U. S. 356; *Hayes* v. *Missouri*, 120 U. S. 68.

"The only limitation upon this power of the State to exclude a foreign corporation from doing business within its limits, or hiring offices for that purpose, or to exact conditions, for allowing the corporation to do business or hire offices there, arises where the corporation is in the employ of the Federal government, or where its business is strictly commerce, interstate or foreign. The control of such commerce, being in the Federal government, is not to be restricted by State authority."

Judgment affirmed.[1]

Mr. JUSTICE BRADLEY was not present at the argument of this cause and took no part in its decision.

NOTE.

"THIS eleventh section [of the Judiciary Act of 1789] deals only with citizens, and it has been from first to last admitted that corporations are not citizens. They are political beings, created by the law, and cannot sustain the character of citizens. . . .

"I suppose it may fairly be said, that neither the framers of the Constitution nor the framers of the Judiciary Act had corporations in view. . . . When this subject first came before the Supreme Court, they took a pretty rigid view of it They considered that a corporation created by the law of a particular State was like a partnership; it had some privileges which partnerships had not, but in substance they considered it to be a partnership, and they went on from that view to this inference: that if all the members of a corporation were citizens of one State, and the party on the other side was a citizen of a different State, by alleging that fact jurisdiction could be obtained. This was held in the case of *The Bank of the United States* v. *Deveaux*, 5 Cranch. 61

[1] Compare *Horn Silver Mining Co.* v. *N. Y.* 143 U. S. 305. — ED.

and in the case of *The Hope Insurance Company* v. *Boardman*, in the same book, page 57. The two cases were considered together; and it was repeated afterwards, so late as the case of *The Bank of Vicksburg* v. *Slocumb*, 14 Peters, 60. Now, you will readily see that there were very few cases of large corporations where all the members were citizens of one State, and that, if it were necessary to aver that fact on the record, the jurisdiction of the courts of the United States would have a very narrow application to corporations. I suppose there is no considerable corporation created by either of the States in which there are not one or more persons who are stockholders outside of the State. Well, this was a difficulty which had been encountered before in the history of the law. If you should take the trouble to look into Mr. Maine's admirable book on the History of Ancient Law, you will find mentioned there three cases of an analogous character. The first arose under the Roman law, where it was necessary, in order to give their important courts jurisdiction, to allege that the plaintiff was a Roman citizen; but after the commerce of the city and the empire became so extended, and such a number of foreigners had important rights and interests to be vindicated in the courts, they introduced what they called 'a fiction' (*fictio*), which meant that anybody who had a proper cause of complaint might allege that he was a Roman citizen, and that allegation should not be denied. In other words, they introduced, by their own authority, a rule that a falsehood might be stated on the record, and that the other party could not allege the truth. Well, there were two instances in England like this. One was where the Court of Exchequer obtained a great amount of jurisdiction by an allegation in the declaration that the plaintiff was a debtor to the king, and could not pay his debt unless the court would help him to recover what he demanded in that action; and that allegation was held not to be traversable. A similar allegation was permitted by the Court of King's Bench, in order to obtain jurisdiction as against the Common Pleas; that the plaintiff was in the custody of the marshal of the Court of King's Bench, and consequently could not go into any other court and prosecute his rights. That was held not to be traversable. Now, I want to bring your attention to the case of *The Ohio and Mississippi Railroad Company* v. *Wheeler*, 1 Black, 286, and you will see how this decision corresponds with the progress made by the Roman and English courts on similar subjects. Some parts of the marginal note express clearly what I wish to bring to your attention: 'A corporation exists only in contemplation of law and by force of law, and can have no legal existence beyond the bounds of the sovereignty by which it is created, and it must dwell in the place of its creation.' All that had been previously settled, and is unquestioned law. 'A corporation is not a citizen within the meaning of the Constitution, and cannot maintain a suit in the courts of the United States against a citizen of a different State from that by which it was created, unless the persons who comprise the corporate body are all citizens of that State.' That is the old law. 'In such cases, they may sue by their corporate name, averring the citizenship of all the members, and such a suit would be regarded as the joint suit of individual persons, united together in a corporate body, and acting under the authority conferred upon them for the more convenient transaction of business, and consequently entitled to maintain a suit in the courts of the United States against the citizen of any State.' That is the old law also.

"'Where a corporation is created by the laws of a State' (we now advance to some new doctrine), 'the legal presumption is that its members are citizens of the State in which alone the corporate body has a legal existence.' That is laid down as a legal presumption.

"'A suit by or against a corporation in its corporate name may be presumed to be a suit by or against citizens of the State which created the corporate body, and no averment or denial to the contrary is admissible for the purpose of withdrawing the suit from the jurisdiction of a court of the United States.' There is the Roman 'fiction.' The court first decides the law, presumes all the members are citizens of the State which created the corporation, and then says you shall not traverse that presumption; and that is the law now. Under it, the courts of the United States constantly entertain suits by or against corporations. It has been so frequently settled, that there is not the slightest reason to suppose that it will ever be departed from by the court. It has been repeated over and over again in subsequent decisions; and the Supreme Court

seems entirely satisfied that it is the right ground to stand upon; and, as I am now going to state to you, they have applied it in some cases which go beyond, much beyond, these decisions to which I have referred. So that when a suit is to be brought in a court of the United States by or against a corporation, by reason of the character of the parties, you have only to say that this corporation (after naming it correctly) was created by a law of the State of Massachusetts, and has its principal place of business in that State; and that is exactly the same in its consequences as if you could allege, and did allege, that the corporation was a citizen of that State. According to the present decisions, it is not necessary you should say that the members of that corporation are citizens of Massachusetts. They have passed beyond that. You have only to say that the corporation was created by a law of the State of Massachusetts, and has its principal place of business in that State; and that makes it, for the purposes of jurisdiction, the same as if it were a citizen of that State." — CURTIS, *Jurisd. U. S. Courts*, 127–133.[1]

"IT is certain that the Constitution and statute law of New York (Const. art. 2, N. Y. Revised Statutes, i. 126, sec. 2) speaks of men of color as being *citizens*, and capable of being freeholders, and entitled to vote. And if, at common law, all human beings born within the legiance of the king, and under the king's obedience, were natural-born subjects, and not aliens, I do not perceive why this doctrine does not apply to the United States, in all cases in which there is no express constitutional or statute declaration to the contrary. Blacks, whether born free or in bondage, if born under the jurisdiction and allegiance of the United States, are natives, and not aliens. They are what the common law terms natural-born subjects. Subjects and citizens are, in a degree, convertible terms as applied to natives; and though the term *citizen* seems to be appropriate to republican freemen, yet we are, equally with the inhabitants of all other countries, *subjects*, for we are equally bound by allegiance and subjection to the government and law of the land. The privilege of voting, and the legal capacity for office, are not essential to the character of a citizen, for women are citizens without either; and free people of color may enjoy the one, and may acquire and hold and devise and transmit, by hereditary descent, real and personal estates. The better opinion, I should think, was, that negroes or other slaves, born within and under the allegiance of the United States, are natural-born subjects, but not citizens. *Citizens*, under our Constitution and laws, mean free inhabitants, born within the United States, or naturalized under the law of Congress. If a slave, born in the United States, be manumitted, or otherwise lawfully discharged from bondage, or if a black man be born within the United States, and born free, he becomes thenceforward a citizen, but under such disabilities as the laws of the States respectively may deem it expedient to prescribe to free persons of color." — 2 KENT'S *Com.* 258, n.

[1] Reprinted by permission. This book, published in 1880, consists of a course of lectures given by Judge Curtis at the Harvard Law School in 1872–73. — ED.

STATE *v.* MANN.

SUPREME COURT OF NORTH CAROLINA. 1829.

[2 *Dev.* 263.]

THE defendant was indicted for an assault and battery upon Lydia, the slave of one Elizabeth Jones.

On the trial it appeared that the defendant had hired the slave for a year — that during the term, the slave had committed some small offence, for which the defendant undertook to chastise her — that while in the act of so doing, the slave ran off, whereupon the defendant called upon her to stop, which being refused, he shot at and wounded her.

His Honor, JUDGE DANIEL, charged the jury, that if they believed the punishment inflicted by the defendant was cruel and unwarrantable, and disproportionate to the offence committed by the slave, that in law the defendant was guilty, as he had only a special property in the slave.

A verdict was returned for the State, and the defendant appealed.

No counsel appeared for the defendant. The *Attorney-General* contended, that no difference existed between this case and that of *The State* v. *Hall*, 2 Hawks, 582. In this case the weapon used was one calculated to produce death. He assimilated the relation between a master and a slave, to those existing between parents and children, masters and apprentices, and tutors and scholars, and upon the limitations to the right of the superiors in these relations, he cited Russell on Crimes, 866.

RUFFIN, J. A judge cannot but lament, when such cases as the present are brought into judgment. It is impossible that the reasons on which they go can be appreciated, but where institutions similar to our own, exist and are thoroughly understood. The struggle, too, in the judge's own breast between the feelings of the man, and the duty of the magistrate is a severe one, presenting strong temptation to put aside such questions, if it be possible. It is useless, however, to complain of things inherent in our political state. And it is criminal in a court to avoid any responsibility which the laws impose. With whatever reluctance, therefore, it is done, the court is compelled to express an opinion upon the extent of the dominion of the master over the slave in North Carolina.

The indictment charges a battery on Lydia, a slave of Elizabeth Jones. Upon the face of the indictment, the case is the same as *The State* v. *Hall*, 2 Hawks, 582.

No fault is found with the rule there adopted; nor would be, if it were now open. But it is not open; for the question, as it relates to a battery on a slave by a stranger, is considered as settled by that case. But the evidence makes this a different case. Here the slave had been

hired by the defendant, and was in his possession; and the battery was committed during the period of hiring. With the liabilities of the hirer to the general owner, for an injury permanently impairing the value of the slave, no rule now laid down is intended to interfere. That is left upon the general doctrine of bailment. The inquiry here is, whether a cruel and unreasonable battery on a slave, by the hirer, is indictable. The judge below instructed the jury that it is. He seems to have put it on the ground, that the defendant had but a special property. Our laws uniformly treat the master or other person having the possession and command of the slave, as entitled to the same extent of authority. The object is the same — the services of the slave; and the same powers must be confided. In a criminal proceeding, and indeed in reference to all other persons but the general owner, the hirer and possessor of a slave, in relation to both rights and duties, is for the time being, the owner. This opinion would, perhaps, dispose of this particular case; because the indictment, which charges a battery upon the slave of Elizabeth Jones, is not supported by proof of a battery upon defendant's own slave; since different justifications may be applicable to the two cases. But upon the general question, whether the owner is answerable *criminaliter*, for a battery upon his own slave, or other exercise of authority or force, not forbidden by statute, the court entertains but little doubt.

That he is so liable, has yet never been decided; nor, as is known, been hitherto contended. There have been no prosecutions of the sort. The established habits and uniform practice of the country in this respect, is the best evidence of the portion of power deemed by the whole community requisite to the preservation of the master's dominion. If we thought differently, we could not set our notions in array against the judgment of everybody else, and say that this, or that authority, may be safely lopped off. This has indeed been assimilated at the bar to the other domestic relations; and arguments drawn from the well-established principles, which confer and restrain the authority of the parent over the child, the tutor over the pupil, the master over the apprentice, have been pressed on us. The court does not recognize their application. There is no likeness between the cases. They are in opposition to each other, and there is an impassable gulf between them, — the difference is that which exists between freedom and slavery — and a greater cannot be imagined. In the one the end in view is the happiness of the youth, born to equal rights with that governor, on whom the duty devolves of training the young to usefulness, in a station which he is afterward to assume among freemen. To such an end, and with such a subject, moral and intellectual instruction seem the natural means; and for the most part, they are found to suffice. Moderate force is superadded, only to make the others effectual. If that fail, it is better to leave the party to his own headstrong passions, and the ultimate correction of the law, than to allow it to be immoderately inflicted by a private person. With slavery it is far otherwise. The

end is the profit of the master, his security and the public safety; the subject, one doomed in his own person, and his posterity, to live without knowledge, and without the capacity to make anything his own, and to toil that another may reap the fruits. What moral considerations shall be addressed to such a being, to convince him what, it is impossible but that the most stupid must feel and know can never be true — that he is thus to labor upon a principle of natural duty, or for the sake of his own personal happiness; such services can only be expected from one who has no will of his own; who surrenders his will in implicit obedience to that of another. Such obedience is the consequence only of uncontrolled authority over the body. There is nothing else which can operate to produce the effect. The power of the master must be absolute, to render the submission of the slave perfect. I most freely confess my sense of the harshness of this proposition: I feel it as deeply as any man can. And as a principle of moral right, every person in his retirement must repudiate it. But in the actual condition of things, it must be so. There is no remedy. This discipline belongs to the state of slavery. They cannot be disunited, without abrogating at once the rights of the master, and absolving the slave from his subjection. It constitutes the curse of slavery to both the bond and free portions of our population. But it is inherent in the relation of master and slave.

That there may be particular instances of cruelty and deliberate barbarity, where, in conscience the law might properly interfere, is most probable. The difficulty is to determine, where a court may properly begin. Merely in the abstract it may well be asked, which power of the master accords with right. The answer will probably sweep away all of them. But we cannot look at the matter in that light. The truth is, that we are forbidden to enter upon a train of general reasoning on the subject. We cannot allow the right of the master to be brought into discussion in the courts of justice. The slave, to remain a slave, must be made sensible, that there is no appeal from his master; that his power is in no instance, usurped; but is conferred by the laws of man at least, if not by the law of God. The danger would be great indeed, if the tribunals of justice should be called on to graduate the punishment appropriate to every temper, and every dereliction of menial duty. No man can anticipate the many and aggravated provocations of the master, which the slave would be constantly stimulated by his own passions, or the instigation of others to give; or the consequent wrath of the master, prompting him to bloody vengeance, upon the turbulent traitor — a vengeance generally practised with impunity, by reason of its privacy. The court, therefore, disclaims the power of changing the relation, in which these parts of our people stand to each other.

We are happy to see, that there is daily less and less occasion for the interposition of the courts. The protection already afforded by several statutes, that all-powerful motive, the private interest of the

owner, the benevolences toward each other, seated in the hearts of those who have been born and bred together, the frowns and deep execrations of the community upon the barbarian, who is guilty of excessive and brutal cruelty to his unprotected slave, all combined, have produced a mildness of treatment, and attention to the comforts of the unfortunate class of slaves, greatly mitigating the rigors of servitude, and ameliorating the condition of the slaves. The same causes are operating, and will continue to operate with increased action, until the disparity in numbers between the whites and blacks shall have rendered the latter in no degree dangerous to the former, when the police now existing may be further relaxed. This result, greatly to be desired, may be much more rationally expected from the events alluded to, and now in progress, than from any rash expositions of abstract truths, by a judiciary tainted with a false and fanatical philanthropy, seeking to redress an acknowledged evil, by means still more wicked and appalling than even that evil.

I repeat that I would gladly have avoided this ungrateful question. But being brought to it, the court is compelled to declare, that while slavery exists amongst us in its present state, or until it shall seem fit to the legislature to interpose express enactments to the contrary, it will be the imperative duty of the judges to recognize the full dominion of the owner over the slave, except where the exercise of it is forbidden by statute. And this we do upon the ground, that this dominion is essential to the value of slaves as property, to the security of the master, and the public tranquillity, greatly dependent upon their subordination; and in fine, as most effectually securing the general protection and comfort of the slaves themselves.

Per Curiam. Let the judgment below be reversed, and judgment entered for the defendant.

In *Prigg* v. *Com. of Pa.*, 16 Pet. 539 (1842), on a writ of error to the Supreme Court of Pennsylvania, the plaintiff had been indicted under a statute of that State, of 1826, for forcibly seizing and removing a negro woman to be kept as a slave. On a plea of not guilty the jury found a special verdict that the woman was held to service as a slave under the laws of Maryland and escaped into Pennsylvania in 1832; that Prigg as the owner's agent, in 1837, caused the woman to be arrested as a fugitive from labor, under a warrant by a Pennsylvania magistrate and to be brought before the same magistrate, who refused to take further cognizance of the case, whereupon Prigg removed her and her children and gave them up to her owner in Maryland. Prigg was found guilty, and the judgment, on error, was sustained by the Supreme Court of the State. In reversing the judgment, the Supreme Court of the United States (Story, J.) said: "There are two clauses in the Constitution upon the subject of fugitives, which stand in juxtaposition with each other, and have been thought mutually to illustrate each other. They are both contained in the 2d section of the 4th article, and are in the following

words: 'A person charged in any State with treason, felony, or other crime, who shall flee from justice, and be found in another State, shall, on demand of the executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime.'

"'No person held to service or labor in one State under the laws thereof, escaping into another, shall in consequence of any law or regulation therein, be discharged from such service or labor; but shall be delivered up, on claim of the party to whom such service or labor may be due.'

"The last clause is that, the true interpretation whereof is directly in judgment before us. Historically, it is well known that the object of this clause was to secure to the citizens of the slaveholding States the complete right and title of ownership in their slaves, as property, in every State in the Union into which they might escape from the State where they were held in servitude. The full recognition of this right and title was indispensable to the security of this species of property in all the slaveholding States; and, indeed, was so vital to the preservation of their domestic interests and institutions, that it cannot be doubted that it constituted a fundamental article, without the adoption of which the Union could not have been formed. Its true design was to guard against the doctrines and principles prevalent in the non-slaveholding States, by preventing them from intermeddling with, or obstructing, or abolishing the rights of the owners of slaves.

"By the general law of nations, no nation is bound to recognize the state of slavery, as to foreign slaves found within its territorial dominions, when it is in opposition to its own policy and institutions, in favor of the subjects of other nations where slavery is recognized. If it does it, it is as a matter of comity, and not as a matter of international right. The state of slavery is deemed to be a mere municipal regulation, founded upon and limited to the range of the territorial laws. This was fully recognized in *Somerset's Case*, Lofft's Rep. 1; s. c. 11 State Trials by Harg. 340; s. c. 20 Howell's State Trials, 79; which was decided before the American Revolution. It is manifest from this consideration, that if the Constitution had not contained this clause, every non-slaveholding State in the Union would have been at liberty to have declared free all runaway slaves coming within its limits, and to have given them entire immunity and protection against the claims of their masters; a course which would have created the most bitter animosities, and engendered perpetual strife between the different States. The clause was, therefore, of the last importance to the safety and security of the Southern States, and could not have been surrendered by them without endangering their whole property in slaves. The clause was accordingly adopted into the Constitution by the unanimous consent of the framers of it; a proof at once of its intrinsic and practical necessity. . . .

"We have said that the clause contains a positive and unqualified

recognition of the right of the owner in the slave, unaffected by any State law or regulation whatsoever, because there is no qualification or restriction of it to be found therein; and we have no right to insert any, which is not expressed, and cannot be fairly implied. Especially are we estopped from so doing, when the clause puts the right to the service or labor upon the same ground and to the same extent in every other State as in the State from which the slave escaped, and in which he was held to the service or labor. If this be so, then all the incidents to that right attach also. The owner must, therefore, have the right to seize and repossess the slave, which the local laws of his own State confer upon him as property; and we all know that this right of seizure and recaption is universally acknowledged in all the slaveholding States. Indeed, this is no more than a mere affirmance of the principles of the common law applicable to this very subject. BLACKSTONE, J., 3 Bl. Com. 4, lays it down as unquestionable doctrine. 'Recaption or reprisal' (says he) 'is another species of remedy by the mere act of the party injured. This happens when any one hath deprived another of his property in goods or chattels personal, or wrongfully detains one's wife, child, or servant; in which case the owner of the goods, and the husband, parent, or master may lawfully claim and retake them, wherever he happens to find them, so it be not in a riotous manner, or attended with a breach of the peace.' Upon this ground we have not the slightest hesitation in holding, that, under and in virtue of the Constitution, the owner of a slave is clothed with entire authority, in every State in the Union, to seize and recapture his slave, whenever he can do it without any breach of the peace or any illegal violence. In this sense, and to this extent this clause of the constitution may properly be said to execute itself, and to require no aid from legislation, State or national.

"But the clause of the Constitution does not stop here. . . . It says: 'But he (the slave) shall be delivered up on claim of the party to whom such service or labor may be due.' Now, we think it exceedingly difficult, if not impracticable, to read this language and not to feel that it contemplated some further remedial redress than that which might be administered at the hands of the owner himself. A claim is to be made. What is a claim? It is, in a just juridical sense, a demand of some matter as of right made by one person upon another, to do or to forbear to do some act or thing as a matter of duty. . . .

"It is plain, then, that where a claim is made by the owner, out of possession, for the delivery of a slave, it must be made, if at all, against some other person; and inasmuch as the right is a right of property capable of being recognized and asserted by proceedings before a court of justice, between parties adverse to each other, it constitutes, in the strictest sense, a controversy between the parties, and a case 'arising under the Constitution' of the United States; within the express delegation of judicial power given by that instrument. Congress, then, may call that power into activity for the very purpose of giving effect to that

right; and if so, then it may prescribe the mode and extent in which it shall be applied, and how, and under what circumstances the proceedings shall afford a complete protection and guarantee to the right.

"Congress has taken this very view of the power and duty of the national government. As early as the year 1791, the attention of Congress was drawn to it (as we shall hereafter more fully see), in consequence of some practical difficulties arising under the other clause respecting fugitives from justice escaping into other States. The result of their deliberations was the passage of the Act of the 12th of February, 1793, c. 51 (7)." [This Act provided for the arrest of fugitives from service; for carrying them before a judge or magistrate, and, upon proof to his satisfaction of the master's right under the laws of the State or Territory from which the fugitive came, for the issuing of a certificate which should warrant the removal of the fugitive. The court go on to hold this Act valid, to declare the power of Congress over the subject to be exclusive, and the statute of Pennsylvania unconstitutional.][1]

[1] "I have always thought that the Constitution addressed itself to the legislatures of the States or to the States themselves. It says that those persons escaping to other States 'shall be delivered up,' and I confess I have always been of the opinion that it was an injunction upon the States themselves.

"When it is said that a person escaping into another State, and coming within the jurisdiction of that State, shall be delivered up, it seems to me the import of the clause is, that the State itself, in obedience to the Constitution, shall cause him to be delivered up. That is my judgment. I have always entertained that opinion, and I entertain it now. But when the subject, some years ago, was before the Supreme Court of the United States, the majority of the judges held that the power to cause fugitives from service to be delivered up was a power to be exercised under the authority of this government. I do not know, on the whole, that it may not have been a fortunate decision. My habit is to respect the result of judicial deliberations and the solemnity of judicial decisions. As it now stands, the business of seeing that these fugitives are delivered up resides in the power of Congress and the national judicature, and my friend at the head of the Judiciary Committee has a bill on the subject now before the Senate, which, with some amendments to it, I propose to support, with all its provisions, to the fullest extent." — DANIEL WEBSTER, *Speech of the 7th of March*, 1850, *Works*, vi. 354.

In *Ableman* v. *Booth*, 21 How. 506. 526 (1859), the case grew out of resistance to the second Federal law for the rendition of fugitive slaves, — that of September 18, 1850, to which Mr. Webster alluded in the passage above quoted. Near the end of the opinion, TANEY, C. J., for the court, said: "Although we think it unnecessary to discuss these questions, yet, as they have been decided by the State court, and are before us on the record, and we are not willing to be misunderstood, it is proper to say that, in the judgment of this court, the Act of Congress commonly called the Fugitive Slave Law is, in all of its provisions, fully authorized by the Constitution of the United States; that the commissioner had lawful authority to issue the warrant and commit the party, and that his proceedings were regular and conformable to law."

See *Groves* v. *Slaughter*, 15 Pet. 449 (1841); *Strader et al* v. *Graham*, 10 How. 82 (1850); *Kentucky* v. *Dennison*, 24 How. 66 (1860). — ED.

DRED SCOTT *v.* SANDFORD.

SUPREME COURT OF THE UNITED STATES. 1857.

[19 *How.* 393]

[ERROR to the Circuit Court of the United States for the District of Missouri. The facts are stated in the opinion printed below. All the judges gave opinions; that of Mr. Justice Nelson is here presented, because a selection must be made, and because this opinion alone limits itself to grounds agreed upon by a majority of the court and necessary to the disposition of the case.[1] *M. Blair* and *Geo. T. Curtis*, for plaintiff; *Geyer* and *Reverdy Johnson*, for defendant.]

NELSON, J. I shall proceed to state the grounds upon which I have arrived at the conclusion, that the judgment of the court below should be affirmed. The suit was brought in the court below by the plaintiff, for the purpose of asserting his freedom, and that of Harriet, his wife, and two children.

The defendant plead, in abatement to the suit, that the cause of action, if any, accrued to the plaintiff out of the jurisdiction of the court, and exclusively within the jurisdiction of the courts of the State of Missouri; for, that the said plaintiff is not a citizen of the State of Missouri, as alleged in the declaration, because he is a negro of African descent; his ancestors were of pure African blood, and were brought into this country and sold as negro slaves.

To this plea the plaintiff demurred, and the defendant joined in demurrer. The court below sustained the demurrer, holding that the plea was insufficient in law to abate the suit.

The defendant then plead over in bar of the action:

1. The general issue. 2. That the plaintiff was a negro slave, the lawful property of the defendant. And 3. That Harriet, the wife of said plaintiff, and the two children, were the lawful slaves of the said defendant. Issue was taken upon these pleas, and the cause went down to trial before the court and jury, and an agreed state of facts was presented, upon which the trial proceeded, and resulted in a verdict for the defendant, under the instructions of the court.

The facts agreed upon were substantially as follows:

That in the year 1834, the plaintiff, Scott, was a negro slave of Dr. Emerson, who was a surgeon in the army of the United States; and in that year he took the plaintiff from the State of Missouri to the military post at Rock Island, in the State of Illinois, and held him there as a slave until the month of April or May, 1836. At this date, Dr. Emerson removed, with the plaintiff, from the Rock Island post to the military post at Fort Snelling, situate on the west bank of the Mississippi River, in the Territory of Upper Louisiana, and north of the

[1] It was originally prepared, by direction of the majority, to stand as the opinion of the court. See note, p. 494, *infra*; also Tyler's "Life of Taney," 384. — ED.

latitude thirty-six degrees thirty minutes, and north of the State of Missouri. That he held the plaintiff in slavery, at Fort Snelling, from the last-mentioned date until the year 1838.

That in the year 1835, Harriet, mentioned in the declaration, was a negro slave of Major Taliaferro, who belonged to the army of the United States; and in that year he took her to Fort Snelling, already mentioned, and kept her there as a slave until the year 1836, and then sold and delivered her to Dr. Emerson, who held her in slavery, at Fort Snelling, until the year 1838. That in the year 1836, the plaintiff and Harriet were married, at Fort Snelling, with the consent of their master. The two children, Eliza and Lizzie, are the fruit of this marriage. The first is about fourteen years of age, and was born on board the steamboat "Gipsey," north of the State of Missouri, and upon the Mississippi River; the other, about seven years of age, was born in the State of Missouri, at the military post called Jefferson Barracks.

In 1838, Dr. Emerson removed the plaintiff, Harriet, and their daughter Eliza, from Fort Snelling to the State of Missouri, where they have ever since resided. And that, before the commencement of this suit, they were sold by the doctor to Sandford, the defendant, who has claimed and held them as slaves ever since.

The agreed case also states that the plaintiff brought a suit for his freedom, in the Circuit Court of the State of Missouri, on which a judgment was rendered in his favor; but that, on a writ of error from the Supreme Court of the State, the judgment of the court below was reversed, and the cause remanded to the circuit for a new trial.

On closing the testimony in the court below, the counsel for the plaintiff prayed the court to instruct the jury, upon the agreed state of facts, that they ought to find for the plaintiff; when the court refused, and instructed them that, upon the facts, the law was with the defendant.

With respect to the plea in abatement, which went to the citizenship of the plaintiff, and his competency to bring a suit in the Federal courts, the common-law rule of pleading is, that upon a judgment against the plea on demurrer, and that the defendant answer over, and the defendant submits to the judgment, and pleads over to the merits, the plea in abatement is deemed to be waived, and is not afterwards to be regarded as a part of the record in deciding upon the rights of the parties. There is some question, however, whether this rule of pleading applies to the peculiar system and jurisdiction of the Federal courts. As, in these courts, if the facts appearing on the record show that the Circuit Court had no jurisdiction, its judgment will be reversed in the appellate court for that cause, and the case remanded with directions to be dismissed.

In the view we have taken of the case, it will not be necessary to pass upon this question, and we shall therefore proceed at once to an examination of the case upon its merits. The question upon the merits, in general terms, is, whether or not the removal of the plaintiff, who was a slave, with his master, from the State of Missouri to the State of

Illinois, with a view to a temporary residence, and after such residence and return to the slave State, such residence in the free State works an emancipation.

As appears from an agreed statement of facts, this question has been before the highest court of the State of Missouri, and a judgment rendered that this residence in the free State has no such effect; but, on the contrary, that his original condition continued unchanged.

The court below, the Circuit Court of the United States for Missouri, in which this suit was afterwards brought, followed the decision of the State court, and rendered a like judgment against the plaintiff.

The argument against these decisions is, that the laws of Illinois, forbidding slavery within her territory, had the effect to set the slave free while residing in that State, and to impress upon him the condition and status of a freeman; and that, by force of these laws, this status and condition accompanied him on his return to the slave State, and of consequence he could not be there held as a slave.

This question has been examined in the courts of several of the slaveholding States, and different opinions expressed and conclusions arrived at. We shall hereafter refer to some of them, and to the principles upon which they are founded. Our opinion is, that the question is one which belongs to each State to decide for itself, either by its legislature or courts of justice; and hence, in respect to the case before us, to the State of Missouri — a question exclusively of Missouri law, and which, when determined by that State, it is the duty of the Federal courts to follow it. In other words, except in cases where the power is restrained by the Constitution of the United States, the law of the State is supreme over the subject of slavery within its jurisdiction.

As a practical illustration of the principle, we may refer to the legislation of the free States in abolishing slavery, and prohibiting its introduction into their territories. Confessedly, except as restrained by the Federal Constitution, they exercised, and rightfully, complete and absolute power over the subject. Upon what principle, then, can it be denied to the State of Missouri? The power flows from the sovereign character of the States of this Union; sovereign, not merely as respects the Federal government — except as they have consented to its limitation — but sovereign as respects each other. Whether, therefore, the State of Missouri will recognize or give effect to the laws of Illinois within her territories on the subject of slavery, is a question for her to determine. Nor is there any constitutional power in this government that can rightfully control her.

Every State or nation possesses an exclusive sovereignty and jurisdiction within her own territory; and, her laws affect and bind all property and persons residing within it. It may regulate the manner and circumstances under which property is held, and the condition, capacity, and state, of all persons therein; and, also, the remedy and modes of administering justice. And it is equally true, that no State or nation can affect or bind property out of its territory, or persons not

residing within it. No State, therefore, can enact laws to operate beyond its own dominions, and, if it attempts to do so, it may be lawfully refused obedience. Such laws can have no inherent authority extra-territorially. This is the necessary result of the independence of distinct and separate sovereignties.

Now, it follows from these principles, that whatever force or effect the laws of one State or nation may have in the territories of another, must depend solely upon the laws and municipal regulations of the latter, upon its own jurisprudence and polity, and upon its own express or tacit consent.

Judge Story observes, in his Conflict of Laws (p. 24), "that a State may prohibit the operation of all foreign laws, and the rights growing out of them, within its territories." "And that when its code speaks positively on the subject, it must be obeyed by all persons who are within reach of its sovereignty; when its customary unwritten or common law speaks directly on the subject, it is equally to be obeyed."

Nations, from convenience and comity, and from mutual interest, and a sort of moral necessity to do justice, recognize and administer the laws of other countries. But, of the nature, extent, and utility, of them, respecting property, or the state and condition of persons within her territories, each nation judges for itself; and is never bound, even upon the ground of comity, to recognize them, if prejudicial to her own interests. The recognition is purely from comity, and not from any absolute or paramount obligation.

Judge Story again observes (398), "that the true foundation and extent of the obligation of the laws of one nation within another is the voluntary consent of the latter, and is inadmissible when they are contrary to its known interests." And he adds, "in the silence of any positive rule affirming or denying or restraining the operation of the foreign laws, courts of justice presume the tacit adoption of them by their own government, unless they are repugnant to its policy or prejudicial to its interests." See also 2 Kent Com., p. 457; 13 Peters, 519, 589.

These principles fully establish, that it belongs to the sovereign State of Missouri to determine by her laws the question of slavery within her jurisdiction, subject only to such limitations as may be found in the Federal Constitution; and, further, that the laws of other States of the Confederacy, whether enacted by their legislatures or expounded by their courts, can have no operation within her territory, or affect rights growing out of her own laws on the subject. This is the necessary result of the independent and sovereign character of the State. The principle is not peculiar to the State of Missouri, but is equally applicable to each State belonging to the Confederacy. The laws of each have no extra-territorial operation within the jurisdiction of another, except such as may be voluntarily conceded by her laws or courts of justice. To the extent of such concession upon the rule of comity of nations, the foreign law may operate, as it then becomes a part of

the municipal law of the State. When determined that the foreign law shall have effect, the municipal law of the State retires, and gives place to the foreign law.

In view of these principles, let us examine a little more closely the doctrine of those who maintain that the law of Missouri is not to govern the status and condition of the plaintiff. They insist that the removal and temporary residence with his master in Illinois, where slavery is inhibited, had the effect to set him free, and that the same effect is to be given to the law of Illinois, within the State of Missouri, after his return. Why was he set free in Illinois? Because the law of Missouri, under which he was held as a slave, had no operation by its own force extra-territorially; and the State of Illinois refused to recognize its effect within her limits, upon principles of comity, as a state of slavery was inconsistent with her laws, and contrary to her policy. But, how is the case different on the return of the plaintiff to the State of Missouri? Is she bound to recognize and enforce the law of Illinois? For, unless she is, the status and condition of the slave upon his return remains the same as originally existed. Has the law of Illinois any greater force within the jurisdiction of Missouri, than the laws of the latter within that of the former? Certainly not. They stand upon an equal footing. Neither has any force extra-territorially, except what may be voluntarily conceded to them.

It has been supposed, by the counsel for the plaintiff, that a rule laid down by Huberus had some bearing upon this question. Huberus observes that "personal qualities, impressed by the laws of any place, surround and accompany the person wherever he goes, with this effect: that in every place he enjoys and is subject to the same law which other persons of his class elsewhere enjoy or are subject to." De Confl. Leg., lib. 1, tit. 3, sec. 12; 4 Dallas, 375 n.; 1 Story Con. Laws, pp. 59, 60.

The application sought to be given to the rule was this: that as Dred Scott was free while residing in the State of Illinois, by the laws of that State, on his return to the State of Missouri he carried with him the personal qualities of freedom, and that the same effect must be given to his status there as in the former State. But the difficulty in the case is in the total misapplication of the rule.

These personal qualities, to which Huberus refers, are those impressed upon the individual by the law of the domicil; it is this that the author claims should be permitted to accompany the person into whatever country he might go, and should supersede the law of the place where he had taken up a temporary residence.

Now, as the domicil of Scott was in the State of Missouri, where he was a slave, and from whence he was taken by his master into Illinois for a temporary residence, according to the doctrine of Huberus, the law of his domicil would have accompanied him, and during his residence there he would remain in the same condition as in the State of Missouri. In order to have given effect to the rule, as claimed in the

argument, it should have been first shown that a domicil had been acquired in the free State, which cannot be pretended upon the agreed facts in the case. But the true answer to the doctrine of Huberus is, that the rule, in any aspect in which it may be viewed, has no bearing upon either side of the question before us, even if conceded to the extent laid down by the author; for he admits that foreign governments give effect to these laws of the domicil no further than they are consistent with their own laws, and not prejudicial to their own subjects; in other words, their force and effect depend upon the law of comity of the foreign government. We should add, also, that this general rule of Huberus, referred to, has not been admitted in the practice of nations, nor is it sanctioned by the most approved jurists of international law. Story Con., secs. 91, 96, 103, 104; 2 Kent Com., p. 457, 458; 1 Burge Con. Laws, pp. 12, 127.

We come now to the decision of this court in the case of *Strader et al.* v. *Graham*, 10 How. p. 2. The case came up from the Court of Appeals, in the State of Kentucky. The question in the case was, whether certain slaves of Graham, a resident of Kentucky, who had been employed temporarily at several places in the State of Ohio, with their master's consent, and had returned to Kentucky into his service, had thereby become entitled to their freedom. The Court of Appeals held that they had not. The case was brought to this court under the twenty-fifth section of the Judiciary Act. This court held that it had no jurisdiction, for the reason, the question was one that belonged exclusively to the State of Kentucky. The Chief Justice, in delivering the opinion of the court, observed that "every State has an undoubted right to determine the status or domestic and social condition of the persons domiciled within its territory, except in so far as the powers of the States in this respect are restrained, or duties and obligations imposed upon them, by the Constitution of the United States. There is nothing in the Constitution of the United States, he observes, that can in any degree control the law of Kentucky upon this subject. And the condition of the negroes, therefore, as to freedom or slavery, after their return, depended altogether upon the laws of that State, and could not be influenced by the laws of Ohio. It was exclusively in the power of Kentucky to determine, for herself, whether their employment in another State should or should not make them free on their return."

It has been supposed, in the argument on the part of the plaintiff, that the eighth section of the Act of Congress passed March 6, 1820 (3 St. at Large, p. 544), which prohibited slavery north of thirty-six degrees thirty minutes, within which the plaintiff and his wife temporarily resided at Fort Snelling, possessed some superior virtue and effect, extra-territorially, and within the State of Missouri, beyond that of the laws of Illinois, or those of Ohio in the case of *Strader et al.* v. *Graham*. A similar ground was taken and urged upon the court in the case just mentioned, under the ordinance of 1787, which was enacted

during the time of the Confederation, and re-enacted by Congress after the adoption of the Constitution, with some amendments adapting it to the new government. 1 St. at Large, p. 50.

In answer to this ground, the Chief Justice, in delivering the opinion of the court, observed: "The argument assumes that the six articles which that ordinance declares to be perpetual, are still in force in the States since formed within the Territory, and admitted into the Union. If this proposition could be maintained, it would not alter the question; for the regulations of Congress, under the old Confederation or the present Constitution, for the government of a particular Territory, could have no force beyond its limits. It certainly could not restrict the power of the States, within their respective territories, nor in any manner interfere with their laws and institutions, nor give this court control over them.

"The ordinance in question," he observes, "if still in force, could have no more operation than the laws of Ohio in the State of Kentucky, and could not influence the decision upon the rights of the master or the slaves in that State."

This view, thus authoritatively declared, furnishes a conclusive answer to the distinction attempted to be set up between the extra-territorial effect of a State law and the Act of Congress in question.

It must be admitted that Congress possesses no power to regulate or abolish slavery within the States; and that, if this Act had attempted any such legislation, it would have been a nullity. And yet the argument here, if there be any force in it, leads to the result, that effect may be given to such legislation; for it is only by giving the Act of Congress operation within the State of Missouri, that it can have any effect upon the question between the parties. Having no such effect directly, it will be difficult to maintain, upon any consistent reasoning, that it can be made to operate indirectly upon the subject.

The argument, we think, in any aspect in which it may be viewed, is utterly destitute of support upon any principles of constitutional law, as, according to that, Congress has no power whatever over the subject of slavery within the State; and is also subversive of the established doctrine of international jurisprudence, as, according to that, it is an axiom that the laws of one government have no force within the limits of another, or extra-territorially, except from the consent of the latter.

It is perhaps not unfit to notice, in this connection, that many of the most eminent statesmen and jurists of the country entertain the opinion that this provision of the Act of Congress, even within the territory to which it relates, was not authorized by any power under the Constitution. The doctrine here contended for, not only upholds its validity in the territory, but claims for it effect beyond and within the limits of a sovereign State — an effect, as insisted, that displaces the laws of the State, and substitutes its own provisions in their place.

The consequences of any such construction are apparent. If Con-

gress possesses the power, under the Constitution, to abolish slavery in a Territory, it must necessarily possess the like power to establish it. It cannot be a one-sided power, as may suit the convenience or particular views of the advocates. It is a power, if it exists at all, over the whole subject; and then, upon the process of reasoning which seeks to extend its influence beyond the Territory, and within the limits of a State, if Congress should establish, instead of abolish, slavery, we do not see but that, if a slave should be removed from the Territory into a free State, his status would accompany him, and continue, notwithstanding its laws against slavery. The laws of the free State, according to the argument, would be displaced, and the Act of Congress, in its effect, be substituted in their place. We do not see how this conclusion could be avoided, if the construction against which we are contending should prevail. We are satisfied, however, it is unsound, and that the true answer to it is, that even conceding, for the purposes of the argument, that this provision of the Act of Congress is valid within the Territory for which it was enacted, it can have no operation or effect beyond its limits, or within the jurisdiction of a State. It can neither displace its laws, nor change the status or condition of its inhabitants.

Our conclusion, therefore, is, upon this branch of the case, that the question involved is one depending solely upon the law of Missouri, and that the Federal court sitting in the State, and trying the case before us, was bound to follow it.

The remaining question for consideration is, What is the law of the State of Missouri on this subject? And it would be a sufficient answer to refer to the judgment of the highest court of the State in the very case, were it not due to that tribunal to state somewhat at large the course of decision and the principles involved, on account of some diversity of opinion in the cases. As we have already stated, this case was originally brought in the Circuit Court of the State, which resulted in a judgment for the plaintiff. The case was carried up to the Supreme Court for revision. That court reversed the judgment below, and remanded the cause to the circuit, for a new trial. In that state of the proceeding, a new suit was brought by the plaintiff in the Circuit Court of the United States, and tried upon the issues and agreed case before us, and a verdict and judgment for the defendant, that court following the decision of the Supreme Court of the State. The judgment of the Supreme Court is reported in the 15 Misso. R., p. 576. The court placed the decision upon the temporary residence of the master with the slaves in the State and Territory to which they removed, and their return to the slave State: and upon the principles of international law, that foreign laws have no extra-territorial force, except such as the State within which they are sought to be enforced may see fit to extend to them, upon the doctrine of comity of nations.

This is the substance of the grounds of the decision.

The same question has been twice before that court since, and the

same judgment given. 15 Misso. R. 595; 17 Ib. 434. It must be admitted, therefore, as the settled law of the State, and according to the decision in the case of *Strader et al.* v. *Graham*, is conclusive of the case in this court.

It is said, however, that the previous cases and course of decision in the State of Missouri on this subject were different, and that the courts had held the slave to be free on his return from a temporary residence in the free State. We do not see, were this to be admitted, that the circumstance would show that the settled course of decision, at the time this case was tried in the court below, was not to be considered the law of the State. Certainly, it must be, unless the first decision of a principle of law by a State court is to be permanent and irrevocable. The idea seems to be, that the courts of a State are not to change their opinions, or, if they do, the first decision is to be regarded by this court as the law of the State. It is certain, if this be so, in the case before us, it is an exception to the rule governing this court in all other cases. But what court has not changed its opinions? What judge has not changed his?

Waiving, however, this view, and turning to the decisions of the courts of Missouri, it will be found that there is no discrepancy between the earlier and the present cases upon this subject. There are some eight of them reported previous to the decision in the case before us, which was decided in 1852. The last of the earlier cases was decided in 1836. In each one of these, with two exceptions, the master or mistress removed into the free State with the slave, with a view to a permanent residence — in other words, to make that his or her domicil. And in several of the cases, this removal and permanent residence were relied on, as the ground of the decision in favor of the plaintiff. All these cases, therefore, are not necessarily in conflict with the decision in the case before us, but consistent with it. In one of the two excepted cases, the master had hired the slave in the State of Illinois from 1817 to 1825. In the other, the master was an officer in the army, and removed with his slave to the military post of Fort Snelling, and at Prairie du Chien, in Michigan, temporarily, while acting under the orders of his government. It is conceded the decision in this case was departed from in the case before us, and in those that have followed it. But it is to be observed that these subsequent cases are in conformity with those in all the slave States bordering on the free — in Kentucky, 2 Marsh. 476; 5 B. Munroe, 176; 9 Ib. 565; in Virginia, 1 Rand. 15; 1 Leigh, 172; 10 Grattan, 495; in Maryland, 4 Harris and McHenry, 295, 322, 325. In conformity, also, with the law of England on this subject, *Ex parte* Grace, 2 Hagg. Adm. R. 94, and with the opinions of the most eminent jurists of the country. Story's Confl. 396 a; 2 Kent Com. 258 n.; 18 Pick. 193, Chief Justice Shaw. See Corresp. between Lord Stowell and Judge Story, 1 vol. Life of Story, p. 552, 558.

Lord Stowell, in communicating his opinion in the case of the slave

Grace to Judge Story, states, in his letter, what the question was before him, namely: "Whether the emancipation of a slave brought to England insured a complete emancipation to him on his return to his own country, or whether it only operated as a suspension of slavery in England, and his original character devolved on him again upon his return." He observed, "the question had never been examined since an end was put to slavery fifty years ago," having reference to the decision of Lord Mansfield in the case of Somersett; but the practice, he observed, "has regularly been, that on his return to his own country, the slave resumed his original character of slave." And so Lord Stowell held in the case.

Judge Story, in his letter in reply, observes: "I have read with great attention your judgment in the slave case, &c. Upon the fullest consideration which I have been able to give the subject, I entirely concur in your views. If I had been called upon to pronounce a judgment in a like case, I should have certainly arrived at the same result." Again he observes: "In my native State (Massachusetts), the state of slavery is not recognized as legal; and yet, if a slave should come hither, and afterwards return to his own home, we should certainly think that the local law attached upon him, and that his servile character would be redintegrated."

We may remark, in this connection, that the case before the Maryland court, already referred to, and which was decided in 1799, presented the same question as that before Lord Stowell, and received a similar decision. This was nearly thirty years before the decision in that case, which was in 1828. The Court of Appeals observed, in deciding the Maryland case, that "however the laws of Great Britain in such instances, operating upon such persons there, might interfere so as to prevent the exercise of certain acts by the masters, not permitted, as in the case of Somersett, yet, upon the bringing Ann Joice into this State (then the province of Maryland), the relation of master and slave continued in its extent, as authorized by the laws of this State." And Luther Martin, one of the counsel in that case, stated, on the argument, that the question had been previously decided the same way in the case of slaves returning from a residence in Pennsylvania, where they had become free under her laws.

The State of Louisiana, whose courts had gone further in holding the slave free on his return from a residence in a free State than the courts of her sister States, has settled the law, by an Act of her Legislature, in conformity with the law of the court of Missouri in the case before us. Sess. Law, 1846.

The case before Lord Stowell presented much stronger features for giving effect to the law of England in the case of the slave Grace than exists in the cases that have arisen in this country, for in that case the slave returned to a colony of England, over which the imperial government exercised supreme authority. Yet, on the return of the slave to the colony, from a temporary residence in England, he held that the

original condition of the slave attached. The question presented in cases arising here is as to the effect and operation to be given to the laws of a foreign State, on the return of the slave within an independent sovereignty.

Upon the whole, it must be admitted that the current of authority, both in England and in this country, is in accordance with the law as declared by the courts of Missouri in the case before us, and we think the court below was not only right, but bound to follow it.

Some question has been made as to the character of the residence in this case in the free State. But we regard the facts as set forth in the agreed case as decisive. The removal of Dr. Emerson from Missouri to the military posts was in the discharge of his duties as surgeon in the army, and under the orders of his government. He was liable at any moment to be recalled, as he was in 1838, and ordered to another post. The same is also true as it respects Major Taliaferro. In such a case, the officer goes to his post for a temporary purpose, to remain there for an uncertain time, and not for the purpose of fixing his permanent abode. The question we think too plain to require argument. The case of the *Attorney-General* v. *Napier*, 6 Welsh, Hurlst. and Gordon Exch. Rep. 217, illustrates and applies the principle in the case of an officer of the English army.

A question has been alluded to, on the argument, namely: the right of the master with his slave of transit into or through a free State, on business or commercial pursuits, or in the exercise of a Federal right, or the discharge of a Federal duty, being a citizen of the United States, which is not before us. This question depends upon different considerations and principles from the one in hand, and turns upon the rights and privileges secured to a common citizen of the republic under the Constitution of the United States. When that question arises, we shall be prepared to decide it.

Our conclusion is, that the judgment of the court below should be affirmed.

[What is reported as the "Opinion of the Court," in this case was in fact only the Opinion of the Chief Justice announcing the Judgment of the Court.[1] It proceeds upon the following grounds: 1. The plea in abatement is before the court and raises the question whether a negro whose ancestors were brought to this country and sold as slaves "can become a member of the political community formed and brought into existence by the Constitution of the United States and so entitled to sue in a court of the United States, as being a citizen of one of the States." Such persons, although free, cannot become citizens, within the meaning of the Federal Constitution, by the action of any State, or even through naturalization by Congress — Dred Scott was not a citizen. The Circuit Court had therefore no jurisdiction, and the judgment on the plea in abatement was erroneous. 2. The record discloses also that Scott

[1] See *infra*, pp. 491 n. and 493 n. — Ed.

is not even a free negro of the kind above named, but a slave, (*a*) Because the eighth section of the Act for the admission of Missouri as a State, March 6, 1820 (3 Stat. at Large, 545), purporting the prohibition of slavery in a Territory of the United States was unconstitutional and did not make Scott or the members of his family free at Fort Snelling. (*b*) Nor is he free by reason of living in Illinois, because upon his return to Missouri his status there was fixed, by the law of Missouri, as being that of a slave. "Upon the whole, therefore, it is the judgment of this court, that it appears by the record before us that the plaintiff in error is not a citizen of Missouri, in the sense in which that word is used in the Constitution; and that the Circuit Court of the United States, for that reason, had no jurisdiction in the case, and could give no judgment in it. Its judgment for the defendant must, consequently, be reversed, and a mandate issued, directing the suit to be dismissed for want of jurisdiction."

WAYNE, J. (p. 454), in a brief statement agreed entirely in this opinion.

DANIEL, J., also supported all its positions. But after disposing of the plea in abatement he made the following observations — "According to the view taken of the law, as applicable to the demurrer to the plea in abatement in this cause, the questions subsequently raised upon the several pleas in bar might be passed by, as requiring neither a particular examination, nor an adjudication directly upon them. But as these questions are intrinsically of primary interest and magnitude, and have been elaborately discussed in argument, and as with respect to them the opinions of a majority of the court, including my own, are perfectly coincident, to me it seems proper that they should here be fully considered, and, so far as it is practicable for this court to accomplish such an end, finally put to rest."

GRIER, J. (p. 469), briefly concurred with NELSON, J., "on the questions discussed by him." He also concurred with the opinion delivered by the Chief Justice, "that the Act of Congress of 6th of March, 1820, is unconstitutional and void." The form of the judgment he regarded as of little importance "as the decision of the pleas in bar shows that the plaintiff is a slave;" and so "whether the judgment be affirmed, or dismissed for want of jurisdiction, it is justified by the decision of the court and is the same in effect between the parties to the suit." He said nothing of the plea in abatement.

CAMPBELL, J. (p. 493), concurred "in the judgment pronounced by the Chief Justice." He passed over the plea in abatement, expressly declining to consider it,[1] and held that neither the law of Illinois nor

[1] See his own statement in 20 Wall. p. xi., that "the plea in abatement and the questions arising upon it, in the opinion of a majority of the court, were not before the court. The case as reported in 19 Howard discloses that each member of this majority held to this opinion, and that neither of them in their separate or concurring opinions examined the merits of the plea or passed an opinion on it." The names of this majority he gives as MCLEAN, CATRON, NELSON, GRIER, and CAMPBELL. At the first argument NELSON, J., had doubted on this point, but had then voted with the other party. — ED.

that of the Territory of Minnesota affected the status of the parties after their return to Missouri. The law of that State made them slaves. 2. That the Missouri Compromise Act was unconstitutional. He concluded by saying that "the judgment should be affirmed on the ground that the Circuit Court had no jurisdiction, or that the case should be reversed and remanded, that the suit may be dismissed."

CATRON, J. (p. 518), held that the plea in abatement was not open. As regarded the residence in Illinois, he agreed with the opinion of Mr. Justice Nelson, — "with which I not only concur but think his opinion is the most conclusive argument on the subject within my knowledge." As regarded the residence at Fort Snelling he declared that the Act of Congress was unconstitutional. He said nothing as to the form of the judgment; and closed his opinion thus: "For the reasons above stated I concur with my brother judges that the plaintiff Scott is a slave and was so when this suit was brought."

Of these seven judges composing the majority who agreed, in substance, as to the disposition of the case, only three passed upon the plea in abatement, and so upon the status of free negroes. Six agreed in declaring the Missouri Compromise Act unconstitutional. But all, without exception, also agreed in the doctrine of Mr. Justice Nelson's opinion, which, as the majority had formerly all agreed, and none afterwards denied, was enough to dispose of the case without raising any question on that Act.

MCLEAN, J., and CURTIS, J., dissented.

The former (p. 529) held, 1. That the plea in abatement was not open. 2. That slavery existed only by local law, and that Scott and his family were freed by being taken into the free State of Illinois, and also into the Territory of Minnesota, where by a law of Congress (the Act of 1820 above named) slavery was prohibited. 3. That there was nothing on the record to show a voluntary return of Scott and his family to Missouri. 4. That it was not the settled law of Missouri that the slave status revived on returning there, but the contrary. 5. That the court below erred in refusing to take notice of the Act of Congress or the Constitution of Illinois.

CURTIS, J., began by saying "I dissent from the opinion pronounced by the Chief Justice, and from the judgment which the majority of the court think it proper to render in this case." He held, 1. That the plea in abatement was now open, but that below it was rightly held insufficient, since negroes the descendants of ancestors brought here and sold as slaves may well be citizens of the States and of the United States. 2. That inasmuch as the law of the Territory where Scott and his wife had been married, had a special and decisive application to the case, it was necessary to consider the effect of that law. 3. That the Act of Congress prohibiting slavery there was valid and operated to give freedom to Scott and his family. 4. That the consent of the master to the marriage was an act of emancipation. 5. That the law of Missouri did not in fact, and could not in law, restore the status of slavery.

Mr. Justice Curtis did not consider specifically the effect of the residence in Illinois; on his view, it was not necessary. "I have touched," he said, "no question which, in the view I have taken, it was not absolutely necessary for me to pass upon, to ascertain whether the judgment of the Circuit Court should stand or be reversed. I have avoided no question on which the validity of that judgment depends. To have done either more or less would have been inconsistent with my views of my duty."][1]

[1] The great historical importance of this case will justify the quotation of the following passages relating to the manner in which the result was arrived at. Tyler's "Life of Chief Justice Taney" (pp. 382–385), preserves a letter from Hon. John A. Campbell, formerly Mr. Justice Campbell, of Nov. 24, 1870, and another confirming it, from Mr. Justice Nelson, of May 13, 1871. The former letter says: "The case of Dred Scott was argued for the first time in the spring of 1856. There were several discussions at the conferences of the judges upon the case. There was much division of opinion among them, and especially upon the first question presented. . . . The minority of the court, at that time, were of opinion that this plea was not open for examination, nor the judgment on it for review, because a demurrer had been filed to it and sustained. . . . This minority was composed of JUSTICES MCLEAN, CATRON, GRIER, and CAMPBELL. The majority were CHIEF JUSTICE TANEY, JUSTICES WAYNE, NELSON, DANIEL, and CURTIS. Justice Nelson hesitated and proposed a reargument of that and other questions to be had at the next term, and this was assented to, none objecting. At the next term these questions were again argued [in December, 1856]. Upon the reargument Justice Nelson's opinion concurred with that of the minority above mentioned, and they, by this addition, became the majority. Each of these judges has recorded in his opinion that there was nothing in the plea in abatement before the court for review." In his address as chairman of a meeting of the Bar of the Supreme Court of the United States, September 15, 1874, on occasion of the death of Hon. B. R. Curtis, formerly Mr. Justice Curtis, Mr. Campbell repeated the foregoing statements, and in allusion to the irregular nature of the opinion of the Chief Justice and to Mr. Justice Curtis's comments upon it, he added (20 Wall. xi.), "It was agreed at a day in the term that the questions should be considered, and each justice might deal with them as his judgment dictated. The abstinence of a portion of the court, on the one side, and the discussion by the others, was regulated by their own opinion as before expressed. And the facts being understood, no censure was deserved by any. My belief is that Justice Curtis misconceived the facts and supposed a portion of the court had concurred in deciding a case which they had before determined was not before the court. I make this statement in justice to him as well as to my other brethren."

This remark indicates the true character of the opinion given by the Chief Justice. It was his own and not that of the court. In substance the situation is identical with that in *Barnes* v. *The Railroads*, 17 Wall. 294, in which the Reporter accurately states (p. 299) in introducing the opinions, that "Mr. Justice Clifford now, March 3, 1873, delivered the judgment of the court;" and, in his headnote, that it was "*held* (by a court nearly equally divided, and the majority who agreed in the judgment not agreeing in the grounds of it) that," &c. In that case, also, the opinion of the individual justice who delivered the judgment of the court was erroneously assumed, even by the counsel in the case, to be the opinion of the court itself; although this opinion had not, as in the *Dred Scott Case*, been so called by any of the judges of the court. See the Reporter's "note" and footnote in 17 Wallace, 335 In substance also it was the same situation as in the *License Cases* (5 How. 504), where, ten years before, the judges agreed in the judgment, but "no opinion of the court was pronounced. Each justice gave his own reasons for affirming the decisions of the State courts" (16 Curtis's Decisions, 514). How imperfectly an opinion, which is allowed to be called that of the court, may represent the

majority of the tribunal in anything but the final judgment which it renders, is further illustrated by Mr. Justice Wayne's narrative, given in the *Passenger Cases*, 7 How. 429–436, as to the "Opinion of the court," in *New York* v. *Miln*, 11 Pet. 102. "Thus there were left," he says, "of the seven judges but two, the Chief Justice and Mr. Justice Barbour, in favor of the opinion as a whole." Compare, also, the "opinion of the court" in *Boyd* v. *Nebraska*, 143 U. S. 135, with the Reporter's headnote showing the actual difference among the judges.

In the "Memoir of B. R. Curtis," written by his brother, George T. Curtis, one of the counsel for Scott (vol. i. 201, *et seq.*), it is said: "The CHIEF JUSTICE and JUSTICES WAYNE, CATRON, DANIEL, and CAMPBELL were from slaveholding States; JUSTICES MCLEAN, NELSON, GRIER, and CURTIS were from non-slaveholding States. The case of Dred Scott was first argued at the December term, 1855. After consideration and comparison of views, it was determined by a majority of the judges that it was not necessary to decide the question of Scott's citizenship under the plea to the jurisdiction, but that the case should be disposed of by an examination of the merits; that is to say, by deciding whether he was a freeman or a slave, upon the facts agreed upon by the parties under the plea in bar of the action. One of the questions thus arising was, as the reader has seen, whether a temporary residence of a slave in the State of Illinois worked an emancipation, notwithstanding his return to Missouri. If it did not, it might be unnecessary to act upon the question of the power of Congress to prohibit slavery in the territory of the United States, into which Scott had been taken from Illinois, unless there were circumstances in his residence in the Federal territory which ought to lead to a different conclusion. It was assigned to Judge Nelson to write the opinion of the court upon this view of the case; in which view, however, Judge McLean and Judge Curtis did not concur. Judge Nelson wrote an opinion, which, from its internal evidence, was manifestly designed to stand and be delivered as the opinion of a majority of the bench. . . . The conclusion reached by this opinion was, not, as was afterwards directed, that the case should be dismissed for want of jurisdiction, but that the judgment of the Circuit Court, which had held Scott to be still a slave, should be affirmed.

"The astuteness with which this opinion avoided a decision of the question arising out of the residence of Scott in a Territory of the United States where slavery was prohibited by an Act of Congress, and the remarkable subtilty of the reasoning that this, too, was a matter for the State court to decide, because the law of the Territory could have no extra-territorial force except such as the State of Missouri might extend to it under the comity of nations, — show very distinctly that, after the first argument of the case in the Supreme Court, it was not deemed, by a majority of the bench, to be either necessary or prudent to express any opinion upon the constitutional power of Congress to prohibit slavery in the Territories of the United States. . . .

"At some time after the first argument of the case, but during the same term, and after Judge Nelson's opinion had been written, a motion was made in a conference of the court for a re-argument of the case at the next term. This motion prevailed, and Judge Nelson's opinion was consequently set aside. Two questions were then carefully framed by the Chief Justice, to be argued *de novo* at the bar, in the following terms: —

"1. Whether, after the plaintiff had demurred to the defendant's first plea to the jurisdiction of the court below, and the court had given judgment on that demurrer in favor of the plaintiff, and had ordered the defendant to answer over, and the defendant had submitted to that judgment and pleaded over to the merits, the appellate court can take notice of the facts admitted on the record by the demurrer, which were pleaded in bar of the jurisdiction of the court below, so as to decide whether that court had jurisdiction to hear and determine the cause?

"2. Whether or not, assuming that the appellate court is bound to take notice of the facts appearing upon the record, the plaintiff is a citizen of the State of Missouri, within the meaning of the eleventh section of the Judiciary Act of 1789? . . .

"After this second argument, and at some time during the same term, Mr. Justice Wayne became convinced that it was practicable for the Supreme Court of the United

States to quiet all agitation on the question of slavery in the Territories, by affirming that Congress had no constitutional power to prohibit its introduction. With the best intentions, with entirely patriotic motives, and believing thoroughly that such was the law on this constitutional question, he regarded it as eminently expedient that it should be so determined by the court. In the short observations which he read in the court, referring to the constitutional questions involved, he said that 'the peace and harmony of the country required the settlement of them by judicial decision;' and it is well known, from his frank avowals in conversation at the time, that he regarded it as a matter of great good fortune to his own section of the country, that he had succeeded in producing a determination, on the part of a sufficient number of his brethren, to act upon the constitutional question which had so divided the people of the United States. He persuaded the Chief Justice, Judge Grier, and Judge Catron of the public expediency of this course; and being perfectly convinced, as he somehow had convinced himself, that the appellate court could hold that the Circuit Court had no jurisdiction of the case, because a free negro could not be a 'citizen,' and yet could go on and decide all questions arising upon the merits, he could conscientiously concur, as he did, in every part of the opinion which the Chief Justice, after the second argument, felt called upon to write, and which was denominated the opinion of the court, although no other judge, excepting Mr. Justice Wayne, concurred in all its points, reasonings, and conclusions."

The same writer, in speaking of the dissenting opinion of Judge Curtis (*Ib.* 231), says: "In my judgment, its permanent importance consists in the demonstration which it made of this proposition: That the Supreme Court of the United States, sitting as an appellate tribunal to correct the errors of a Circuit Court, cannot, under a plea to the jurisdiction, decide that the lower court had no jurisdiction to hear and determine the cause, and then proceed to decide a question of constitutional law which arises only on a plea in bar to the merits of the action. The following impressive close of Judge Curtis's discussion of this part of the subject comprehends the whole substance of his objection to the course of a majority of his brethren: 'I do not consider it to be within the scope of the judicial power of the majority of the court to pass upon any question respecting the plaintiff's citizenship in Missouri, save that raised by the plea to the jurisdiction; and I do not hold any opinion of this court, or any court, binding, when expressed on a question not legitimately before it. The judgment of this court is, that the case is to be dismissed for want of jurisdiction, because the plaintiff was not a citizen of Missouri, as he alleged in his declaration. Into that judgment, according to the settled course of this court, nothing appearing after a plea to the merits can enter. A great question of constitutional law, deeply affecting the peace and welfare of the country, is not, in my opinion, a fit subject to be thus reached.'

"To those who do not fully appreciate the judicial functions of the Supreme Court of the United States, or who do not fully understand the limits within which it should carefully act, this may seem to have been hypercritical in its technicality. But to the instructed and enlightened student of our national jurisprudence, who contemplates the true function of the Supreme Court as the judicial arbiter of constitutional questions, these apparent technicalities will be recognized as pregnant with most important substance; for it cannot be doubted that the temptation to be drawn into the expression of opinions on constitutional questions, because they are entering into the politics of the time, is one against which that court should be hedged by the strict and logical order of judicial action, which can alone produce a judicial, and therefore a binding, determination."

In a very careful and valuable discussion of this case ("A Legal Review of the Case of Dred Scott," Boston, Crosby, Nichols & Co., 1857, reprinted, with some alterations, from the [Boston] "Law Reporter" for June, 1857), by Messrs. John Lowell and Horace Gray, better known afterwards as Judge Lowell, of the United States Circuit Court for Massachusetts, and Mr. Justice Gray, of the Supreme Court of the United States, it is said (p. 25): "The court, as we have shown, undoubtedly did decide that the

plaintiff was a slave when this suit was brought; and in order to arrive at this conclusion, they must have held, either that he never became entitled to his freedom, or that, having acquired such a right, he lost it by his return to Missouri. But in order to determine the case upon the first ground, it must have been held, not only that the plaintiff did not become entitled to freedom in the Territory, but also that he could not have asserted such a right in Illinois, — a position which most of the judges do not even suggest. On the contrary, the decision, so far as the residence in Illinois is concerned, is put distinctly upon the ground that the laws of Illinois could not operate on the plaintiff after his return to Missouri. This decision disposes equally of his residence in the Territory, for his stay in each place was for an equal time, and for similar purposes. The whole case being thus disposed of, the opinion on the Missouri Compromise Act was clearly extra-judicial."

And later on (p. 51), it is added: "Measuring the point adjudged, therefore, by all the material facts of the case, it is set forth at length in our headnote, or may be briefly stated thus: A slave taken by his master into a State or Territory where slavery is prohibited by law, and afterwards returning with his master into a slave State, and acquiring a residence there, if deemed by the highest court of that State, after his return, to be a slave, must be deemed a slave by the courts of the United States, and therefore not entitled to sue in one of those courts as a citizen of that State. In this conclusion seven of the nine judges concur; and it is best stated by Mr. Justice Nelson, whose opinion is wholly devoted to the question of the plaintiff's condition in Missouri after his return, and is the ablest in reasoning, and most judicial in tone of all the opinions of the majority."

Compare Bryce, Am. Com. i. 256, 257 (1st ed.): "Occasionally it (the Supreme Court of the United States) has been required to give decisions which have worked with tremendous force on politics. The most famous of these was the *Dred Scott Case*, in which the Supreme Court, on an action by a negro for assault and battery against the person claiming to be his master, declared that a slave taken temporarily to a free State and to a Territory in which Congress had forbidden slavery, and afterwards returning into a slave State and resuming residence there, was not a citizen capable of suing in the Federal courts if by the law of the slave State he was still a slave. This was the point which actually called for decision; but the majority of the court — for there was a dissentient minority — went further, and delivered a variety of *dicta* on various other points touching the legal status of negroes and the constitutional views of slavery. This judgment, since the language used in it seemed to cut off the hope of a settlement by the authority of Congress of the then (1857) pending disputes over slavery and its extension, did much to precipitate the Civil War."

See *Hobbs* v. *Fogg*, 6 Watts, 553 (1837); *West Chester, &c. R. R. Co.* v. *Miles*, 55 Pa. St. 209 (1867); and *Cory* v. *Carter*, 48 Ind. 327, 338 (1874). See also, generally, Cobb on Slavery (1858), and Stroud on Slavery (1827). — ED.

LEMMON *v.* THE PEOPLE.

NEW YORK COURT OF APPEALS. 1860.

[20 *N. Y.* 562.]

[APPEAL from a judgment of the Supreme Court (Dec. 1857), affirming an order of a justice of the Superior Court of the city of New York (Nov. 13, 1852) discharging on *habeas corpus* eight negroes claimed

as the slaves of Juliet Lemmon.] *Charles O'Conor*,[1] for the appellants; *Joseph Blunt* and *Wm. M. Evarts*, for the respondents.

DENIO, J. The petition upon which the writ of *habeas corpus* was issued, states that the colored persons sought to be discharged from imprisonment were, on the preceding night, taken from the steamer "City of Richmond," in the harbor of New York, and at the time of presenting the petition, were confined in a certain house in Carlisle Street in that city. The writ is directed to the appellant by the name of "Lemmings," as the person having in charge "eight colored persons lately taken from the steamer 'City of Richmond,' and to the man in whose house in Carlisle Street they were confined." The return is made by Lemmon, the appellant, and it speaks of the colored persons who are therein alleged to be slaves, and the property of Juliet Lemmon, as "the eight slaves or persons named in the said writ of *habeas corpus*." It alleges that they were taken out of the possession of Mrs. Lemmon, while *in transitu* between Norfolk, in Virginia, and the State of Texas, and that both Virginia and Texas are slaveholding States; that she had no intention of bringing the slaves into this State to remain therein, or in any manner except on their transit as aforesaid through the port of New York; that she was compelled by necessity to touch or land, but did not intend to remain longer than necessary, and that such landing was for the purpose of passage and transit and not otherwise, and that she did not intend to sell the slaves. It is also stated that she was compelled by "necessity or accident" to take passage from Norfolk in the above-mentioned steamship, and that Texas was her ultimate place of destination.

I understand the effect of these statements to be that Mrs. Lemmon, being the owner of these slaves, desired to take them from her residence in Norfolk to the State of Texas; and, as a means of effecting that purpose, she embarked, in the steamship mentioned, for New York, with a view to secure a passage from thence to her place of destination. As nothing is said of any stress of weather, and no marine casualty is mentioned, the necessity of landing, which is spoken of, refers, no doubt, to the exigency of that mode of prosecuting her journey. If the ship in which she arrived was not bound for the Gulf of Mexico, she would be under the necessity of landing at New York to re-embark in some other vessel sailing for that part of the United States; and this, I suppose, is what it was intended to state. The necessity or accident which is mentioned as having compelled her to embark at Norfolk in the "City of Richmond," is understood to refer to some circumstance which prevented her making a direct voyage from Virginia to Texas. The question to be decided is whether the bringing the slaves into this State under these circumstances entitled them to their freedom.

[1] The extraordinary argument of this distinguished lawyer is fully reported. It cannot find a place here, but it is well worth attention, — whatever may be thought of the soundness of its positions. — ED.

The intention, and the effect, of the statutes of this State bearing upon the point are very plain and unequivocal. By an Act passed in 1817, it was declared that no person held as a slave should be imported, introduced or brought into this State on any pretence whatever, except in the cases afterwards mentioned in the Act, and any slave brought here contrary to the Act was declared to be free. Among the excepted cases was that of a person, not an inhabitant of the State, passing through it, who was allowed to bring his slaves with him; but they were not to remain in the State longer than nine months. Laws of 1817, ch. 137, §§ 9, 15. The portions of this Act which concern the present question were re-enacted at the revision of the laws in 1830. The first and last sections of the title are in the following language: —

"§ 1. No person held as a slave shall be imported, introduced or brought into this State on any pretence whatsoever, except in the cases hereinafter specified. Every such person shall be free. Every person held as a slave who hath been introduced or brought in this State contrary to the laws in force at the time, shall be free."

"§ 16. Every person born in this State, whether white or colored, is free. Every person who shall hereafter be born within this State shall be free; and every person brought into this State as a slave, except as authorized by this title, shall be free." R. S., part 1, ch. 20, tit. 7.

The intermediate sections, three to seven inclusive, contain the exceptions. Section 6 is as follows: "Any person, not being an inhabitant of this State, who shall be travelling to or from, or passing through this State, may bring with him any person lawfully held in slavery, and may take such person with him from this State; but the person so held in slavery shall not reside or continue in this State more than nine months; if such residence be continued beyond that time such person shall be free." In the year 1841, the legislature repealed this section, together with the four containing other exceptions to the general provisions above mentioned. Ch. 247. The effect of this repeal was to render the 1st and 16th sections absolute and unqualified. If any doubt of this could be entertained upon the perusal of the part of the title left unrepealed, the rules of construction would oblige us to look at the repealed portions in order to ascertain the sense of the residue. *Bussey* v. *Story*, 4 Barn. & Adolph. 98. Thus examined, the meaning of the statute is as plain as though the legislature had declared in terms that if any person should introduce a slave into this State, in the course of a journey to or from it, or in passing through it, the slave shall be free.

If, therefore, the legislature had the constitutional power to enact this statute, the law of the State precisely meets the case of the persons who were brought before the judge on the writ of *habeas corpus*, and his order discharging them from constraint was unquestionably correct. Every sovereign State has a right to determine by its laws the condition of all persons who may at any time be within its jurisdiction; to

exclude therefrom those whose introduction would contravene its policy, or to declare the conditions upon which they may be received, and what subordination or restraint may lawfully be allowed by one class or description of persons over another. Each State has, moreover, the right to enact such rules as it may see fit respecting the title to property, and to declare what subjects shall, within the State, possess the attributes of property, and what shall be incapable of a proprietary right. These powers may of course be variously limited or modified by its own constitutional or fundamental laws; but independently of such restraints (and none are alleged to exist affecting this case) the legislative authority of the State over these subjects is without limit or control, except so far as the State has voluntarily abridged her jurisdiction by arrangements with other States. There are, it is true, many cases where the conditions impressed upon persons and property by the laws of other friendly States may and ought to be recognized within our own jurisdiction. These are defined, in the absence of express legislation, by the general assent and by the practice and usage of civilized countries, and being considered as incorporated into the municipal law, are freely administered by the courts. They are not, however, thus allowed on account of any supposed power residing in another State to enact laws which should be binding on our tribunals, but from the presumed assent of the law-making power to abide by the usages of other civilized States. Hence it follows that where the legislature of the State, in which a right or privilege is claimed on the ground of comity, has by its laws spoken upon the subject of the alleged right, the tribunals are not at liberty to search for the rule of decision among the doctrines of international comity, but are bound to adopt the directions laid down by the political government of their own State. We have not, therefore, considered it necessary to inquire whether by the law of nations, a country where negro slavery is established has generally a right to claim of a neighboring State, in which it is not allowed, the right to have that species of property recognized and protected in the course of a lawful journey taken by the owner through the last-mentioned country, as would undoubtedly be the case with a subject recognized as property everywhere; and it is proper to say that the counsel for the appellant has not urged that principle in support of the claim of Mrs. Lemmon.

What has been said as to the right of a sovereign State to determine the status of persons within its jurisdiction applies to the States of this Union, except as it has been modified or restrained by the Constitution of the United States. *Groves* v. *Slaughter*, 15 Pet. 419; *Moore* v. *The People of Illinois*, 14 How. 13; *City of New York* v. *Miln*, 11 Pet. 131, 139. There are undoubtedly reasons, independently of the provisions of the Federal Constitution, for conciliatory legislation on the part of the several States, towards the polity, institutions and interests of each other, of a much more persuasive character than those which prevail even between the most friendly States unconnected by

any political union; but these are addressed exclusively to the political power of the respective States; so that whatever opinion we might entertain as to the reasonableness, or policy, or even of the moral obligation of the non-slaveholding States to establish provisions similar to those which have been stricken out of the Revised Statutes, it is not in our power, while administering the laws of this State in one of its tribunals of justice, to act at all upon those sentiments, when we see, as we cannot fail to do, that the legislature has deliberately repudiated them.

The power which has been mentioned as residing in the States is assumed by the Constitution itself to extend to persons held as slaves by such of the States as allow the condition of slavery, and to apply also to a slave in the territory of another State, which did not allow slavery, even unaccompanied with an intention on the part of the owner to hold him in a state of slavery in such other State. The provision respecting the return of fugitives from service contains a very strong implication to that effect. It declares that no person held to service or labor in one State, under the laws thereof, escaping into another, shall in consequence of any law or regulation therein, be discharged from such service or labor, &c. There was at least one State which at the adoption of the Constitution did not tolerate slavery; and in several of the other States the number of slaves was so small and the prevailing sentiment in favor of emancipation so strong, that it was morally certain that slavery would be speedily abolished. It was assumed by the authors of the Constitution, that the fact of a Federative Union would not of itself create a duty on the part of the States which should abolish slavery to respect the rights of the owners of slaves escaping thence from the States where it continued to exist. The apprehension was not that any of the States would establish rules or regulations looking primarily to the emancipation of fugitives from labor, but that the abolition of slavery in any State would draw after it the principle that a person held in slavery would immediately become free on arriving, in any manner, within the limits of such State. That principle had then recently been acted upon in England in a case of great notoriety, which could not fail to be well known to the cultivated and intelligent men who were the principal actors in framing the Federal Constitution. A Virginia gentleman of the name of Stewart had occasion to make a voyage from his home in that colony to England, on his own affairs, with the intention of returning as soon as they were transacted; and he took with him as his personal servant his negro slave, Somerset, whom he had purchased in Virginia and was entitled to hold in a state of slavery by the laws prevailing there. While they were in London, the negro absconded from the service of his master, but was re-taken and put on board a vessel lying in the Thames bound to Jamaica, where slavery also prevailed, for the purpose of being there sold as a slave. On application to Lord Mansfield, Chief Justice of the King's Bench, a writ of *habeas corpus* was issued to Knowles as

master of the vessel, whose return to the writ disclosed the foregoing facts. Lord Mansfield referred the case to the decision of the Court of King's Bench, where it was held, by the unanimous opinion of the judges, that the restraint was illegal, and the negro was discharged. *The Negro Case*, 11 Harg. S. T. 340; *Somerset* v. *Stewart*, Lofft, 1.[1] It was the opinion of the court that a state of slavery could not exist except by force of positive law, and it being considered that there was no law to uphold it in England, the principles of the law respecting the writ of *habeas corpus* immediately applied themselves to the case, and it became impossible to continue the imprisonment of the negro. The case was decided in 1772, and from that time it became a maxim that slaves could not exist in England. The idea was reiterated in the popular literature of the language, and fixed in the public mind by a striking metaphor which attributed to the atmosphere of the British Islands a quality which caused the shackles of the slave to fall off. The laws of England respecting personal rights were in general the laws of the colonies, and they continued the same system after the Revolution by provisions in their constitutions, adopting the common law subject to alterations by their own statutes. The literature of the colonies was that of the mother country.

The aspect in which the case of fugitive slaves was presented to the authors of the Constitution therefore was this: A number of the States had very little interest in continuing the institution of slavery, and were likely soon to abolish it within their limits. When they should do so, the principle of the laws of England as to personal rights and the remedies for illegal imprisonment, would immediately prevail in such States. The judgment in Somerset's case and the principles announced by Lord Mansfield, were standing admonitions that even a temporary restraint of personal liberty by virtue of a title derived under the laws of slavery, could not be sustained where that institution did not exist by positive law, and where the remedy by *habeas corpus*, which was a cherished institution of this country as well as in England, was established. Reading the provision for the rendition of fugitive slaves, in the light which these considerations afford, it is impossible not to perceive that the convention assumed the general principle to be that the escape of a slave from a State in which he was lawfully held to service into one which had abolished slavery would *ipso facto* transform him into a free man. This was recognized as the legal consequence of a slave going into a State where slavery did not exist, even though it were without the consent and against the will of the owner. *A fortiori* he would be free if the master voluntarily brought him into a free State for any purpose of his own. But the provision in the Constitution extended no further than the case of fugitives. As to such cases, the admitted general consequence of the presence of a slave in a

[1] For a striking passage from an unpublished report of this case by Tilghman, afterwards Chief Justice of Pennsylvania, then a student of law in England, see the London Times for October 20, 1883, in a letter entitled "American Law and Lawyers." — ED.

free State was not to prevail, but he was by an express provision in the Federal compact to be returned to the party to whom the service was due. Other cases were left to be governed by the general laws applicable to them. This was not unreasonable, as the owner was free to determine whether he would voluntarily permit his slave to go within a jurisdiction which did not allow him to be held in bondage. That was within his own power, but he could not always prevent his slaves from escaping out of the State in which their servile condition was recognized. The provision was precisely suited to the exigency of the case, and it went no further.

In examining other arrangements of the Constitution, apparently inserted for purposes having no reference to slavery, we ought to bear in mind that when passing the fugitive slave provision the convention was contemplating the future existence of States which should have abolished slavery, in a political union with other States where the institution would still remain in force. It would naturally be supposed that if there were other cases in which the rights of slave-owners ought to be protected in the States which should abolish slavery, they would be adjusted in connection with the provision looking specially to that case, instead of being left to be deduced by construction from clauses intended primarily for cases to which slavery had no necessary relation. It has been decided that the fugitive clause does not extend beyond the case of the actual escape of a slave from one State to another. *Ex parte Simmons*, 4 Wash. C. C. R. 396. But the provision is plainly so limited by its own language.

The Constitution declares that the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States. Art. 4, § 2. No provision in that instrument has so strongly tended to constitute the citizens of the United States one people as this. Its influence in that direction cannot be fully estimated without a consideration of what would have been the condition of the people if it or some similar provision had not been inserted. Prior to the adoption of the Articles of Confederation, the British colonies on this continent had no political connection, except that they were severally dependencies of the British crown. Their relation to each other was the same which they respectively bore to the other English colonies, whether on this continent or in Europe or Asia. When, in consequence of the Revolution, they severally became independent and sovereign States, the citizens of each State would have been under all the disabilities of alienage in every other, but for a provision in the compacts into which they entered whereby that consequence was avoided. The articles adopted during the Revolution formed essentially a league for mutual protection against external force; but in passing them it was felt to be necessary to secure a community of intercourse which would not necessarily obtain even among closely allied States. This was effected by the fourth article of that instrument, which declared that the free inhabitants of each of the States (paupers, vagabonds, and fugitives from justice excepted)

should be entitled to all privileges and immunities of free citizens in the several States, and that the people of each State should have free ingress and egress to and from any other State, and should enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants thereof, respectively. The Constitution organized a still more intimate union, constituting the States, for all external purposes and for certain enumerated domestic objects, a single nation; but still the principle of State sovereignty was retained as to all subjects, except such as were embraced in the delegations of power to the general government or prohibited to the States. The social status of the people, and their personal and relative rights as respects each other, the definition and arrangements of property, were among the reserved powers of the States. The provision conferring rights of citizenship upon the citizens of every State in every other State, was inserted substantially as it stood in the Articles of Confederation. The question now to be considered is, how far the State jurisdiction over the subjects just mentioned is restricted by the provision we are considering; or, to come at once to the precise point in controversy, whether it obliges the State governments to recognize, in any way, within their own jurisdiction, the property in slaves which the citizens of States in which slavery prevails may lawfully claim within their own States — beyond the case of fugitive slaves. The language is that they shall have the privileges and immunities of citizens in the several States. In my opinion the meaning is, that in a given State, every citizen of every other State shall have the same privileges and immunities — that is, the same rights — which the citizens of that State possess. In the first place, they are not to be subjected to any of the disabilities of alienage. They can hold property by the same titles by which every other citizen may hold it, and by no other. Again, any discriminating legislation which should place them in a worse situation than a proper citizen of the particular State would be unlawful. But the clause has nothing to do with the distinctions founded on domicil. A citizen of Virginia, having his home in that State, and never having been within the State of New York, has the same rights under our laws which a native-born citizen, domiciled elsewhere, would have, and no other rights. Either can be the proprietor of property here, but neither can claim any rights which under our laws belong only to residents of the State. But where the laws of the several States differ, a citizen of one State asserting rights in another, must claim them according to the laws of the last-mentioned State, not according to those which obtain in his own.

The position that a citizen carries with him, into every State into which he may go, the legal institutions of the one in which he was born, cannot be supported. A very little reflection will show the fallacy of the idea. Our laws declare contracts depending upon games of chance or skill, lotteries, wagering policies of insurance, bargains for more than 7 per cent per annum of interest, and many others, void. In

other States such contracts, or some of them, may be lawful. But no one would contend that if made within this State by a citizen of another State where they would have been lawful, they would be enforced in our courts. Certain of them, if made in another State and in conformity with the laws there, would be executed by our tribunals upon the principles of comity; and the case would be the same if they were made in Europe or in any other foreign country. The clause has nothing to do with the doctrine of international comity. That doctrine, as has been remarked, depends upon the usage of civilized nations and the presumed assent of the legislative authority of the particular State in which the right is claimed; and an express denial of the right by that authority is decisive against the claim. How then, is the case of the appellant aided by the provision under consideration?

The legislature has declared, in effect, that no person shall bring a slave into this State, even in the course of a journey between two slaveholding States, and that if he does, the slave shall be free. Our own citizens are of course bound by this regulation. If the owner of these slaves is not in like manner bound it is because, in her quality of citizen of another State, she has rights superior to those of any citizen of New York, and because, in coming here, or sending her slaves here for a temporary purpose, she has brought with her, or sent with them, the laws of Virginia, and is entitled to have those laws enforced in the courts, notwithstanding the mandate of our own laws to the contrary. But the position of the appellant proves too much. The privileges and immunities secured to the citizens of each State by the Constitution are not limited by time, or by the purpose for which, in a particular case, they may be desired, but are permanent and absolute in their character. Hence, if the appellant can claim exemption from the operation of the statute on which the respondent relies, on the ground that she is a citizen of a State where slavery is allowed, and that our courts are obliged to respect the title which those laws confer, she may retain slaves here during her pleasure; and, as one of the chief attributes of property is the power to use it, and to sell or dispose of it, I do not see how she could be debarred of these rights within our jurisdiction as long as she may choose to exercise them. She could not, perhaps, sell them to a citizen of New York, who would at all events be bound by our laws, but any other citizen of a slave State — who would equally bring with him the immunities and privileges of his own State — might lawfully traffic in the slave property. But my opinion is that she has no more right to the protection of this property than one of the citizens of this State would have upon bringing them here under the same circumstances, and that the clause of the Constitution referred to has no application to the case. I concede that this clause gives to citizens of each State entire freedom of intercourse with every other State, and that any law which should attempt to deny them free ingress or egress would be void. But it is citizens only who possess these rights, and slaves certainly are not citizens. Even free negroes, as is well known,

have been alleged not to possess that quality. In *Moore* v. *The State of Illinois*, already referred to, the Supreme Court of the United States, in its published opinion, declared that the States retained the power to forbid the introduction into their territory of paupers, criminals or fugitive slaves. The case was a conviction under a statute of Illinois, making it penal to harbor or secrete any negro, mulatto or person of color being a slave or servant owing service or labor to any other person. The indictment was for secreting a fugitive slave who had fled from his owner in Missouri. The owner had not intervened to reclaim him so as to bring the fugitive law into operation, and the case was placed by the court on the ground that it was within the legitimate power of State legislation, in the promotion of its policy, to exclude an unacceptable population. I do not at all doubt the right to exclude a slave as I do not consider him embraced under the provision securing a common citizenship; but it does not seem to me clear that one who is truly a citizen of another State can be thus excluded, though he may be a pauper or a criminal, unless he be a fugitive from justice. The fourth article of confederation contained an exception to the provision for a common citizenship, excluding from its benefits paupers and vagabonds as well as fugitives from justice; but this exception was omitted in the corresponding provision of the Constitution. If a slave attempting to come into a State of his own accord can be excluded on the ground mentioned, namely, because as a slave he is an unacceptable inhabitant, as it is very clear he may be, it would seem to follow that he might be expelled if accompanied by his master. It might, it is true, be less mischievous to permit the residence of such a person when under the restraint of his owner; but of this the legislature must judge. But it is not the right of the slave but of the master which is supposed to be protected under the clause respecting citizenship. The answer to the claim in that aspect has been already given. It is that the owner cannot lawfully do anything which our laws do not permit to be done by one of our own citizens; and as a citizen of this State cannot bring a slave within its limits except under the condition that he shall immediately become free, the owner of these slaves could not do it without involving herself in the same consequences. . . .

Upon the whole case, I have come to the conclusion that there is nothing in the National Constitution or the laws of Congress to preclude the State judicial authorities from declaring these slaves thus introduced into the territory of this State, free, and setting them at liberty, according to the direction of the statute referred to. For the foregoing reasons, I am in favor of affirming the judgment of the Supreme Court.

[The concurring opinion of WRIGHT, J., and the dissenting opinion of CLERKE, J., are omitted. With the first two judges above named concurred DAVIES, BACON, and WELLES, JJ.; CLERKE, J., and COMSTOCK, C. J., dissenting, and SELDEN, J., doubting.]

NOTE.

See, at this point, the amendments to the Constitution of the United States, XIII.–XV. inclusive, *ante*, pp. 413, 414. Compare Pomeroy, Const. Law (Bennett's ed.), ss. 231–239, and 2 Story, Const. Law, ss. 1959–1963, an addition by Judge Cooley.

UNITED STATES *v.* RHODES.

CIRCUIT COURT OF THE UNITED STATES, DISTRICT OF KENTUCKY. 1866.

[1 *Abbott, U. S.* 28.]

MOTION in arrest of judgment.

SWAYNE, J. This is a prosecution under the Act of Congress of the 9th of April, 1866, entitled "An Act to protect all Persons in the United States in their Civil Rights, and to furnish the Means for their Vindication." The defendants having been found guilty by a jury, the case is now before us upon a motion in arrest of judgment.

Three grounds are relied upon in support of the motion. It is insisted: —

I. That the indictment is fatally defective.

II. That the case which it makes, or was intended to make, is not within the Act of Congress upon which it is founded.

III. That the Act itself is unconstitutional and void.

I. As to the indictment, if either count be sufficient, it will support the judgment of the court upon the verdict. Our attention will be confined to the second count. That count alleges that the defendants, being white persons, "on the 1st of May, 1866, at the county of Nelson, in the State and District of Kentucky, at the hour of eleven of the clock in the night of the same day, feloniously and burglariously did break and enter the dwelling-house there situate of Nancy Talbot, a citizen of the United States of the African race, having been born in the United States, and not subject to any foreign power, who was then and there, and is now, denied the right to testify against the said defendants, in the courts of the State of Kentucky, and of the said county of Nelson, with intent the goods and chattels, moneys and property of the said Nancy Talbot, in the said dwelling-house then and there being, feloniously and burglariously to steal, take, and carry away, contrary to the statute in such case made and provided, and against the peace and dignity of the United States."

The objection urged against this count is, that it does not aver that "white citizens" enjoy the right which it is alleged is denied to Nancy Talbot. This fact is vital in the case. Without it our jurisdiction cannot be maintained. It is averred that she is a citizen of the United States, of the African race, and that she is denied the right to testify against the defendants, they being white persons. Section 669 of the

Code of Civil Practice of Kentucky gives this right to white persons under the same circumstances. This is a public statute, and we are bound to take judicial cognizance of it. It is never necessary to set forth matters of law in a criminal pleading. The indictment is, in legal effect, as if it averred the existence and provisions of the statute. The enjoyment of the right in question by white citizens is a conclusion of law from the facts stated. Averment and proof could not bring it into the case more effectually for any purpose than it is there already. 1 Chitt. Cr. Law, 188; 2 Bos. and P. 127; 2 Leach, 942; 1 Bishop Crim. Pro., §§ 52, 53.

This right is one of those secured to Nancy Talbot by the first section of this Act. The objection to this count cannot be sustained.

II. Is the offence charged, within the statute?

The first section enacts: "That all persons born in the United States, and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery, . . . shall have the same right in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, sell and convey real and personal property; and to full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding."

The second section provides: "That any person, who under color of any law, statute, ordinance, regulation, or custom, shall subject, or cause to be subjected, any inhabitant of any State or Territory to the deprivation of any right secured or protected by this Act, or to different punishment, pains, or penalties on account of such person having at any time been held in the condition of slavery, . . . or by reason of his color or race, than is prescribed for the punishment of white persons, shall be deemed guilty of a misdemeanor," &c.

The third section declares: "That the District Courts of the United States within their respective districts, shall have, exclusively of the courts of the several States, cognizance of all crimes and offences committed against the provisions of this Act, and also, concurrently with the Circuit Courts of the United States, of all causes, civil and criminal, affecting persons who are denied or cannot enforce in the courts or judicial tribunals of the State where they may be, any of the rights secured to them by the first section of this Act; and if any suit or prosecution, civil or criminal, shall be commenced in any State court against such person, for any cause whatsoever, . . . such defendant shall have the right to remove such cause for trial to the proper District or Circuit Court in the manner prescribed by the Act relating to *habeas corpus*, and regulating judicial proceedings in certain cases, approved March 3, 1863, and all Acts amendatory thereof." . . .

When the Act was passed there was no State where ample provision did not exist for the trial and punishment of persons of color for all offences; and no locality where there was any difficulty in enforcing the law against them. There was no complaint upon the subject. The aid of Congress was not invoked in that direction. It is not denied that the first and second sections were designed solely for their benefit. The third section, giving the jurisdiction to which this question relates, provides expressly that if sued or prosecuted in a State court under the circumstances mentioned, they may at once have the cause certified into a proper Federal court. . . .

It is incredible that all this machinery, including the agency of the freedmen's bureau, would have been provided, if the intention were to limit the criminal jurisdiction conferred by the third section to colored persons, and exclude all white persons from its operation.

The title of the Act is in harmony with this view of the subject.

The construction contended for would obviously defeat the main object which Congress had in view in passing the Act, and produce results the opposite of those intended.

The difficulty was that where a white man was sued by a colored man, or was prosecuted for a crime against a colored man, colored witnesses were excluded. This in many cases involved a denial of justice. Crimes of the deepest dye were committed by white men with impunity. Courts and juries were frequently hostile to the colored man, and administered justice, both civil and criminal, in a corresponding spirit. Congress met these evils by giving to the colored man everywhere the same right to testify "as is enjoyed by white citizens," abolishing the distinction between white and colored witnesses, and by giving to the courts of the United States jurisdiction of all causes, civil and criminal, which concern him, wherever the right to testify as if he were white is denied to him or cannot be enforced in the local tribunals of the State.

The context and the rules of interpretation to be applied permit of no other construction. Such was clearly the intention of Congress, and that intention constitutes the law.

This, with the provision which authorizes colored defendants in the State courts to have their causes certified into the Federal courts, and the other provisions referred to, renders the protection which Congress has given as effectual as it can well be made by legislation. It is one system, all the parts looking to the same end.

Where crime is committed with impunity by any class of persons, society, so far as they are concerned, is reduced to that condition of barbarism which compels those unprotected by other sanctions to rely upon physical force for the vindication of their natural rights. There is no other remedy, and no other security.

It is said there can be no such thing as a right to testify, and that if Congress conferred it by this Act, a cloud of colored witnesses may appear in every case and claim to exercise it.

There is no force in this argument. The statute is to be construed

reasonably. Like the right to sue and to contract, it is to be exercised only on proper occasions and within proper limits. Every right given is to be the same "as is enjoyed by white citizens."

It is urged that this is a penal statute, and to be construed strictly. We regard it as remedial in its character, and to be construed liberally, to carry out the wise and beneficent purposes of Congress in enacting it. Bacon's Abr. tit. Statute, 1.

But if the Act were a penal statute, the canons of interpretation to be applied would not affect the conclusion at which we have arrived. *United States* v. *Wiltberger*, 5 Wheat. 96; *Commonwealth* v. *Lowry*, 8 Pick. 374; *United States* v. *Morris*, 14 Pet. 475; *United States* v. *Winn*, 3 Sumn. 211; 1 Bish. Cr. Law, 236.

This objection to the indictment cannot avail the defendants.

III. Is the Act warranted by the Constitution?

The first eleven amendments of the Constitution were intended to limit the powers of the government which it created, and to protect the people of the States. Though earnestly sustained by the friends of the Constitution, they originated in the hostile feelings with which it was regarded by a large portion of the people, and were shaped by the jealous policy which those feelings inspired. The enemies of the Constitution saw many perils of evil in the centre, but none elsewhere. They feared tyranny in the head, not anarchy in the members, and they took their measures accordingly. The friends of the Constitution desired to obviate all just grounds of apprehension, and to give repose to the public mind. It was important to unite, as far as possible, the entire people in support of the new system which had been adopted. They felt the necessity of doing all in their power to remove every obstacle in the way of its success. The most momentous consequences for good or evil to the country were to follow in the results of the experiment. Hence the spirit of concession which animated the Convention, and hence the adoption of these amendments after the work of the Convention was done and had been approved by the people.

The Twelfth Amendment grew out of the contest between Jefferson and Burr for the presidency.

The Thirteenth Amendment is the last one made. It trenches directly upon the power of the States and of the people of the States. It is the first and only instance of a change of this character in the organic law. It destroyed the most important relation between capital and labor in all the States where slavery existed. It affected deeply the fortunes of a large portion of their people. It struck out of existence millions of property. The measure was the consequence of a strife of opinions, and a conflict of interests, real or imaginary, as old as the Constitution itself. These elements of discord grew in intensity. Their violence was increased by the throes and convulsions of a civil war. The impetuous vortex finally swallowed up the evil, and with it forever the power to restore it. Those who insisted upon the adoption of this amendment were animated by no spirit of vengeance. They sought security against

the recurrence of a sectional conflict. They felt that much was due to the African race for the part it had borne during the war. They were also impelled by a sense of right and by a strong sense of justice to an unoffending and long-suffering people. These considerations must not be lost sight of when we come to examine the amendment in order to ascertain its proper construction.

The Act of Congress confers citizenship. Who are citizens, and what are their rights? The Constitution uses the words "citizen" and "natural-born citizens;" but neither that instrument nor any Act of Congress has attempted to define their meaning. British jurisprudence, whence so much of our own is drawn, throws little light upon the subject. . . .

All persons born in the allegiance of the king are natural-born subjects, and all persons born in the allegiance of the United States are natural-born citizens. Birth and allegiance go together. Such is the rule of the common law, and it is the common law of this country, as well as of England. There are two exceptions, and only two, to the universality of its application. The children of ambassadors are in theory born in the allegiance of the powers the ambassadors represent, and slaves, in legal contemplation, are property, and not persons. 2 Kent Com. 1; *Calven's Case*, 7 Coke, 1; 4 Black. Com. 366; *Lynch* v. *Clark*, 1 Sandf. Ch. 139.

The common law has made no distinction on account of race or color. None is now made in England, nor in any other Christian country of Europe.

The fourth of the Articles of Confederation declared that the "free inhabitants of each of these States, paupers, vagabonds, and fugitives from justice excepted, shall be entitled to all the privileges and immunities of free citizens in the United States," &c. On the 25th of June, 1778, when these Articles were under consideration by the Congress, South Carolina moved to amend this fourth Article by inserting after the word "free," and before the word "inhabitants," the word "white." Two States voted for the amendment and eight against it. The vote of one was divided. *Scott* v. *Sanford*, 19 How. 575. When the Constitution was adopted, free men of color were clothed with the franchise of voting in at least five States, and were a part of the people whose sanction breathed into it the breath of life. *Scott* v. *Sanford*, 19 How. 573; *State* v. *Manuel*, 2 Dev. & Batt. 24, 25.

"'Citizens' under our Constitution and laws means free inhabitants born within the United States or naturalized under the laws of Congress." 1 Kent Com. 292, note.

We find no warrant for the opinion that this great principle of the common law has ever been changed in the United States. It has always obtained here with the same vigor, and subject only to the same exceptions, since as before the Revolution.

It is further said in the note in 1 Kent's Commentaries, before referred to: —

"If a slave born in the United States be manumitted or otherwise lawfully discharged from bondage, or if a black man born in the United States becomes free, he becomes thenceforward a citizen, but under such disabilities as the laws of the several States may deem it expedient to prescribe to persons of color."

In the case of *State* v. *Manuel*, *supra*, it was remarked: —

"It has been said that, by the Constitution of the United States, the power of naturalization has been conferred exclusively upon Congress, and therefore it cannot be competent for any State by its municipal regulations to make a citizen. But what is naturalization? It is the removal of the disabilities of alienage. Emancipation is the removal of the incapacity of slavery. The latter depends wholly upon the internal regulations of the State. The former belongs to the government of the United States. It would be dangerous to confound them." p. 25.

This was a decision of the Supreme Court of North Carolina, made in the year 1836. The opinion was delivered by JUDGE GASTON. He was one of the most able and learned judges this country has produced. The same court, in 1848, CHIEF JUSTICE RUFFIN delivering the opinion, referred to the case of *State* v. *Manuel*, and said: —

"That case underwent a very laborious investigation by both the Bench and the Bar. The case was brought here by appeal, and was felt to be one of very great importance in principle. It was considered with an anxiety and care worthy of the principle involved, and which give it a controlling influence upon all questions of similar nature." *State* v. *Newcomb*, 5 Ired. 253.

We cannot deny the assent of our judgment to the soundness of the proposition that the emancipation of a native-born slave by removing the disability of slavery made him a citizen. If these views be correct, the provision in the Act of Congress conferring citizenship was unnecessary, and is inoperative. Granting this to be so, it was well, if Congress had the power, to insert it, in order to prevent doubts and differences of opinion which might otherwise have existed upon the subject. We are aware that a majority of the court, in the case of *Scott* v. *Sanford*, arrived at conclusions different from those we have expressed. But in our judgment these points were not before them. They decided that the whole case, including the agreed facts, was open to their examination, and that Scott was a slave. This central and controlling fact excluded all other questions, and what was said upon them by those of the majority, with whatever learning and ability the argument was conducted, is no more binding upon this court as authority than the views of the minority upon the same subjects. *Carroll* v. *Carroll*, 16 How. 287.

The fact that one is a subject or citizen determines nothing as to his rights as such. They vary in different localities and according to circumstances.

Citizenship has no necessary connection with the franchise of voting, eligibility to office, or indeed with any other rights, civil or political.

Women, minors, and persons *non compos* are citizens, and not the less so on account of their disabilities. In England, not to advert to the various local regulations, the new reform bill gives the right of voting for members of Parliament to about eight hundred thousand persons from whom it was before withheld. There, the subject is wholly within the control of Parliament. Here, until the Thirteenth Amendment was adopted, the power belonged entirely to the States, and they exercised it without question from any quarter, as absolutely as if they were not members of the Union.

The first ten amendments to the Constitution, which are in the nature of a bill of rights, apply only to the national government. They were not intended to restrict the power of the States. *Barrows* v. *Mayor, &c.*, 7 Pet. 247; *Withers* v. *Buckley*, 20 How. 84; *Murphy* v. *People*, 2 Cow. 818.

Our attention has been called to several treaties by which Indians were made citizens; to those by which Louisiana, Florida, and California were acquired, and to the Act passed in relation to Texas. All this was done under the war and treaty making powers of the Constitution, and those which authorize the national government to regulate the territory and other property of the United States, and to admit new States into the Union. *American Ins. Co.* v. *Canter*, 1 Pet. 511; *Cross* v. *Harrison*, 16 How. 164; 2 Story Const. 158.

These powers are not involved in the question before us, and it is not necessary particularly to consider them. A few remarks, however, in this connection will not be out of place. A treaty is declared by the Constitution to be the "law of the land." What is unwarranted or forbidden by the Constitution can no more be done in one way than in another. The authority of the national government is limited, though supreme in the sphere of its operation. As compared with the State governments, the subjects upon which it operates are few in number. Its objects are all national. It is one wholly of delegated powers. The States possess all which they have not surrendered; the government of the Union only such as the Constitution has given to it, expressly or incidentally, and by reasonable intendment. Whenever an act of that government is challenged a grant of power must be shown, or the act is void.

"The power to make colored persons citizens has been actually exercised in repeated and important instances. See the treaty with the Choctaws of September 27, 1830, art. 14; with the Cherokees of May 20, 1836, art. 12; and the treaty of Guadeloupe Hidalgo, of February 2, 1848, art. 8." *Scott* v. *Sanford*, 19 How. 486, opinion of CURTIS, J.

See, also, the treaty with France of April 30, 1803, by which Louisiana was acquired, art. 3; and the treaty with Spain of the 23d of February, 1819, by which Florida was acquired, art. 3.

The article referred to in the treaty with France and in the treaty with Spain is in the same language. In both the phrase "inhabitants" is used. No discrimination is made against those, in whole or in part, of

the African race. So in the treaty of Guadeloupe Hidalgo (articles 8 and 9), no reference is made to color. . . .

This brings us to the examination of the Thirteenth Amendment. It is as follows: —

"Article XIII. Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States or any place subject to their jurisdiction.

"Section 2. Congress shall have power to enforce this article by appropriate legislation."

Before the adoption of this amendment, the Constitution, at the close of the enumeration of the powers of Congress, authorized that body —

"To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or any department or officer thereof." . . .

Without any other provision than the first section of the amendment, Congress would have had authority to give full effect to the abolition of slavery thereby decreed. It would have been competent to put in requisition the executive and judicial, as well as the legislative power, with all the energy needful for that purpose. The second section of the amendment was added out of abundant caution. It authorizes Congress to select, from time to time, the means that might be deemed appropriate to the end. It employs a phrase which had been enlightened by well-considered judicial application. Any exercise of legislative power within its limits involves a legislative, and not a judicial question. It is only when the authority given has been clearly exceeded, that the judicial power can be invoked. Its office, then, is to repress and annul the excess; beyond that it is powerless.

We will now proceed to consider the state of things which existed before and at the time the amendment was adopted, the mischiefs complained of or apprehended, and the remedy intended to be provided for existing and anticipated evils.

When the late Civil War broke out, slavery of the African race subsisted in fifteen States of the Union. The legal code relating to persons in that condition was everywhere harsh and severe. An eminent writer said: "They cannot take property by descent or purchase; and all they find and all they own belongs to their master. They cannot make contracts, and they are deprived of civil rights. They are assets for the payment of debts, and cannot be emancipated by will or otherwise to the prejudice of creditors." 2 Kent Com. 281, 282.

In a note, it is added:

"In Georgia, by an Act of 1829, no person is permitted to teach a slave, a negro, or a free person of color to read or write. So in Virginia, by a statute of 1830, meetings of free negroes to learn reading or writing are unlawful, and subject them to corporal punishment; and it is unlawful for white persons to assemble with free negroes or slaves to

teach them to read or write. The prohibitory Act of the Legislature of Alabama, passed at the session of 1831–32, relative to the instruction to be given to the slaves or free colored population, or exhortation, or preaching to them, or any mischievous influence attempted to be exerted over them, is sufficiently penal. Laws of similar import are presumed to exist in the other slaveholding States; but in Louisiana the law on the subject is armed with tenfold severity. It not only forbids any person teaching slaves to read or write, but it declares that any person using language in any public discourse from the bar, bench, stage, or pulpit, or any other place, or in any private conversation, or making use of any sign or actions having a tendency to produce discontent among the free colored population or insubordination among the slaves, or who shall be knowingly instrumental in bringing into the State any paper, book, or pamphlet having a like tendency, shall, on conviction, be punishable with imprisonment or death, at the discretion of the court."

Slaves were imperfectly, if at all, protected from the grossest outrages by the whites. Justice was not for them. The charities and rights of the domestic relations had no legal existence among them. The shadow of the evil fell upon the free blacks. They had but few civil and no political rights in the slave States. Many of the badges of the bondman's degradation were fastened upon them. Their condition, like his, though not so bad, was helpless and hopeless. This is borne out by the passages we have given from Kent's Commentaries. Further research would darken the picture. The States had always claimed and exercised the exclusive right to fix the status of all persons living within their jurisdiction.

On January 1, 1863, President Lincoln issued his proclamation of emancipation. Missouri and Maryland abolished slavery by their own voluntary action. Throughout the war the African race had evinced entire sympathy with the Union cause. At the close of the Rebellion two hundred thousand had become soldiers in the Union armies. The race had strong claims upon the justice and generosity of the nation. Weighty considerations of policy, humanity, and right were superadded. Slavery, in fact, still subsisted in thirteen States. Its simple abolition, leaving these laws and this exclusive power of the States over the emancipated in force, would have been a phantom of delusion. The hostility of the dominant class would have been animated with new ardor. Legislative oppression would have been increased in severity. Under the guise of police and other regulations slavery would have been in effect restored, perhaps in a worse form, and the gift of freedom would have been a curse instead of a blessing to those intended to be benefited. They would have had no longer the protection which the instinct of property leads its possessor to give in whatever form the property may exist. It was to guard against such evils that the second section of the amendment was framed. It was intended to give expressly to Congress the requisite authority, and to leave no room for doubt or cavil upon the subject. The results have shown the wisdom of this forecast. Al-

most simultaneously with the adoption of the amendment this course of legislative oppression was begun. Hence, doubtless, the passage of the Act under consideration. In the presence of these facts, who will say it is not an "appropriate" means of carrying out the object of the first section of the amendment, and a necessary and proper execution of the power conferred by the second? Blot out this Act and deny the constitutional power to pass it, and the worst effects of slavery might speedily follow. It would be a virtual abrogation of the amendment.

It would be a remarkable anomaly if the national government, without this amendment, could confer citizenship on aliens of every race or color, and citizenship, with civil and political rights, on the "inhabitants" of Louisiana and Florida, without reference to race or color, and cannot, with the help of the amendment, confer on those of the African race, who have been born and always lived within the United States, all that this law seeks to give them.

It was passed by the Congress succeeding the one which proposed the amendment. Many of the members of both Houses were the same.

This fact is not without weight and significance. *McCulloch* v. *Maryland*, 4 Wheat. 401.

The amendment reversed and annulled the original policy of the Constitution, which left it to each State to decide exclusively for itself whether slavery should or should not exist as a local institution, and what disabilities should attach to those of the servile race within its limits. The whites needed no relief or protection, and they are practically unaffected by the amendment. The emancipation which it wrought was an act of great national grace, and was doubtless intended to reach further in its effects as to every one within its scope, than the consequences of a manumission by a private individual.

We entertain no doubt of the constitutionality of the Act in all its provisions.

It gives only certain civil rights. Whether it was competent for Congress to confer political rights also, involves a different inquiry. We have not found it necessary to consider the subject.

We are not unmindful of the opinion of the Court of Appeals of Kentucky, in the case of *Brown* v. *Commonwealth*. With all our respect for the eminent tribunal from which it proceeded, we have found ourselves unable to concur in its conclusions. The constitutionality of the Act is sustained by the Supreme Court of Indiana, and the Chief Justice of the Court of Appeals of Maryland, in able and well-considered opinions. *Smith* v. *Moody*, 26 Ind. 299; *Re A. H. Somers.*

We are happy to know that if we have erred the Supreme Court of the United States can revise our judgment and correct our error.

The motion is overruled, and judgment will be entered upon the verdict.

Motion overruled.

SLAUGHTER-HOUSE CASES.

SUPREME COURT OF THE UNITED STATES. 1873.

[16 *Wall.* 36.][1]

Mr. John A. Campbell, and also *Mr. J. Q. A. Fellows*, argued the case at much length and on the authorities, in behalf of the plaintiffs in error.

Messrs. M. H. Carpenter and *J. S. Black* (a brief of *Mr. Charles Allen* being filed on the same side), and *Mr. T. J. Durant*, representing in addition the State of Louisiana, *contra*.

MR. JUSTICE MILLER now, April 14, 1873, delivered the opinion of the court.

These cases are brought here by writs of error to the Supreme Court of the State of Louisiana. They arise out of the efforts of the butchers of New Orleans to resist the Crescent City Live-Stock Landing and Slaughter-House Company in the exercise of certain powers conferred by the charter which created it, and which was granted by the legislature of that State. . . .

The records show that the plaintiffs in error relied upon, and asserted throughout the entire course of the litigation in the State courts, that the grant of privileges in the charter of defendant, which they were contesting, was a violation of the most important provisions of the thirteenth and fourteenth articles of amendment of the Constitution of the United States. The jurisdiction and the duty of this court to review the judgment of the State court on those questions is clear and is imperative.

The statute thus assailed as unconstitutional was passed March 8, 1869, and is entitled "An Act to protect the health of the City of New Orleans, to locate the stock-landings and slaughter-houses, and to incorporate the Crescent City Live-Stock Landing and Slaughter-House Company."

The first section forbids the landing or slaughtering of animals whose flesh is intended for food, within the city of New Orleans and other parishes and boundaries named and defined, or the keeping or establishing any slaughter-houses or abattoirs within those limits, except by the corporation thereby created, which is also limited to certain places afterwards mentioned. Suitable penalties are enacted for violations of this prohibition.

The second section designates the corporators, gives the name to the corporation, and confers on it the usual corporate powers.

The third and fourth sections authorize the company to establish and erect within certain territorial limits, therein defined, one or more stock-yards, stock-landings, and slaughter-houses, and impose upon it the

[1] The statement of facts is omitted. — ED.

duty of erecting, on or before the first day of June, 1869, one grand slaughter-house of sufficient capacity for slaughtering five hundred animals per day.

It declares that the company, after it shall have prepared all the necessary buildings, yards, and other conveniences for that purpose, shall have the sole and exclusive privilege of conducting and carrying on the live-stock landing and slaughter-house business within the limits and privilege granted by the Act, and that all such animals shall be landed at the stock-landings and slaughtered at the slaughter-houses of the company, and nowhere else. Penalties are enacted for infractions of this provision, and prices fixed for the maximum charges of the company for each steamboat and for each animal landed.

Section five orders the closing up of all other stock-landings and slaughter-houses after the first day of June, in the parishes of Orleans, Jefferson, and St. Bernard, and makes it the duty of the company to permit any person to slaughter animals in their slaughter-houses under a heavy penalty for each refusal. Another section fixes a limit to the charges to be made by the company for each animal so slaughtered in their building, and another provides for an inspection of all animals intended to be so slaughtered, by an officer appointed by the Governor of the State for that purpose.

These are the principal features of the statute, and are all that have any bearing upon the questions to be decided by us.

This statute is denounced not only as creating a monopoly and conferring odious and exclusive privileges upon a small number of persons at the expense of the great body of the community of New Orleans, but it is asserted that it deprives a large and meritorious class of citizens — the whole of the butchers of the city — of the right to exercise their trade, the business to which they have been trained and on which they depend for the support of themselves and their families; and that the unrestricted exercise of the business of butchering is necessary to the daily subsistence of the population of the city.

But a critical examination of the Act hardly justifies these assertions.

It is true that it grants, for a period of twenty-five years, exclusive privileges. And whether those privileges are at the expense of the community in the sense of a curtailment of any of their fundamental rights, or even in the sense of doing them an injury, is a question open to considerations to be hereafter stated. But it is not true that it deprives the butchers of the right to exercise their trade, or imposes upon them any restriction incompatible with its successful pursuit, or furnishing the people of the city with the necessary daily supply of animal food.

The Act divides itself into two main grants of privilege, — the one in reference to stock-landings and stock-yards, and the other to slaughter-houses. That the landing of live-stock in large droves, from steamboats on the bank of the river, and from railroad trains, should, for the safety

and comfort of the people and the care of the animals, be limited to proper places, and those not numerous, it needs no argument to prove. Nor can it be injurious to the general community that while the duty of making ample preparation for this is imposed upon a few men, or a corporation, they should, to enable them to do it successfully, have the exclusive right of providing such landing-places, and receiving a fair compensation for the service.

It is, however, the slaughter-house privilege, which is mainly relied on to justify the charges of gross injustice to the public, and invasion of private right.

It is not, and cannot be successfully controverted, that it is both the right and the duty of the legislative body — the supreme power of the State or municipality — to prescribe and determine the localities where the business of slaughtering for a great city may be conducted. To do this effectively it is indispensable that all persons who slaughter animals for food shall do it in those places and nowhere else.

The statute under consideration defines these localities and forbids slaughtering in any other. It does not, as has been asserted, prevent the butcher from doing his own slaughtering. On the contrary, the Slaughter-House Company is required, under a heavy penalty, to permit any person who wishes to do so, to slaughter in their houses; and they are bound to make ample provision for the convenience of all the slaughtering for the entire city. The butcher then is still permitted to slaughter, to prepare, and to sell his own meats; but he is required to slaughter at a specified place and to pay a reasonable compensation for the use of the accommodations furnished him at that place.

The wisdom of the monopoly granted by the legislature may be open to question, but it is difficult to see a justification for the assertion that the butchers are deprived of the right to labor in their occupation, or the people of their daily service in preparing food, or how this statute, with the duties and guards imposed upon the company, can be said to destroy the business of the butcher, or seriously interfere with its pursuit.

The power here exercised by the Legislature of Louisiana is, in its essential nature, one which has been, up to the present period in the constitutional history of this country, always conceded to belong to the States, however it may now be questioned in some of its details.

"Unwholesome trades, slaughter-houses, operations offensive to the senses, the deposit of powder, the application of steam-power to propel cars, the building with combustible materials, and the burial of the dead, may all," says Chancellor Kent, 2 Commentaries, 340, "be interdicted by law, in the midst of dense masses of population, on the general and rational principle, that every person ought so to use his property as not to injure his neighbors; and that private interests must be made subservient to the general interests of the community." This is called the police power; and it is declared by Chief Justice Shaw, *Commonwealth v. Alger*, 7 Cush. 84, that it is much easier to perceive and realize

the existence and sources of it than to mark its boundaries, or prescribe limits to its exercise.

This power is, and must be from its very nature, incapable of any very exact definition or limitation. Upon it depends the security of social order, the life and health of the citizen, the comfort of an existence in a thickly populated community, the enjoyment of private and social life, and the beneficial use of property. "It extends," says another eminent judge (*Thorpe* v. *Rutland and Burlington Railroad Co.*, 27 Vt. 149), "to the protection of the lives, limbs, health, comfort, and quiet of all persons, and the protection of all property within the State; . . . and persons and property are subjected to all kinds of restraints and burdens in order to secure the general comfort, health, and prosperity of the State. Of the perfect right of the legislature to do this no question ever was, or, upon acknowledged general principles, ever can be made, so far as natural persons are concerned."

The regulation of the place and manner of conducting the slaughtering of animals, and the business of butchering within a city, and the inspection of the animals to be killed for meat, and of the meat afterwards, are among the most necessary and frequent exercises of this power. It is not, therefore, needed that we should seek for a comprehensive definition, but rather look for the proper source of its exercise. . . . [Here the court briefly considers *Gibbons* v. *Ogden*, 9 Wheat. 1, *New York* v. *Miln*, 11 Pet. 102, *The License Tax*, 5 Wall. 471, and *United States* v. *Dewitt*, 9 Wall. 41.]

It cannot be denied that the statute under consideration is aptly framed to remove from the more densely populated part of the city the noxious slaughter-houses, and large and offensive collections of animals necessarily incident to the slaughtering business of a large city, and to locate them where the convenience, health, and comfort of the people require they shall be located. And it must be conceded that the means adopted by the Act for this purpose are appropriate, are stringent, and effectual. But it is said that in creating a corporation for this purpose, and conferring upon it exclusive privileges — privileges which it is said constitute a monopoly — the legislature has exceeded its power. If this statute had imposed on the city of New Orleans precisely the same duties, accompanied by the same privileges, which it has on the corporation which it created, it is believed that no question would have been raised as to its constitutionality. In that case the effect on the butchers in pursuit of their occupation and on the public would have been the same as it is now. Why cannot the legislature confer the same powers on another corporation, created for a lawful and useful public object, that it can on the municipal corporation already existing? That wherever a legislature has the right to accomplish a certain result, and that result is best attained by means of a corporation, it has the right to create such a corporation, and to endow it with the powers necessary to effect the desired and lawful purpose, seems hardly to admit of debate. The proposition is ably discussed and affirmed in the case of

McCulloch v. *The State of Maryland*, 4 Wheat. 316, in relation to the power of Congress to organize the Bank of the United States to aid in the fiscal operations of the government.

It can readily be seen that the interested vigilance of the corporation created by the Louisiana Legislature will be more efficient in enforcing the limitation prescribed for the stock-landing and slaughtering business for the good of the city than the ordinary efforts of the officers of the law.

Unless, therefore, it can be maintained that the exclusive privilege granted by this charter to the corporation is beyond the power of the Legislature of Louisiana, there can be no just exception to the validity of the statute. And in this respect we are not able to see that these privileges are especially odious or objectionable. The duty imposed as a consideration for the privilege is well defined, and its enforcement well guarded. The prices or charges to be made by the company are limited by the statute, and we are not advised that they are on the whole exorbitant or unjust.

The proposition is, therefore, reduced to these terms: Can any exclusive privileges be granted to any of its citizens, or to a corporation, by the legislature of a State?

The eminent and learned counsel who has twice argued the negative of this question, has displayed a research into the history of monopolies in England and the European Continent, only equalled by the eloquence with which they are denounced.

But it is to be observed, that all such references are to monopolies established by the monarch in derogation of the rights of his subjects, or arise out of transactions in which the people were unrepresented, and their interests uncared for. The great *Case of Monopolies*, reported by Coke, and so fully stated in the brief, was undoubtedly a contest of the commons against the monarch. The decision is based upon the ground that it was against common law, and the argument was aimed at the unlawful assumption of power by the Crown; for who ever doubted the authority of Parliament to change or modify the common law? The discussion in the House of Commons cited from Macaulay clearly establishes that the contest was between the Crown, and the people represented in Parliament.

But we think it may be safely affirmed, that the Parliament of Great Britain, representing the people in their legislative functions, and the legislative bodies of this country, have from time immemorial to the present day continued to grant to persons and corporations exclusive privileges, — privileges denied to other citizens, — privileges which come within any just definition of the word monopoly, as much as those now under consideration; and that the power to do this has never been questioned or denied. Nor can it be truthfully denied, that some of the most useful and beneficial enterprises set on foot for the general good, have been made successful by means of these exclusive rights, and could only have been conducted to success in that way.

It may, therefore, be considered as established, that the authority of the Legislature of Louisiana to pass the present statute is ample, unless some restraint in the exercise of that power be found in the Constitution of that State or in the amendments to the Constitution of the United States, adopted since the date of the decisions we have already cited.

If any such restraint is supposed to exist in the Constitution of the State, the Supreme Court of Louisiana having necessarily passed on that question, it would not be open to review in this court.

The plaintiffs in error accepting this issue, allege that the statute is a violation of the Constitution of the United States in these several particulars: —

That it creates an involuntary servitude forbidden by the thirteenth article of amendment;

That it abridges the privileges and immunities of citizens of the United States;

That it denies to the plaintiffs the equal protection of the laws; and,

That it deprives them of their property without due process of law; contrary to the provisions of the first section of the fourteenth article of amendment.

This court is thus called upon for the first time to give construction to these articles.

We do not conceal from ourselves the great responsibility which this duty devolves upon us. No questions so far-reaching and pervading in their consequences, so profoundly interesting to the people of this country, and so important in their bearing upon the relations of the United States, and of the several States to each other and to the citizens of the States and of the United States, have been before this court during the official life of any of its present members.[1] We have given every opportunity for a full hearing at the bar; we have discussed it freely and compared views among ourselves; we have taken ample time for careful deliberation, and we now propose to announce the judgments which we have formed in the construction of those articles, so far as we have found them necessary to the decision of the cases before us, and beyond that we have neither the inclination nor the right to go.

Twelve articles of amendment were added to the Federal Constitution soon after the original organization of the government under it in 1789. Of these all but the last were adopted so soon afterwards as to justify the statement that they were practically contemporaneous with the adoption of the original; and the twelfth, adopted in eighteen hundred and three, was so nearly so as to have become, like all the others, historical and of another age. But within the last eight years three other articles of

[1] The oldest in office, MR. JUSTICE CLIFFORD, had succeeded CURTIS, J., in January, 1858. No one of the bench who had decided the case of *Dred Scott* v. *Sandford*, was now present, except Mr. Justice Campbell, — and he was at the bar now, and counsel for the plaintiffs. — ED.

amendment of vast importance have been added by the voice of the people to that now venerable instrument.

The most cursory glance at these articles discloses a unity of purpose, when taken in connection with the history of the times, which cannot fail to have an important bearing on any question of doubt concerning their true meaning. Nor can such doubts, when any reasonably exist, be safely and rationally solved without a reference to that history; for in it is found the occasion and the necessity for recurring again to the great source of power in this country, the people of the States, for additional guarantees of human rights; additional powers to the Federal government; additional restraints upon those of the States. Fortunately that history is fresh within the memory of us all, and its leading features, as they bear upon the matter before us, free from doubt.

The institution of African slavery, as it existed in about half the States of the Union, and the contests pervading the public mind for many years, between those who desired its curtailment and ultimate extinction and those who desired additional safeguards for its security and perpetuation, culminated in the effort, on the part of most of the States in which slavery existed, to separate from the Federal government, and to resist its authority. This constituted the War of the Rebellion, and whatever auxiliary causes may have contributed to bring about this war, undoubtedly the overshadowing and efficient cause was African slavery.

In that struggle slavery, as a legalized social relation, perished. It perished as a necessity of the bitterness and force of the conflict. When the armies of freedom found themselves upon the soil of slavery they could do nothing less than free the poor victims whose enforced servitude was the foundation of the quarrel. And when hard pressed in the contest these men (for they proved themselves men in that terrible crisis) offered their services and were accepted by thousands to aid in suppressing the unlawful rebellion, slavery was at an end wherever the Federal government succeeded in that purpose. The proclamation of President Lincoln expressed an accomplished fact as to a large portion of the insurrectionary districts, when he declared slavery abolished in them all. But the war being over, those who had succeeded in re-establishing the authority of the Federal government were not content to permit this great act of emancipation to rest on the actual results of the contest or the proclamation of the Executive, both of which might have been questioned in after times, and they determined to place this main and most valuable result in the Constitution of the restored Union as one of its fundamental articles. Hence the thirteenth article of amendment of that instrument. Its two short sections seem hardly to admit of construction, so vigorous is their expression and so appropriate to the purpose we have indicated.

"1. Neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States or any place subject to their jurisdiction.

"2. Congress shall have power to enforce this article by appropriate legislation."

To withdraw the mind from the contemplation of this grand yet simple declaration of the personal freedom of all the human race within the jurisdiction of this government — a declaration designed to establish the freedom of four millions of slaves — and with a microscopic search endeavor to find in it a reference to servitudes, which may have been attached to property in certain localities, requires an effort, to say the least of it.

That a personal servitude was meant is proved by the use of the word "involuntary," which can only apply to human beings. The exception of servitude as a punishment for crime gives an idea of the class of servitude that is meant. The word "servitude" is of larger meaning than slavery, as the latter is popularly understood in this country, and the obvious purpose was to forbid all shades and conditions of African slavery. It was very well understood that in the form of apprenticeship for long terms, as it had been practised in the West India Islands, on the abolition of slavery by the English government, or by reducing the slaves to the condition of serfs attached to the plantation, the purpose of the article might have been evaded, if only the word "slavery" had been used. The case of the apprentice slave, held under a law of Maryland, liberated by Chief Justice Chase, on a writ of *habeas corpus* under this article, illustrates this course of observation. *Matter of Turner*, 1 Abbott United States Reports, 84. And it is all that we deem necessary to say on the application of that article to the statute of Louisiana, now under consideration.

The process of restoring to their proper relations with the Federal government and with the other States those which had sided with the Rebellion, undertaken under the proclamation of President Johnson in 1865, and before the assembling of Congress, developed the fact that, notwithstanding the formal recognition by those States of the abolition of slavery, the condition of the slave race would, without further protection of the Federal government, be almost as bad as it was before. Among the first acts of legislation adopted by several of the States in the legislative bodies which claimed to be in their normal relations with the Federal government, were laws which imposed upon the colored race onerous disabilities and burdens, and curtailed their rights in the pursuit of life, liberty, and property to such an extent that their freedom was of little value, while they had lost the protection which they had received from their former owners from motives both of interest and humanity.

They were in some States forbidden to appear in the towns in any other character than menial servants. They were required to reside on and cultivate the soil without the right to purchase or own it. They were excluded from many occupations of gain, and were not permitted to give testimony in the courts in any case where a white man was a party. It was said that their lives were at the mercy of bad men,

either because the laws for their protection were insufficient or were not enforced.

These circumstances, whatever of falsehood or misconception may have been mingled with their presentation, forced upon the statesmen who had conducted the Federal government in safety through the crisis of the Rebellion, and who supposed that by the thirteenth article of amendment they had secured the result of their labors, the conviction that something more was necessary in the way of constitutional protection to the unfortunate race who had suffered so much. They accordingly passed through Congress the proposition for the Fourteenth Amendment, and they declined to treat as restored to their full participation in the government of the Union the States which had been in insurrection, until they ratified that article by a formal vote of their legislative bodies.

Before we proceed to examine more critically the provisions of this amendment, on which the plaintiffs in error rely, let us complete and dismiss the history of the recent amendments, as that history relates to the general purpose which pervades them all. A few years' experience satisfied the thoughtful men who had been the authors of the other two amendments that, notwithstanding the restraints of those articles on the States, and the laws passed under the additional powers granted to Congress, these were inadequate for the protection of life, liberty, and property, without which freedom to the slave was no boon. They were in all those States denied the right of suffrage. The laws were administered by the white man alone. It was urged that a race of men distinctively marked as was the negro, living in the midst of another and dominant race, could never be fully secured in their person and their property without the right of suffrage.

Hence the Fifteenth Amendment, which declares that "the right of a citizen of the United States to vote shall not be denied or abridged by any State on account of race, color, or previous condition of servitude." The negro having, by the Fourteenth Amendment, been declared to be a citizen of the United States, is thus made a voter in every State of the Union.

We repeat, then, in the light of this recapitulation of events, almost too recent to be called history, but which are familiar to us all; and on the most casual examination of the language of these amendments, no one can fail to be impressed with the one pervading purpose found in them all, lying at the foundation of each, and without which none of them would have been even suggested; we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him. It is true that only the Fifteenth Amendment, in terms, mentions the negro by speaking of his color and his slavery. But it is just as true that each of the other articles was addressed to the grievances of that race, and designed to remedy them as the Fifteenth.

We do not say that no one else but the negro can share in this protection. Both the language and spirit of these articles are to have their fair and just weight in any question of construction. Undoubtedly while negro slavery alone was in the mind of the Congress which proposed the thirteenth article, it forbids any other kind of slavery, now or hereafter. If Mexican peonage or the Chinese cooly labor system shall develop slavery of the Mexican or Chinese race within our territory, this amendment may safely be trusted to make it void. And so if other rights are assailed by the States which properly and necessarily fall within the protection of these articles, that protection will apply, though the party interested may not be of African descent. But what we do say, and what we wish to be understood [as saying] is, that in any fair and just construction of any section or phrase of these amendments, it is necessary to look to the purpose which we have said was the pervading spirit of them all, the evil which they were designed to remedy, and the process of continued addition to the Constitution, until that purpose was supposed to be accomplished, as far as constitutional law can accomplish it.

The first section of the fourteenth article, to which our attention is more specially invited, opens with a definition of citizenship — not only citizenship of the United States, but citizenship of the States. No such definition was previously found in the Constitution, nor had any attempt been made to define it by Act of Congress. It had been the occasion of much discussion in the courts, by the executive departments, and in the public journals. It had been said by eminent judges that no man was a citizen of the United States, except as he was a citizen of one of the States composing the Union. Those, therefore, who had been born and resided always in the District of Columbia or in the Territories, though within the United States, were not citizens. Whether this proposition was sound or not had never been judicially decided. But it had been held by this court, in the celebrated *Dred Scott Case*, only a few years before the outbreak of the Civil War, that a man of African descent, whether a slave or not, was not and could not be a citizen of a State or of the United States.[1] This decision, while it met the condemnation of some of the ablest statesmen and constitutional lawyers of the country, had never been overruled; and if it was to be accepted as a constitutional limitation of the right of citizenship, then all the negro race who had recently been made freemen, were still, not only not citizens, but were incapable of becoming so by anything short of an amendment to the Constitution.

To remove this difficulty primarily, and to establish a clear and comprehensive definition of citizenship which should declare what should constitute citizenship of the United States, and also citizenship of a State, the first clause of the first section was framed.

"All persons born or naturalized in the United States, and subject

[1] An inadvertence. See *ante*, pp. 491 n. and 493 n. — ED.

to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."

The first observation we have to make on this clause is, that it puts at rest both the questions which we stated to have been the subject of differences of opinion. It declares that persons may be citizens of the United States without regard to their citizenship of a particular State, and it overturns the Dred Scott decision by making all persons born within the United States and subject to its jurisdiction citizens of the United States. That its main purpose was to establish the citizenship of the negro can admit of no doubt. The phrase, "subject to its jurisdiction" was intended to exclude from its operation children of ministers, consuls, and citizens or subjects of foreign States born within the United States.

The next observation is more important in view of the arguments of counsel in the present case. It is, that the distinction between citizenship of the United States and citizenship of a State is clearly recognized and established. Not only may a man be a citizen of the United States without being a citizen of a State, but an important element is necessary to convert the former into the latter. He must reside within the State to make him a citizen of it, but it is only necessary that he should be born or naturalized in the United States to be a citizen of the Union.

It is quite clear, then, that there is a citizenship of the United States, and a citizenship of a State, which are distinct from each other, and which depend upon different characteristics or circumstances in the individual.

We think this distinction and its explicit recognition in this amendment of great weight in this argument, because the next paragraph of this same section, which is the one mainly relied on by the plaintiffs in error, speaks only of privileges and immunities of citizens of the United States, and does not speak of those of citizens of the several States. The argument, however, in favor of the plaintiffs rests wholly on the assumption that the citizen is the same, and the privileges and immunities guaranteed by the clause are the same.

The language is, "nor shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." It is a little remarkable, if this clause was intended as a protection to the citizen of a State against the legislative power of his own State, that the word citizen of the State should be left out when it is so carefully used, and used in contradistinction to citizens of the United States, in the very sentence which precedes it. It is too clear for argument that the change in phraseology was adopted understandingly and with a purpose.

Of the privileges and immunities of the citizen of the United States, and of the privileges and immunities of the citizen of the State, and what they respectively are, we will presently consider; but we wish to state here that it is only the former which are placed by this clause under the protection of the Federal Constitution, and that the latter, whatever

they may be, are not intended to have any additional protection by this paragraph of the amendment.

If, then, there is a difference between the privileges and immunities belonging to a citizen of the United States as such, and those belonging to the citizen of the State as such, the latter must rest for their security and protection where they have heretofore rested; for they are not embraced by this paragraph of the amendment.

The first occurrence of the words "privileges and immunities" in our constitutional history, is to be found in the fourth of the Articles of the old Confederation.

It declares "that the better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free inhabitants of each of these States, paupers, vagabonds, and fugitives from justice excepted, shall be entitled to all the privileges and immunities of free citizens in the several States; and the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions, and restrictions as the inhabitants thereof respectively."

In the Constitution of the United States, which superseded the Articles of Confederation, the corresponding provision is found in section two of the fourth article, in the following words: "The citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States."

There can be but little question that the purpose of both these provisions is the same, and that the privileges and immunities intended are the same in each. In the article of the Confederation we have some of these specifically mentioned, and enough perhaps to give some general idea of the class of civil rights meant by the phrase.

Fortunately we are not without judicial construction of this clause of the Constitution. . . . [Here the court cites and briefly considers *Corfield* v. *Coryell*, 4 Wash. C. C. [illegible] *Ward* v. *Maryland*, 12 Wall. 430, and *Paul* v. *Virginia*, 8 Wall. 1[illegible]

The constitutional provision there [illegible] did not create those rights, which it called privileges and immunities of citizens of the States. It threw around them in that clause no security for the citizen of the State in which they were claimed or exercised. Nor did it profess to control the power of the State governments over the rights of its own citizens.

Its sole purpose was to declare to the several States, that whatever those rights, as you grant or establish them to your own citizens, or as you limit or qualify, or impose restrictions on their exercise, the same, neither more nor less, shall be the measure of the rights of citizens of other States within your jurisdiction.

It would be the vainest show of learning to attempt to prove by citations of authority, that up to the adoption of the recent amendments, no claim or pretence was set up that those rights depended on the Fed-

to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."

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It would be the vainest show of learning to attempt to prove by citations of authority, that up to the adoption of the recent amendments, no claim or pretence was set up that those rights depended on the Fed-

eral government for their existence or protection, beyond the very few express limitations which the Federal Constitution imposed upon the States — such, for instance, as the prohibition against *ex post facto* laws, bills of attainder, and laws impairing the obligation of contracts. But with the exception of these and a few other restrictions, the entire domain of the privileges and immunities of citizens of the States, as above defined, lay within the constitutional and legislative power of the States, and without that of the Federal government. Was it the purpose of the Fourteenth Amendment, by the simple declaration that no State should make or enforce any law which shall abridge the privileges and immunities of citizens of the United States, to transfer the security and protection of all the civil rights which we have mentioned, from the States to the Federal government? And where it is declared that Congress shall have the power to enforce that article, was it intended to bring within the power of Congress the entire domain of civil rights heretofore belonging exclusively to the States?

All this and more must follow, if the proposition of the plaintiffs in error be sound. For not only are these rights subject to the control of Congress whenever in its discretion any of them are supposed to be abridged by State legislation, but that body may also pass laws in advance, limiting and restricting the exercise of legislative power by the States, in their most ordinary and usual functions, as in its judgment it may think proper on all such subjects. And still further, such a construction followed by the reversal of the judgments of the Supreme Court of Louisiana in these cases, would constitute this court a perpetual censor upon all legislation of the States, on the civil rights of their own citizens, with authority to nullify such as it did not approve as consistent with those rights, as they existed at the time of the adoption of this amendment. The argument, we admit, is not always the most conclusive which is drawn from the consequences urged against the adoption of a particular construction of an instrument. But when, as in the case before us, these consequences are so serious, so far-reaching and pervading, so great a departure from the structure and spirit of our institutions; when the effect is to fetter and degrade the State governments by subjecting them to the control of Congress, in the exercise of powers heretofore universally conceded to them of the most ordinary and fundamental character; when in fact it radically changes the whole theory of the relations of the State and Federal governments to each other and of both these governments to the people; the argument has a force that is irresistible, in the absence of language which expresses such a purpose too clearly to admit of doubt.

We are convinced that no such results were intended by the Congress which proposed these amendments, nor by the legislatures of the States which ratified them.

Having shown that the privileges and immunities relied on in the argument are those which belong to citizens of the States as such, and that they are left to the State governments for security and protection,

and not by this article placed under the special c. re of the Federal government, we may hold ourselves excused from defining the privileges and immunities of citizens of the United States which no State can abridge, until some case involving those privileges may make it necessary to do so.

But lest it should be said that no such privileges and immunities are to be found if those we have been considering are excluded, we venture to suggest some which owe their existence to the Federal government, its national character, its Constitution, or its laws.

One of these is well described in the case of *Crandall* v. *Nevada*, 6 Wall. 36. It is said to be the right of the citizen of this great country, protected by implied guarantees of its Constitution, "to come to the seat of government to assert any claim he may have upon that government, to transact any business he may have with it, to seek its protection, to share its offices, to engage in administering its functions. He has the right of free access to its seaports, through which all operations of foreign commerce are conducted, to the sub-treasuries, land offices, and courts of justices in the several States." And quoting from the language of Chief Justice Taney in another case, it is said "that for all the great purposes for which the Federal government was established, we are one people, with one common country, we are all citizens of the United States;" and it is, as such citizens, that their rights are supported in this court in *Crandall* v. *Nevada*.

Another privilege of a citizen of the United States is to demand the care and protection of the Federal government over his life, liberty, and property when on the high seas or within the jurisdiction of a foreign government. Of this there can be no doubt, nor that the right depends upon his character as a citizen of the United States. The right to peaceably assemble and petition for redress of grievances, the privilege of the writ of *habeas corpus*, are rights of the citizen guaranteed by the Federal Constitution. The right to use the navigable waters of the United States, however they may penetrate the territory of the several States, all rights secured to our citizens by treaties with foreign nations, are dependent upon citizenship of the United States, and not citizenship of a State. One of these privileges is conferred by the very article under consideration. It is that a citizen of the United States can, of his own volition, become a citizen of any State of the Union by a *bona fide* residence therein, with the same rights as other citizens of that State. To these may be added the rights secured by the thirteenth and fifteenth articles of amendment, and by the other clause of the fourteenth, next to be considered.

But it is useless to pursue this branch of the inquiry, since we are of opinion that the rights claimed by these plaintiffs in error, if they have any existence, are not privileges and immunities of citizens of the United States within the meaning of the clause of the Fourteenth Amendment under consideration.

"All persons born or naturalized in the United States, and subject

to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of its laws."

The argument has not been much pressed in these cases that the defendant's charter deprives the plaintiffs of their property without due process of law, or that it denies to them the equal protection of the law. The first of these paragraphs has been in the Constitution since the adoption of the Fifth Amendment, as a restraint upon the Federal power. It is also to be found in some form of expression in the constitutions of nearly all the States, as a restraint upon the power of the States. This law, then, has practically been the same as it now is during the existence of the government, except so far as the present amendment may place the restraining power over the States in this matter in the hands of the Federal government.

We are not without judicial interpretation, therefore, both State and national, of the meaning of this clause. And it is sufficient to say that under no construction of that provision that we have ever seen, or any that we deem admissible, can the restraint imposed by the State of Louisiana upon the exercise of their trade by the butchers of New Orleans be held to be a deprivation of property within the meaning of that provision.

"Nor shall any State deny to any person within its jurisdiction the equal protection of the laws."

In the light of the history of these amendments, and the pervading purpose of them, which we have already discussed, it is not difficult to give a meaning to this clause. The existence of laws in the States where the newly emancipated negroes resided, which discriminated with gross injustice and hardship against them as a class, was the evil to be remedied by this clause, and by it such laws are forbidden.

If, however, the States did not conform their laws to its requirements, then by the fifth section of the article of amendment Congress was authorized to enforce it by suitable legislation. We doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision. It is so clearly a provision for that race and that emergency, that a strong case would be necessary for its application to any other. But as it is a State that is to be dealt with, and not alone the validity of its laws, we may safely leave that matter until Congress shall have exercised its power, or some case of State oppression, by denial of equal justice in its courts, shall have claimed a decision at our hands. We find no such case in the one before us, and do not deem it necessary to go over the argument again, as it may have relation to this particular clause of the amendment.

In the early history of the organization of the government, its statesmen seem to have divided on the line which should separate the powers of the national government from those of the State governments, and though this line has never been very well defined in public opinion, such a division has continued from that day to this.

The adoption of the first eleven amendments to the Constitution so soon after the original instrument was accepted, shows a prevailing sense of danger at that time from the Federal power. And it cannot be denied that such a jealousy continued to exist with many patriotic men until the breaking out of the late Civil War. It was then discovered that the true danger to the perpetuity of the Union was in the capacity of the State organizations to combine and concentrate all the powers of the State, and of contiguous States, for a determined resistance to the general government.

Unquestionably this has given great force to the argument, and added largely to the number, of those who believe in the necessity of a strong national government.

But, however pervading this sentiment, and however it may have contributed to the adoption of the amendments we have been considering, we do not see in those amendments any purpose to destroy the main features of the general system. Under the pressure of all the excited feeling growing out of the war, our statesmen have still believed that the existence of the States with powers for domestic and local government, including the regulation of civil rights — the rights of person and of property — was essential to the perfect working of our complex form of government, though they have thought proper to impose additional limitations on the States, and to confer additional power on that of the nation.

But whatever fluctuations may be seen in the history of public opinion on this subject during the period of our national existence, we think it will be found that this court, so far as its functions required, has always held with a steady and an even hand the balance between State and Federal power, and we trust that such may continue to be the history of its relation to that subject so long as it shall have duties to perform which demand of it a construction of the Constitution, or of any of its parts.

The judgments of the Supreme Court of Louisiana in these cases are *Affirmed*.[1]

[1] CHIEF JUSTICE CHASE and the JUSTICES FIELD, BRADLEY, and SWAYNE dissented, and opinions were given by the last three.

MR. JUSTICE FIELD argued that the legislation in question was not a legitimate exercise of what is called the police power, but was an attempt to take from private persons and to vest exclusively in a corporation the right to pursue a lawful and necessary calling. It may or may not, he said, be forbidden by the Thirteenth Amendment. But it certainly is by the Fourteenth, for it denies to citizens of the United States fundamental rights belonging to the citizens of all free governments. The Fourteenth Amendment secures citizens of the United States in the same fundamental rights which are guaranteed in the body of the Constitution (art. 4, s. 2) to citizens of

BARTEMEYER *v.* IOWA.

SUPREME COURT OF THE UNITED STATES. 1873.

[18 *Wall.* 129.]

ERROR to the Supreme Court of Iowa, the case being thus:

Bartemeyer, the plaintiff in error, was tried before a justice of the peace, on the charge of selling intoxicating liquors, on the 8th of March, 1870, to one Timothy Hickey, in Davenport township, in the State of Iowa, and was acquitted. On an appeal to the Circuit Court of the State the defendant filed the following plea:

"And now comes the defendant, F. Bartemeyer, and for plea to the information in this cause says: He admits that at the time and place mentioned in said information he did sell and deliver to one Timothy Hickey one glass of intoxicating liquor called whiskey, and did then and there receive pay in lawful money from said Hickey for the same. But

the States as against hostile legislation from States other than their own. It protects them against monopolies and secures equality of right in pursuing the ordinary avocations of life.

MR. JUSTICE BRADLEY, concurring in this opinion, added that the Louisiana statute deprived people of both liberty and property, and also of the equal protection of the laws. The right of choice in adopting lawful employments "is a portion of their liberty: their occupation is their property."

MR. JUSTICE SWAYNE agreed with both these dissenting opinions, and expressed the view that liberty in the Fourteenth Amendment "is freedom from all restraints but such as are justly imposed by law. . . . Property is everything which has an exchangeable value. . . . Labor is property. . . . The right to make it available is next in importance to the rights of life and liberty."

In *Yick Wo* v. *Hopkins*, 118 U. S. 356, 369 (1885), MATTHEWS, J., for the court, said: "The Fourteenth Amendment to the Constitution is not confined to the protection of citizens. It says: 'Nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.' These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws. It is accordingly enacted by § 1977 of the Revised Statutes, that 'all persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.' The questions we have to consider and decide in these cases, therefore, are to be treated as involving the rights of every citizen of the United States equally with those of the strangers and aliens who now invoke the jurisdiction of the court.

"It is contended on the part of the petitioners, that the ordinances for violations of which they are severally sentenced to imprisonment, are void on their face, as being within the prohibitions of the Fourteenth Amendment; and, in the alternative, if not so, that they are void by reason of their administration, operating unequally, so as to punish in the present petitioners what is permitted to others as lawful, without any distinction of circumstances, — an unjust and illegal discrimination, it is claimed, which, though not made expressly by the ordinances, is made possible by them." — ED.

defendant alleges that he committed no crime known to the law by the selling of the intoxicating liquor hereinbefore described to said Hickey, for the reason that he, the defendant, was the lawful owner, holder, and possessor, in the State of Iowa, of said property, to wit, said one glass of intoxicating liquor, sold as aforesaid to said Hickey, prior to the day on which the law was passed under which these proceedings are instituted and prosecuted, known as the Act for the Suppression of Intemperance, and being chapter sixty-four of the revision of 1860; and that, prior to the passage of said Act for the Suppression of Intemperance, he was a citizen of the United States and of the State of Iowa."

Without any evidence whatever the case was submitted to the court on this written plea, the parties waiving a jury, and a judgment was rendered that the defendant was guilty as charged, and he was sentenced to pay a fine of $20 and costs. A bill of exceptions was taken, and the case carried to the Supreme Court of Iowa, and that court affirmed the judgment of the Circuit Court and rendered a judgment for costs against the defendant, who now brought the case here on error.

There was sufficient evidence that the main ground relied on to reverse the judgment in the Supreme Court of Iowa was, that the Act of the Iowa Legislature on which the prosecution was based, was in violation of the Constitution of the United States. . . .

The case was submitted on printed arguments some time ago, and when the *Slaughter-House Cases*, reported in 16th Wallace, 36, were argued; the position of the plaintiff in error in this case being, as it partly was in those, that the Act of the State legislature, the maintenance of which by the courts below was the ground of the writ of error, was in violation of the Fourteenth Amendment to the Constitution. . . .

Mr. W. T. Dittoe, for the plaintiff in error; *Mr. H. O'Connor*, Attorney-General of Iowa, for the State, *contra*.

Mr. Justice Miller, after stating the case, delivered the opinion of the court, as follows:

The case has been submitted to us on printed argument. That on the part of the plaintiff in error has taken a very wide range, and is largely composed of the arguments familiar to all, against the right of the States to regulate traffic in intoxicating liquors. So far as this argument deals with the mere question of regulating this traffic, or even its total prohibition, as it may have been affected by anything in the Federal Constitution prior to the recent amendments of that instrument, we do not propose to enter into a discussion. Up to that time it had been considered as falling within the police regulations of the States, left to their judgment, and subject to no other limitations than such as were imposed by the State Constitution, or by the general principles supposed to limit all legislative power. It has never been seriously contended that such laws raised any question growing out of the Constitution of the United States.

But the case before us is supposed by counsel of the plaintiff in error to present a violation of the Fourteenth Amendment of the Constitution, on the ground that the Act of the Iowa Legislature is a violation of the privileges and immunities of citizens of the United States which that amendment declares shall not be abridged by the States; and that in his case it deprives him of his property without due process of law.

As regards both branches of this defence, it is to be observed that the statute of Iowa, which is complained of, was in existence long before the amendment of the Federal Constitution, which is thus invoked to render it invalid. Whatever were the privileges and immunities of Mr. Bartemeyer, as they stood before that amendment, under the Iowa statute, they have certainly not been abridged by any action of the State legislature since that amendment became a part of the Constitution. And unless that amendment confers privileges and immunities which he did not previously possess, the argument fails. But the most liberal advocate of the rights conferred by that amendment have contended for nothing more than that the rights of the citizen previously existing, and dependent wholly on State laws for their recognition, are now placed under the protection of the Federal government, and are secured by the Federal Constitution. The weight of authority is overwhelming that no such immunity has heretofore existed as would prevent State legislatures from regulating and even prohibiting the traffic in intoxicating drinks, with a solitary exception. That exception is the case of a law operating so rigidly on property in existence at the time of its passage, absolutely prohibiting its sale, as to amount to depriving the owner of his property. A single case, that of *Wynehamer* v. *The People*, 3 Kernan, 486, has held that as to such property the statute would be void for that reason. But no case has held that such a law was void as violating the privileges or immunities of citizens of a State or of the United States. If, however, such a proposition is seriously urged, we think that the right to sell intoxicating liquors, so far as such a right exists, is not one of the rights growing out of citizenship of the United States, and in this regard the case falls within the principles laid down by this court in the *Slaughter-House Cases*, 16 Wallace, 36.

But if it were true, and it was fairly presented to us, that the defendant was the owner of the glass of intoxicating liquor which he sold to Hickey, at the time that the State of Iowa first imposed an absolute prohibition on the sale of such liquors, then we concede that two very grave questions would arise, namely: 1. Whether this would be a statute depriving him of his property without due process of law; and secondly, whether if it were so, it would be so far a violation of the Fourteenth Amendment in that regard as would call for judicial action by this court?

Both of these questions, whenever they may be presented to us, are of an importance to require the most careful and serious consideration.

They are not to be lightly treated, nor are we authorized to make any advances to meet them until we are required to do so by the duties of our position.

In the case before us, the Supreme Court of Iowa, whose judgment we are called on to review, did not consider it. They said that the record did not present it.

It is true the bill of exceptions, as it seems to us, does show that the defendant's plea was all the evidence given, but this does not remove the difficulty in our minds. The plea states that the defendant was the owner of the glass of liquor sold prior to the passage of the law under which the proceedings against him were instituted, being chapter sixty-four of the revision of 1860.

If this is to be treated as an allegation that the defendant was the owner of that glass of liquor prior to 1860, it is insufficient, because the revision of the laws of Iowa of 1860 was not an enactment of new laws, but a revision of those previously enacted; and there has been in existence in the State of Iowa, ever since the code of 1851, a law strictly prohibiting the sale of such liquors; the Act in all essential particulars under which the defendant was prosecuted, amended in some immaterial points. If it is supposed that the averment is helped by the statement that he owned the liquor before the law was passed, the answer is that this is a mere conclusion of law. He should have stated when he became the owner of the liquor, or at least have fixed a date when he did own it, and leave the court to decide when the law took effect, and apply it to his case. But the plea itself is merely argumentative, and does not state the ownership as a fact, but says he is not guilty of any offence, because of such fact.

If it be said that this manner of looking at the case is narrow and technical, we answer that the record affords to us on its face the strongest reason to believe that it has been prepared from the beginning, for the purpose of obtaining the opinion of this court on important constitutional questions without the actual existence of the facts on which such questions can alone arise.

It is absurd to suppose that the plaintiff, an ordinary retailer of drinks, could have proved, if required, that he had owned that particular glass of whiskey prior to the prohibitory liquor law of 1851.

The defendant, from his first appearance before the justice of the peace to his final argument in the Supreme Court, asserted in the record in various forms that the statute under which he was prosecuted was a violation of the Constitution of the United States. The act of the prosecuting attorney, under these circumstances, in going to trial without any replication or denial of the plea, which was intended manifestly to raise that question, but which carried on its face the strongest probability of its falsehood, satisfies us that a moot case was deliberately made up to raise the particular point when the *real* facts of the case would not have done so. As the Supreme Court of Iowa did not consider this question as raised by the record, and passed no opinion

on it, we do not feel at liberty, under all the circumstances, to pass on it on this record.

The other errors assigned being found not to exist, the judgment of the Supreme Court of Iowa is affirmed.

[JUSTICES BRADLEY and FIELD read concurring opinions, restating the views of the minority in the *Slaughter-House Cases*. The former, speaking for himself and JUSTICES FIELD and SWAYNE, said: . . . "By that portion of the Fourteenth Amendment by which no State may make or enforce any law which shall abridge the privileges and immunities of citizens of the United States, or take life, liberty, or property, without due process of law, it has now become the fundamental law of this country that life, liberty, and property (which include 'the pursuit of happiness') are sacred rights, which the Constitution of the United States guarantees to its humblest citizen against oppressive legislation, whether national or local, so that he cannot be deprived of them without due process of law. The monopoly created by the Legislature of Louisiana, which was under consideration in the *Slaughter-House Cases*, was, in my judgment, legislation of this sort and obnoxious to this objection. But police regulations, intended for the preservation of the public health and the public order, are of an entirely different character. So much of the Louisiana law as partook of this character was never objected to. It was the unconscionable monopoly, of which the police regulation was a mere pretext, that was deemed by the dissenting members of the court an invasion of the right of the citizen to pursue his lawful calling. A claim of right to pursue an unlawful calling stands on very different grounds, occupying the same platform as does a claim of right to disregard license laws and to usurp public franchises. It is greatly to be regretted, as it seems to me, that this distinction was lost sight of (as I think it was) in the decision of the court referred to."

MR. JUSTICE FIELD said: . . . "No one has ever pretended, that I am aware of, that the Fourteenth Amendment interferes in any respect with the police power of the State. . . . It was because the Act of Louisiana transcended the limits of police regulation, and asserted a power in the State to farm out the ordinary avocations of life, that dissent was made to the judgment of the court sustaining the validity of the Act."[1]]

[1] See Pomeroy's Constitutional Law (Bennett's ed.) s. 256 *c*. — ED.

BUTCHERS' UNION SLAUGHTER-HOUSE, &c., COMPANY *v.* CRESCENT CITY, &c., SLAUGHTER-HOUSE COMPANY.

SUPREME COURT OF THE UNITED STATES. 1883.

[111 *U. S.* 746.]

IN 1869, the Legislature of Louisiana granted the appellee exclusive privileges for stock-landing and slaughter-houses, at New Orleans for twenty-five years, which were sustained by this court in the *Slaughter-House Cases*, 16 Wall. 36. In 1881, under a provision of the State Constitution of 1879, the municipal authorities granted privileges for slaughter-houses and stock-landing at New Orleans to the appellants. The appellee as plaintiff below filed its bill in the Circuit Court to restrain the appellants from exercising the privileges thus conferred. A preliminary injunction was granted, which, on hearing, was made perpetual. From this decree the defendants below appealed. The legislation and other facts bearing upon the issues are stated in the opinion of the court.

Mr. B. R. Forman, for appellant.

Mr. Thomas J. Semmes, for appellee.

MR. JUSTICE MILLER delivered the opinion of the court.

This is an appeal from the Circuit Court for the Eastern District of Louisiana.

The appellee brought a suit in the Circuit Court to obtain an injunction against the appellant forbidding the latter from exercising the business of butchering, or receiving and landing live-stock intended for butchering, within certain limits in the parishes of Orleans, Jefferson, and St. Bernard, and obtained such injunction by a final decree in that court.

The ground on which this suit was brought and sustained is that the plaintiffs had the exclusive right to have all such stock landed at their stock-landing place, and butchered at their slaughter-house, by virtue of an Act of the General Assembly of Louisiana, approved March 8th, 1869, entitled, "An Act to protect the health of the City of New Orleans, to locate the stock-landing and slaughter-houses, and to incorporate the Crescent City Live-Stock Landing and Slaughter-House Company."

An examination of that statute, especially of its fourth and fifth sections, leaves no doubt that it did grant such an exclusive right.

The fact that it did so, and that this was conceded, was the basis of the contest in this court in the *Slaughter-House Cases*, 16 Wall. 36, in which the law was assailed as a monopoly forbidden by the Thirteenth and Fourteenth Amendments to the Constitution of the United States, and these amendments as well as the Fifteenth, came for the first time before this court for construction. The constitutional power of the State to enact the statute was upheld by this court.

This power was placed by the court in that case expressly on the ground that it was the exercise of the police power which had remained with the States in the formation of the original Constitution of the United States, and had not been taken away by the amendments adopted since.

Citing the definition of this power from Chancellor Kent, it declares that the statute in question came within it. "Unwholesome trades, slaughter-houses, operations offensive to the senses, the deposit of powder, the application of steam-power to propel cars, the building with combustible materials, and the burial of the dead, may all" (he says) "be interdicted by law in the midst of dense masses of population, on the general and rational principle that every person ought so to use his property as not to injure his neighbors; and that private interests must be made subservient to the general interest of the community." 2 Kent's Commentaries, 340; 16 Wall. 62. In this latter case it was added that "the regulation of the place and manner of conducting the slaughtering of animals, and the business of butchering within a city, and the inspection of the animals to be killed for meat, and of the meat afterwards, are among the most necessary and frequent exercises of this power."

But in the year 1879 the State of Louisiana adopted a new Constitution, in which were the following articles:

"Article 248. The police juries of the several parishes, and the constituted authorities of all incorporated municipalities of the State, shall alone have the power of regulating the slaughtering of cattle and other live-stock within their respective limits; provided no monopoly or exclusive privilege shall exist in this State, nor such business be restricted to the land or houses of any individual or corporation; provided the ordinances designating places for slaughtering shall obtain the concurrent approval of the Board of Health or other sanitary organization.

"Article 258. . . . The monopoly features in the charter of any corporation now existing in the State, save such as may be contained in the charters of railroad companies, are hereby abolished."

Under the authority of these articles of the Constitution the municipal authorities of the city of New Orleans enacted ordinances which opened to general competition the right to build slaughter-houses, establish stock-landings, and engage in the business of butchering in that city under regulations established by those ordinances, but which were in utter disregard of the monopoly granted to the Crescent City Company, and which in effect repealed the exclusive grant made to that company by the Act of 1869.

The appellant here, the Butchers' Union Slaughter-House Company, availing themselves of this repeal, entered upon the business, or were about to do so, by establishing their slaughter-house and stock-landing within the limits of the grant of the Act of 1869 to the Crescent City Company.

Both these corporations, organized under the laws of Louisiana and

doing business in that State, were citizens of the same State, and could not, in respect of that citizenship, sue each other in a court of the United States.

The Crescent City Company, however, on the allegation that these constitutional provisions of 1879 and the subsequent ordinances of the city, were a violation of their contract with the State under the Act of 1869, brought this suit in the Circuit Court as arising under the Constitution of the United States, art. 1, sec. 10. That court sustained the view of the plaintiff below, and held that the Act of 1869 and the acceptance of it by the Crescent City Company, constituted a contract for the exclusive right mentioned in it for twenty-five years; that it was within the power of the Legislature of Louisiana to make that contract, and as the constitutional provisions of 1879 and the subsequent ordinances of the city impaired its obligation, they were to that extent void.

No one can examine the provisions of the Act of 1869 with the knowledge that they were accepted by the Crescent City Company, and so far acted on that a very large amount of money was expended in a vast slaughter-house, and an equally extensive stock-yard and landing-place, and hesitate to pronounce that in form they have all the elements of a contract on sufficient consideration.

It admits of as little doubt that the ordinance of the city of New Orleans, under the new Constitution, impaired the supposed obligation imposed by those provisions on the State, by taking away the exclusive right of the company granted to it for twenty-five years, which was to the company the most valuable thing supposed to be secured to it by the statutory contract.

We do not think it necessary to spend time in demonstrating either of these propositions. We do not believe they will be controverted.

The appellant, however, insists that, so far as the Act of 1869 partakes of the nature of an irrepealable contract, the legislature exceeded its authority, and it had no power to tie the hands of the legislature in the future from legislating on that subject without being bound by the terms of the statute then enacted. This proposition presents the real point in the case.

Let us see clearly what it is.

It does not deny the power of that legislature to create a corporation, with power to do the business of landing live-stock and providing a place for slaughtering them in the city. It does not deny the power to locate the place where this shall be done exclusively. It does not deny even the power to give an exclusive right, for the time being, to particular persons or to a corporation to provide this stock-landing and to establish this slaughter-house.

But it does deny the power of that legislature to continue this right so that no future legislature nor even the same body can repeal or modify it, or grant similar privileges to others. It concedes that such a law, so long as it remains on the statute-book as the latest expression of the legislative will, is a valid law, and must be obeyed, which is all

that was decided by this court in the *Slaughter-House Cases*. But it asserts the right of the legislature to repeal such a statute, or to make a new one inconsistent with it, whenever, in the wisdom of such legislature, it is for the good of the public it should be done.

Nor does this proposition contravene the established principle that the legislature of a State may make contracts on many subjects which will bind it, and will bind succeeding legislatures for the time the contract has to run, so that its provisions can neither be repealed nor its obligation impaired. The examples are numerous where this has been done and the contract upheld.

The denial of this power, in the present instance, rests upon the ground that the power of the legislature intended to be suspended is one so indispensable to the public welfare that it cannot be bargained away by contract. It is that well-known but undefined power called the police power. We have not found a better definition of it for our present purpose than the extract from Kent's Commentaries in the earlier part of this opinion. "The power to regulate unwholesome trades, slaughter-houses, operations offensive to the senses," there mentioned, points unmistakably to the powers exercised by the Act of 1869, and the ordinances of the city under the Constitution of 1879. While we are not prepared to say that the legislature can make valid contracts on no subject embraced in the largest definition of the police power, we think that, in regard to two subjects so embraced, it cannot, by any contract, limit the exercise of those powers to the prejudice of the general welfare. These are the public health and public morals. The preservation of these is so necessary to the best interests of social organization that a wise policy forbids the legislative body to divest itself of the power to enact laws for the preservation of health and the repression of crime.

It cannot be permitted that, when the Constitution of a State, the fundamental law of the land, has imposed upon its legislature the duty of guarding, by suitable laws, the health of its citizens, especially in crowded cities, and the protection of their person and property by suppressing and preventing crime, that the power which enables it to perform this duty can be sold, bargained away, under any circumstances, as if it were a mere privilege which the legislator could dispose of at his pleasure.

This principle has been asserted and repeated in this court in the last few years in no ambiguous terms.

The first time it seems to have been distinctly and clearly presented, was in the case of *Boyd* v. *Alabama*, 94 U. S. 645. That was a writ of error to the Supreme Court of Alabama, brought by Boyd, who had been convicted in the courts of that State of carrying on a lottery contrary to law. In his defence, he relied upon a statute which authorized lotteries for a specific purpose, under which he held a license. The repeal of this statute, which made his license of no avail against the general law forbidding lotteries, was asserted by his counsel to be void as

impairing the obligation of the contract, of which his license was evidence, and the Supreme Court of Alabama had in a previous case held it to be a contract.

In Boyd's case, however, that court held the law under which his license was issued to be void, because the object of it was not expressed in the title, as required by the Constitution of the State. This court followed that decision, and affirmed the judgment on that ground.

But in the concluding sentences of the opinion by Mr. Justice Field, the court, to repel the inference that the contract would have been irrepealable, if the statute had conformed to the special requirement of the Constitution, said:

"We are not prepared to admit that it is competent for one legislature, by any contract with an individual, to restrain the power of a subsequent legislature to legislate for the public welfare, and to that end to suppress any and all practices tending to corrupt the public morals," citing *Moore* v. *The State*, 48 Miss. 147, and *Metropolitan Board of Excise* v. *Barrie*, 34 N. Y. 657, 663.

This cautionary declaration received the unanimous concurrence of the court, and a year later the principle became the foundation of the decision in the case of *The Beef Company* v. *Massachusetts*, 97 U. S. 25, 28. . . . [Here the court considers the case last named, and also *Stone* v. *Mississippi*, 101 U. S. 814, and *Fertilizing Co.* v. *Hyde Park*, 97 U. S. 659.]

These cases are all cited and their views adopted in the opinion of the Supreme Court of Louisiana in a suit between the same parties in regard to the same matter as the present case, and which was brought to this court by writ of error and dismissed before a hearing by the present appellee.

The result of these considerations is that the Constitution of 1879 and the ordinances of the city of New Orleans, which are complained of, are not void as impairing the obligation of complainant's contract, and that

The decree of the Circuit Court must be reversed, and the case remanded to that court with directions to dismiss the bill.[1]

[1] JUSTICES FIELD and BRADLEY (with the latter of whom agreed JUSTICES HARLAN and WOODS) gave concurring opinions, in which they again restated the views of the minority in the *Slaughter-House Cases*.

FIELD, J., said: ". . . As in our intercourse with our fellow-men certain principles of morality are assumed to exist, without which society would be impossible, so certain inherent rights lie at the foundation of all action, and upon a recognition of them alone can free institutions be maintained. These inherent rights have never been more happily expressed than in the Declaration of Independence, that new evangel of liberty to the people: 'We hold these truths to be self-evident,' — that is, so plain that their truth is recognized upon their mere statement, — 'that all men are endowed' — not by edicts of emperors, or decrees of Parliament, or acts of Congress, but 'by their Creator with certain inalienable rights,' — that is, rights which cannot be bartered away, or given away, or taken away except in punishment of crime. — 'and that among these are life, liberty, and the pursuit of happiness, and to secure these' — not grant them, but secure

them — 'governments are instituted among men, deriving their just powers from the consent of the governed.' Among these inalienable rights, as proclaimed in that great document, is the right of men to pursue their happiness, by which is meant the right to pursue any lawful business or vocation, in any manner not inconsistent with the equal rights of others, which may increase their prosperity or develop their faculties, so as to give to them their highest enjoyment. The common business and callings of life, the ordinary trades and pursuits, which are innocuous in themselves, and have been followed in all communities from time immemorial, must, therefore, be free in this country to all alike upon the same conditions. The right to pursue them, without let or hindrance, except that which is applied to all persons of the same age, sex, and condition, is a distinguishing privilege of citizens of the United States, and an essential element of that freedom which they claim as their birthright. It has been well said that, 'The property which every man has in his own labor, as it is the original foundation of all other property, so it is the most sacred and inviolable. The patrimony of the poor man lies in the strength and dexterity of his own hands, and to hinder his employing this strength and dexterity in what manner he thinks proper, without injury to his neighbor, is a plain violation of this most sacred property. It is a manifest encroachment upon the just liberty both of the workman and of those who might be disposed to employ him. As it hinders the one from working at what he thinks proper, so it hinders the others from employing whom they think proper.' — ADAM SMITH'S *Wealth of Nations*, Bk. I. Chap. 10. . . . The first section of the amendment is stripped of all its protective force, if its application be limited to the privileges and immunities of citizens of the United States as distinguished from citizens of the States, and thus its prohibition be extended only to the abridgment or impairment of such rights, as the right to come to the seat of government, . . . which are specified in the opinion in the *Slaughter-House Cases* as the special rights of such citizens. If thus limited, nothing was accomplished by adopting it. The States could not previously have interfered with these privileges and immunities, or any other privileges and immunities which citizens enjoyed under the Constitution and laws of the United States. . . . Whilst, therefore, I fully concur in the decision of the court that it was entirely competent for the State to annul the monopoly features of the original Act incorporating the plaintiff, I am of opinion that the Act, in creating the monopoly in an ordinary employment and business, was to that extent against common right and void."

BRADLEY, J. (speaking also for JUSTICES HARLAN and WOODS), said: . . . "I do not mean to say that there are no exclusive rights which can be granted, or that there are not many regulative restraints on civil action which may be imposed by law. . . . But this concession does not in the slightest degree affect the proposition (which I deem a fundamental one), that the ordinary pursuits of life, forming the large mass of industrial avocations, are and ought to be free and open to all, subject only to such general regulations, applying equally to all, as the general good may demand; and the grant to a favored few of a monopoly in any of these common callings is necessarily an outrage upon the liberty of the citizen as exhibited in one of its most important aspects, — the liberty of pursuit. . . . It abridges the privileges of citizens of the United States; it deprives them of a portion of their liberty and property without due process of law; and it denies to them the equal protection of the laws 1. I hold that the liberty of pursuit — the right to follow any of the ordinary callings of life — is one of the privileges of a citizen of the United States. . . . 2. But if it does not abridge the privileges and immunities of a citizen of the United States to prohibit him from pursuing his chosen calling, and giving to others the exclusive right of pursuing it, it certainly does deprive him (to a certain extent) of his liberty; for it takes from him the freedom of adopting and following the pursuit which he prefers; which, as already intimated, is a material part of the liberty of the citizen. And, if a man's right to his calling is property, as many maintain, then those who had already adopted the prohibited pursuits in New Orleans, were deprived, by the law in question, of their property, as well as their liberty, without due process of law. 3. But still more apparent is the violation, by this monopoly law, of the last clause of the section, — 'no State shall deny to any person the equal protection of the laws.' If it is not a denial of the equal protection

STRAUDER *v.* WEST VIRGINIA.

SUPREME COURT OF THE UNITED STATES. 1879.

[100 *U. S.* 303.]

ERROR to the Supreme Court of Appeals of the State of West Virginia.

The facts are stated in the opinion of the court.

Mr. Charles Devens and *Mr. George O. Davenport*, for the plaintiff in error.

Mr. Robert White, Attorney-General of West Virginia, and *Mr. James W. Green*, *contra*.

MR. JUSTICE STRONG delivered the opinion of the court.

The plaintiff in error, a colored man, was indicted for murder in the Circuit Court of Ohio County, in West Virginia, on the 20th of October, 1874, and upon trial was convicted and sentenced. The record was then removed to the Supreme Court of the State, and there the judgment of the Circuit Court was affirmed. The present case is a writ of error to that court, and it is now, in substance, averred that at the trial in the State court the defendant (now plaintiff in error) was denied rights to which he was entitled under the Constitution and laws of the United States.

In the Circuit Court of the State, before the trial of the indictment was commenced, the defendant presented his petition, verified by his oath, praying for a removal of the cause into the Circuit Court of the United States, assigning, as ground for the removal, that, "by virtue of the laws of the State of West Virginia no colored man was eligible to be a member of the grand jury or to serve on a petit jury in the State; that white men are so eligible, and that by reason of his being a colored man and having been a slave, he had reason to believe, and did believe, he could not have the full and equal benefit of all laws and proceedings in the State of West Virginia for the security of his person as is enjoyed by white citizens, and that he had less chance of enforcing in the courts of the State his rights on the prosecution, as a citizen of the United States, and that the probabilities of a denial of them to him

of the laws to grant to one man, or set of men, the privilege of following an ordinary calling in a large community, and to deny it to all others, it is difficult to understand what would come within the constitutional prohibition. Monopolies are the bane of our body politic at the present day. In the eager pursuit of gain they are sought in every direction. They exhibit themselves in corners in the stock market and produce market, and in many other ways. If by legislative enactment they can be carried into the common avocations and callings of life, so as to cut off the right of the citizen to choose his avocation, the right to earn his bread by the trade which he has learned; and if there is no constitutional means of putting a check to such enormity, I can only say that it is time the Constitution was still further amended. In my judgment, the present Constitution is amply sufficient for the protection of the people if it is fairly interpreted and faithfully enforced." — ED.

as such citizen on every trial which might take place on the indictment in the courts of the State were much more enhanced than if he was a white man." This petition was denied by the State court, and the cause was forced to trial.

Motions to quash the *venire*, "because the law under which it was issued was unconstitutional, null, and void," and successive motions to challenge the array of the panel, for a new trial, and in arrest of judgment were then made, all of which were overruled and made by exceptions parts of the record.

The law of the State to which reference was made in the petition for removal and in the several motions was enacted on the 12th of March, 1873 (Acts of 1872–73, p. 102), and it is as follows: "All white male persons who are twenty-one years of age and who are citizens of this State shall be liable to serve as jurors, except as herein provided." The persons excepted are State officials.

In this court, several errors have been assigned, and the controlling questions underlying them all are, first, whether, by the Constitution and laws of the United States, every citizen of the United States has a right to a trial of an indictment against him by a jury selected and impanelled without discrimination against his race or color, because of race or color; and, second, if he has such a right, and is denied its enjoyment by the State in which he is indicted, may he cause the case to be removed into the Circuit Court of the United States?

It is to be observed that the first of these questions is not whether a colored man, when an indictment has been preferred against him, has a right to a grand or a petit jury composed in whole or in part of persons of his own race or color, but it is whether, in the composition or selection of jurors by whom he is to be indicted or tried, all persons of his race or color may be excluded by law, solely because of their race or color, so that by no possibility can any colored man sit upon the jury. . . . [Sect. 1 of the Fourteenth Amendment is here recited.]

This is one of a series of constitutional provisions having a common purpose; namely, securing to a race recently emancipated, a race that through many generations had been held in slavery, all the civil rights that the superior race enjoy. The true spirit and meaning of the amendments, as we said in the *Slaughter-House Cases*, 16 Wall. 36, cannot be understood without keeping in view the history of the times when they were adopted, and the general objects they plainly sought to accomplish. At the time when they were incorporated into the Constitution, it required little knowledge of human nature to anticipate that those who had long been regarded as an inferior and subject race would, when suddenly raised to the rank of citizenship, be looked upon with jealousy and positive dislike, and that State laws might be enacted or enforced to perpetuate the distinctions that had before existed. Discriminations against them had been habitual. It was well known that in some States laws making such discriminations then existed, and others might well be expected. The colored race, as a race, was abject and

ignorant, and in that condition was unfitted to command the respect of those who had superior intelligence. Their training had left them mere children, and as such they needed the protection which a wise government extends to those who are unable to protect themselves. They especially needed protection against unfriendly action in the States where they were resident. It was in view of these considerations the Fourteenth Amendment was framed and adopted. It was designed to assure to the colored race the enjoyment of all the civil rights that under the law are enjoyed by white persons, and to give to that race the protection of the general government, in that enjoyment, whenever it should be denied by the States. It not only gave citizenship and the privileges of citizenship to persons of color, but it denied to any State the power to withhold from them the equal protection of the laws, and authorized Congress to enforce its provisions by appropriate legislation. . . .

If this is the spirit and meaning of the amendment, whether it means more or not, it is to be construed liberally, to carry out the purposes of its framers. It ordains that no State shall make or enforce any laws which shall abridge the privileges or immunities of citizens of the United States (evidently referring to the newly made citizens, who, being citizens of the United States, are declared to be also citizens of the State in which they reside). It ordains that no State shall deprive any person of life, liberty, or property, without due process of law, or deny to any person within its jurisdiction the equal protection of the laws. What is this but declaring that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color? The words of the amendment, it is true, are prohibitory, but they contain a necessary implication of a positive immunity, or right, most valuable to the colored race, — the right to exemption from unfriendly legislation against them distinctively as colored, — exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps towards reducing them to the condition of a subject race.

That the West Virginia statute respecting juries — the statute that controlled the selection of the grand and petit jury in the case of the plaintiff in error — is such a discrimination ought not to be doubted. Nor would it be if the persons excluded by it were white men. If in those States where the colored people constitute a majority of the entire population a law should be enacted excluding all white men from jury service, thus denying to them the privilege of participating equally with the blacks in the administration of justice, we apprehend no one would be heard to claim that it would not be a denial to white men of the equal protection of the laws. Nor if a law should be passed exclud-

ing all naturalized Celtic Irishmen, would there be any doubt of its inconsistency with the spirit of the amendment. The very fact that colored people are singled out and expressly denied by a statute all right to participate in the administration of the law, as jurors, because of their color, though they are citizens, and may be in other respects fully qualified, is practically a brand upon them, affixed by the law, an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others.

The right to a trial by jury is guaranteed to every citizen of West Virginia by the Constitution of that State, and the constitution of juries is a very essential part of the protection such a mode of trial is intended to secure. The very idea of a jury is a body of men composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds. Blackstone, in his Commentaries, says, "The right of trial by jury, or the country, is a trial by the peers of every Englishman, and is the grand bulwark of his liberties, and is secured to him by the Great Charter." It is also guarded by statutory enactments intended to make impossible what Mr. Bentham called "packing juries." It is well known that prejudices often exist against particular classes in the community, which sway the judgment of jurors, and which, therefore, operate in some cases to deny to persons of those classes the full enjoyment of that protection which others enjoy. Prejudice in a local community is held to be a reason for a change of venue. The framers of the constitutional amendment must have known full well the existence of such prejudice and its likelihood to continue against the manumitted slaves and their race, and that knowledge was doubtless a motive that led to the amendment. By their manumission and citizenship the colored race became entitled to the equal protection of the laws of the States in which they resided; and the apprehension that through prejudice they might be denied that equal protection, that is, that there might be discrimination against them, was the inducement to bestow upon the national government the power to enforce the provision that no State shall deny to them the equal protection of the laws. Without the apprehended existence of prejudice that portion of the amendment would have been unnecessary, and it might have been left to the States to extend equality of protection. . . .

We do not say that within the limits from which it is not excluded by the amendment, a State may not prescribe the qualifications of its jurors, and in so doing make discriminations. It may confine the selection to males, to freeholders, to citizens, to persons within certain ages, or to persons having educational qualifications. We do not believe the Fourteenth Amendment was ever intended to prohibit this. Looking at its history, it is clear it had no such purpose. Its aim was against discrimination because of race or color. As we have said more than once, its design was to protect an emancipated race, and to strike down

all possible legal discriminations against those who belong to it. To quote further from 16 Wall., *supra:* "In giving construction to any of these articles [amendments], it is necessary to keep the main purpose steadily in view." "It is so clearly a provision for that race and that emergency, that a strong case would be necessary for its application to any other." We are not now called upon to affirm or deny that it had other purposes.

The Fourteenth Amendment makes no attempt to enumerate the rights it designed to protect. It speaks in general terms, and those are as comprehensive as possible. Its language is prohibitory; but every prohibition implies the existence of rights and immunities, prominent among which is an immunity from inequality of legal protection, either for life, liberty, or property. Any State action that denies this immunity to a colored man is in conflict with the Constitution.

Concluding, therefore, that the statute of West Virginia, discriminating in the selection of jurors, as it does, against negroes because of their color, amounts to a denial of the equal protection of the laws to a colored man when he is put upon trial for an alleged offence against the State, it remains only to be considered whether the power of Congress to enforce the provisions of the Fourteenth Amendment by appropriate legislation is sufficient to justify the enactment of sect. 641 of the Revised Statutes.

A right or an immunity, whether created by the Constitution or only guaranteed by it, even without any express delegation of power, may be protected by Congress. *Prigg* v. *The Commonwealth of Pennsylvania*, 16 Pet. 539. So in *United States* v. *Reese*, 92 U. S. 214, it was said by the Chief Justice of this court: "Rights and immunities created by or dependent upon the Constitution of the United States can be protected by Congress. The form and manner of the protection may be such as Congress in the legitimate exercise of its legislative discretion shall provide. These may be varied to meet the necessities of the particular right to be protected." But there is express authority to protect the rights and immunities referred to in the Fourteenth Amendment, and to enforce observance of them by appropriate congressional legislation. And one very efficient and appropriate mode of extending such protection and securing to a party the enjoyment of the right or immunity, is a law providing for the removal of his case from a State court, in which the right is denied by the State law, into a Federal court, where it will be upheld. This is an ordinary mode of protecting rights and immunities conferred by the Federal Constitution and laws. Sect. 641 is such a provision. . . .

We have heretofore considered and affirmed the constitutional power of Congress to authorize the removal from State courts into the circuit courts of the United States, before trial, of criminal prosecutions for alleged offences against the laws of the State, when the defence presents a Federal question, or when a right under the Federal Constitution or laws is involved. *Tennessee* v *Davis, supra,* p. 257. It is unnecessary now to repeat what we there said.

That the petition of the plaintiff in error, filed by him in the State court before the trial of his case, made a case for removal into the Federal Circuit Court, under sect. 641, is very plain, if, by the constitutional amendment and sect. 1977 of the Revised Statutes, he was entitled to immunity from discrimination against him in the selection of jurors, because of their color, as we have endeavored to show that he was. It set forth sufficient facts to exhibit a denial of that immunity, and a denial by the statute law of the State.

There was error, therefore, in proceeding to the trial of the indictment against him after his petition was filed, as also in overruling his challenge to the array of the jury, and in refusing to quash the panel.

The judgment of the Supreme Court of West Virginia will be reversed, and the case remitted with instructions to reverse the judgment of the Circuit Court of Ohio County; and it is *So ordered.*

[FIELD and CLIFFORD, JJ., dissented.]

EX PARTE VIRGINIA.

SUPREME COURT OF THE UNITED STATES. 1879.

[100 *U. S.* 339.]

PETITION for a writ of *habeas corpus.*

The facts are stated in the opinion of the court.

Mr. James G. Field, Attorney-General of Virginia, and *Mr. William J. Robertson*, for the petitioner.

Mr. Attorney-General Devens and *Mr. Assistant Attorney-General Smith*, *contra.*

MR. JUSTICE STRONG delivered the opinion of the court.

The petitioner, J. D. Coles, was arrested, and he is now held in custody under an indictment found against him in the District Court of the United States for the Western District of Virginia. The indictment alleged that he, being a judge of the county court of Pittsylvania County of that State, and an officer charged by law with the selection of jurors to serve in the circuit and county courts of said county in the year 1878, did then and there exclude and fail to select as grand and petit jurors certain citizens of said county of Pittsylvania, of African race and black color, said citizens possessing all other qualifications prescribed by law, and being by him excluded from the jury lists made out by him as such judge, on account of their race, color, and previous condition of servitude, and for no other reason, against the peace and dignity of the United States, and against the form of the statute of the United States in such case made and provided.

Being thus in custody, he has presented to us his petition for a writ of *habeas corpus* and a writ of *certiorari* to bring up the record of the District Court, in order that he may be discharged; and he avers that

the District Court had and has no jurisdiction of the matters charged against him in said indictment; that they constitute no offence punishable in said District Court; and that the finding of said indictment, and his consequent arrest and imprisonment, are unwarranted by the Constitution of the United States, or by any law made in pursuance thereof, and are in violation of his rights and of the rights of the State of Virginia, whose judicial officer he is.

A similar petition has been presented by the State of Virginia, praying for a *habeas corpus* and for the discharge of the said Coles. Accompanying both these petitions are exhibited copies of the indictment, the bench-warrant, and the return of the marshal, showing the arrest of the said Coles and his detention in custody.

Both these petitions have been considered as one case, and the first question they present is, whether this court has jurisdiction to award the writ asked for by the petitioners. . . . Our conclusion, then, is that we are empowered to grant the writ in such a case as is presented in these petitions. We come now to the merits of the case.

The indictment and bench-warrant, in virtue of which the petitioner Coles has been arrested and is held in custody, have their justification, — if any they have, — in the Act of Congress of March 1, 1875, sect. 4. 18 Stat., part 3, 336. That section enacts that "no citizen, possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States, or of any State, on account of race, color, or previous condition of servitude; and any officer or other person charged with any duty in the selection or summoning of jurors who shall exclude or fail to summon any citizen for the cause aforesaid shall, on conviction thereof, be deemed guilty of a misdemeanor, and be fined not more than $5,000." The defendant has been indicted for the misdemeanor described in this Act, and it is not denied that he is now properly held in custody to answer the indictment, if the Act of Congress was warranted by the Constitution. The whole merits of the case are involved in the question, whether the Act was thus warranted. . . .

One great purpose of these amendments was to raise the colored race from that condition of inferiority and servitude in which most of them had previously stood, into perfect equality of civil rights with all other persons within the jurisdiction of the States. They were intended to take away all possibility of oppression by law because of race or color. They were intended to be, what they really are, limitations of the power of the States and enlargements of the power of Congress. They are to some extent declaratory of rights, and though in form prohibitions, they imply immunities, such as may be protected by congressional legislation. We had occasion in the *Slaughter-House Cases*, 16 Wall. 36, to express our opinion of their spirit and purpose, and to some extent of their meaning. We have again been called to consider them in *Tennessee* v. *Davis*, 100 U. S. 257, and *Strauder* v. *West Virginia*, Id. 303. In this latter case . . . we held, further, that this protection

and this guarantee, as the fifth section of the amendment expressly ordains, may be enforced by Congress by means of appropriate legislation.

All of the amendments derive much of their force from this latter provision. It is not said the judicial power of the general government shall extend to enforcing the prohibitions and to protecting the rights and immunities guaranteed. It is not said that branch of the government shall be authorized to declare void any action of a State in violation of the prohibitions. It is the power of Congress which has been enlarged. Congress is authorized to enforce the prohibitions by appropriate legislation. Some legislation is contemplated to make the amendments fully effective. Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power. . . .

We have said the prohibitions of the Fourteenth Amendment are addressed to the States. They are, "No State shall make or enforce a law which shall abridge the privileges or immunities of citizens of the United States, . . . nor deny to any person within its jurisdiction the equal protection of the laws." They have reference to actions of the political body denominated a State, by whatever instruments or in whatever modes that action may be taken. A State acts by its legislative, its executive, or its judicial authorities. It can act in no other way. The constitutional provision, therefore, must mean that no agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a State government, deprives another of property, life, or liberty, without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State. This must be so, or the constitutional prohibition has no meaning. Then the State has clothed one of its agents with power to annul or to evade it. . . .

We do not perceive how holding an office under a State, and claiming to act for the State, can relieve the holder from obligation to obey the Constitution of the United States, or take away the power of Congress to punish his disobedience.

It was insisted during the argument on behalf of the petitioner that Congress cannot punish a State judge for his official acts; and it was assumed that Judge Cole, in selecting the jury as he did, was performing a judicial act. This assumption cannot be admitted. Whether the act done by him was judicial or not is to be determined by its character, and not by the character of the agent. Whether he was a county judge or not is of no importance. The duty of selecting jurors might as well have been committed to a private person as to one holding the office of

a judge. It often is given to county commissioners, or supervisors, or assessors. In former times, the selection was made by the sheriff. In such cases, it surely is not a judicial act, in any such sense as is contended for here. It is merely a ministerial act, as much so as the act of a sheriff holding an execution, in determining upon what piece of property he will make a levy, or the act of a roadmaster in selecting laborers to work upon the roads. That the jurors are selected for a court makes no difference. So are court-criers, tipstaves, sheriffs, &c. Is their election or their appointment a judicial act?

But if the selection of jurors could be considered in any case a judicial act, can the act charged against the petitioner be considered such when he acted outside of his authority and in direct violation of the spirit of the State statute? That statute gave him no authority, when selecting jurors, from whom a panel might be drawn for a circuit court, to exclude all colored men merely because they were colored. Such an exclusion was not left within the limits of his discretion. It is idle, therefore, to say that the Act of Congress is unconstitutional because it inflicts penalties upon State judges for their judicial action. It does no such thing.

Upon the whole, as we are of opinion that the Act of Congress upon which the indictment against the petitioner was founded is constitutional, and that he is correctly held to answer it, and as, therefore, no object would be secured by issuing a writ of *habeas corpus*, the petitions are *Denied.*

[FIELD, J., for himself and CLIFFORD, J., gave a dissenting opinion.]

IN *Ex parte Yarbrough*, 110 U. S. 651 (1883), in denying a petition for a writ of *habeas corpus* for the release of several persons, sentenced and imprisoned for conspiracy to intimidate persons of African descent from voting at an election for a member of Congress, the court (MILLER, J.) said: "It is said that the parties assaulted in these cases are not officers of the United States, and their protection in exercising the right to vote by Congress does not stand on the same ground.

"But the distinction is not well taken. The power in either case arises out of the circumstance that the function in which the party is engaged or the right which he is about to exercise is dependent on the laws of the United States.

"In both cases it is the duty of that government to see that he may exercise this right freely, and to protect him from violence while so doing, or on account of so doing. This duty does not arise solely from the interest of the party concerned, but from the necessity of the government itself, that its service shall be free from the adverse influence of force and fraud practised on its agents, and that the votes by which its members of Congress and its President are elected shall be the *free* votes of the electors, and the officers thus chosen the free and uncorrupted choice of those who have the right to take part in that choice.

"This proposition answers also another objection to the constitutionality of the laws under consideration, namely, that the right to vote for

a member of Congress is not dependent upon the Constitution or laws of the United States, but is governed by the law of each State respectively.

"If this were conceded, the importance to the general government of having the actual election — the voting for those members — free from force and fraud is not diminished by the circumstance that the qualification of the voter is determined by the law of the State where he votes. It equally affects the government, it is as indispensable to the proper discharge of the great function of legislating for that government, that those who are to control this legislation shall not owe their election to bribery or violence, whether the class of persons who shall vote is determined by the law of the State, or by law of the United States, or by their united result.

"But it is not correct to say that the right to vote for a member of Congress does not depend on the Constitution of the United States.

"The office, if it be properly called an office, is created by that Constitution. and by that alone. It also declares how it shall be filled; namely, by election.

"Its language is: 'The House of Representatives shall be composed of members chosen every second year by the people of the several States, and the electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature.' Article 1, section 2.

"The States in prescribing the qualifications of voters for the most numerous branch of their own legislatures, do not do this with reference to the election for members of Congress. Nor can they prescribe the qualification for voters for those *eo nomine*. They define who are to vote for the popular branch of their own legislature, and the Constitution of the United States says the same persons shall vote for members of Congress in that State. It adopts the qualification thus furnished as the qualification of its own electors for members of Congress.

"It is not true, therefore, that electors for members of Congress owe their right to vote to the State law in any sense which makes the exercise of the right to depend exclusively on the law of the State.

"Counsel for petitioners, seizing upon the expression found in the opinion of the court in the case of *Minor* v. *Happersett*, 21 Wall. 162, that 'the Constitution of the United States does not confer the right of suffrage upon any one,' without reference to the connection in which it is used, insists that the voters in this case do not owe their right to vote in any sense to that instrument.

"But the court was combating the argument that this right was conferred on all citizens, and therefore upon women as well as men.

"In opposition to that idea, it was said the Constitution adopts as the qualification for voters of members of Congress that which prevails in the State where the voting is to be done; therefore, said the opinion, the right is not definitely conferred on any person or class of persons, by the Constitution alone, because you have to look to the law of

the State for the description of the class. But the court did not intend to say that when the class or the person is thus ascertained, his right to vote for a member of Congress was not fundamentally based upon the Constitution, which created the office of member of Congress, and declared it should be elective, and pointed to the means of ascertaining who should be electors.

"The Fifteenth Amendment of the Constitution, by its limitation on the power of the States in the exercise of their right to prescribe the qualifications of voters in their own elections, and by its limitation of the power of the United States over that subject, clearly shows that the right of suffrage was considered to be of supreme importance to the national government, and was not intended to be left within the exclusive control of the States. It is in the following language: —

"'SEC. 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States, or by any State, on account of race, color, or previous condition of servitude.

"'SEC. 2. The Congress shall have power to enforce this article by appropriate legislation.'

"While it is quite true, as was said by this court in *United States* v. *Reese*, 92 U. S. 214, that this article gives no affirmative right to the colored man to vote, and is designed primarily to prevent discrimination against him whenever the right to vote may be granted to others, it is easy to see that under some circumstances it may operate as the immediate source of a right to vote. In all cases where the former slaveholding States had not removed from their constitutions the words 'white man' as a qualification for voting, this provision did, in effect, confer on him the right to vote, because, being paramount to the State law, and a part of the State law, it annulled the discriminating word *white*, and thus left him in the enjoyment of the same right as white persons. And such would be the effect of any future constitutional provision of a State which should give the right of voting exclusively to white people, whether they be men or women. *Neal* v. *Delaware*, 103 U. S. 370.

"In such cases this Fifteenth Article of Amendment does, *proprio vigore*, substantially confer on the negro the right to vote, and Congress has the power to protect and enforce that right.

"In the case of *United States* v. *Reese*, so much relied on by counsel, this court said in regard to the Fifteenth Amendment, that 'it has invested the citizens of the United States with a new constitutional right which is within the protecting power of Congress. That right is an exemption from discrimination in the exercise of the elective franchise on account of race, color, or previous condition of servitude.' This new constitutional right was mainly designed for citizens of African descent. The principle, however, that the protection of the exercise of this right is within the power of Congress, is as necessary to the right of other citizens to vote as to the colored citizen, and to the right to vote in general as to the right to be protected against discrimination.

"The exercise of the right in both instances is guaranteed by the Constitution, and should be kept free and pure by congressional enactments whenever that is necessary.

"The reference to cases in this court in which the power of Congress under the first section of the Fourteenth Amendment has been held to relate alone to acts done under State authority, can afford petitioners no aid in the present case. For, while it may be true that acts which are mere invasions of private rights, which acts have no sanction in the statutes of a State, or which are not committed by any one exercising its authority, are not within the scope of that amendment, it is quite a different matter when Congress undertakes to protect the citizen in the exercise of rights conferred by the Constitution of the United States essential to the healthy organization of the government itself."

CIVIL RIGHTS CASES.

SUPREME COURT OF THE UNITED STATES. 1883.

[109 *U. S.* 3.]

THESE cases were all founded on the first and second sections of the Act of Congress, known as the Civil Rights Act, passed March 1st, 1875, entitled "An Act to protect all Citizens in their Civil and Legal Rights." 18 Stat. 335. Two of the cases, those against Stanley and Nichols, were indictments for denying to persons of color the accommodations and privileges of an inn or hotel; two of them, those against Ryan and Singleton, were, one an information, the other an indictment, for denying to individuals the privileges and accommodations of a theatre, the information against Ryan being for refusing a colored person a seat in the dress circle of Maguire's theatre in San Francisco; and the indictment against Singleton was for denying to another person, whose color was not stated, the full enjoyment of the accommodations of the theatre known as the Grand Opera House in New York, "said denial not being made for any reasons by law applicable to citizens of every race and color, and regardless of any previous condition of servitude." The case of Robinson and wife against the Memphis & Charleston R. R. Company was an action brought in the Circuit Court of the United States for the Western District of Tennessee, to recover the penalty of five hundred dollars given by the second section of the Act; and the gravamen was the refusal by the conductor of the railroad company to allow the wife to ride in the ladies' car, for the reason, as stated in one of the counts, that she was a person of African descent. The jury rendered a verdict for the defendants in this case upon the merits, under a charge of the court to which a bill of exceptions was taken by the plaintiffs. The case was tried on the assumption by both parties of the validity of the Act of Congress; and the principal point

made by the exceptions was, that the judge allowed evidence to go to the jury tending to show that the conductor had reason to suspect that the plaintiff, the wife, was an improper person, because she was in company with a young man whom he supposed to be a white man, and on that account inferred that there was some improper connection between them; and the judge charged the jury, in substance, that if this was the conductor's *bona fide* reason for excluding the woman from the car, they might take it into consideration on the question of the liability of the company. The case was brought here by writ of error at the suit of the plaintiffs. The cases of Stanley, Nichols, and Singleton, came up on certificates of division of opinion between the judges below as to the constitutionality of the first and second sections of the Act referred to; and the case of Ryan, on a writ of error to the judgment of the Circuit Court for the District of California sustaining a demurrer to the information.

The Stanley, Ryan, Nichols, and Singleton cases were submitted together, by the Solicitor-General at the last term of court, on the 7th day of November, 1882. There were no appearances and no briefs filed for the defendants.

The Robinson case was submitted on the briefs at the last term, on the 29th day of March, 1883.

Mr. Solicitor-General Phillips, for the United States.

Mr. William M. Randolph, for Robinson and wife, plaintiffs in error.

Mr. William Y. C. Humes and *Mr. David Posten* for the Memphis and Charleston Railroad Co., defendants in error.

MR. JUSTICE BRADLEY delivered the opinion of the court. After stating the facts in the above language he continued:

It is obvious that the primary and important question in all the cases is the constitutionality of the law: for if the law is unconstitutional none of the prosecutions can stand.

The sections of the law referred to provide as follows: [These sections are given in a note below.] [1]

[1] "SEC. 1. That all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theatres, and other places of public amusement; subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude.

"SEC. 2. That any person who shall violate the foregoing section by denying to any citizen, except for reasons by law applicable to citizens of every race and color, and regardless of any previous condition of servitude, the full enjoyment of any of the accommodations, advantages, facilities, or privileges in said section enumerated, or by aiding or inciting such denial, shall for every such offence forfeit and pay the sum of five hundred dollars to the person aggrieved thereby, to be recovered in an action of debt, with full costs; and shall also, for every such offence, be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than five hundred nor more than one thousand dollars, or shall be imprisoned not less than thirty days nor more than one year: *Provided*, That all persons may elect to sue for the penalty afore-

Are these sections constitutional? The first section, which is the principal one, cannot be fairly understood without attending to the last clause, which qualifies the preceding part.

The essence of the law is, not to declare broadly that all persons shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances, and theatres; but that such enjoyment shall not be subject to any conditions applicable only to citizens of a particular race or color, or who had been in a previous condition of servitude. In other words, it is the purpose of the law to declare that, in the enjoyment of the accommodations and privileges of inns, public conveyances, theatres, and other places of public amusement, no distinction shall be made between citizens of different race or color, or between those who have, and those who have not, been slaves. Its effect is to declare, that in all inns, public conveyances, and places of amusement, colored citizens, whether formerly slaves or not, and citizens of other races, shall have the same accommodations and privileges in all inns, public conveyances, and places of amusement as are enjoyed by white citizens; and *vice versa*. The second section makes it a penal offence in any person to deny to any citizen of any race or color, regardless of previous servitude, any of the accommodations or privileges mentioned in the first section.

Has Congress constitutional power to make such a law? Of course, no one will contend that the power to pass it was contained in the Constitution before the adoption of the last three amendments. The power is sought, first, in the Fourteenth Amendment, and the views and arguments of distinguished Senators, advanced whilst the law was under consideration, claiming authority to pass it by virtue of that amendment, are the principal arguments adduced in favor of the power. We have carefully considered those arguments, as was due to the eminent ability of those who put them forward, and have felt, in all its force, the weight of authority which always invests a law that Congress deems itself competent to pass. But the responsibility of an independent judgment is now thrown upon this court; and we are bound to exercise it according to the best lights we have.

The first section of the Fourteenth Amendment (which is the one relied on), after declaring who shall be citizens of the United States, and of the several States, is prohibitory in its character, and prohibitory upon the States. It declares that:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due pro-

said, or to proceed under their rights at common law and by State statutes; and having so elected to proceed in the one mode or the other, their right to proceed in the other jurisdiction shall be barred. But this provision shall not apply to criminal proceedings, either under this Act or the criminal law of any State: *And provided further*, That a judgment for the penalty in favor of the party aggrieved, or a judgment upon an indictment, shall be a bar to either prosecution respectively."

cess of law; nor deny to any person within its jurisdiction the equal protection of the laws."

It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the amendment. It has a deeper and broader scope. It nullifies and makes void all State legislation, and State action of every kind, which impairs the privileges and immunities of citizens of the United States, or which injures them in life, liberty or property without due process of law, or which denies to any of them the equal protection of the laws. It not only does this, but, in order that the national will, thus declared, may not be a mere *brutum fulmen*, the last section of the amendment invests Congress with power to enforce it by appropriate legislation. To enforce what? To enforce the prohibition. To adopt appropriate legislation for correcting the effects of such prohibited State laws and State Acts, and thus to render them effectually null, void, and innocuous. This is the legislative power conferred upon Congress, and this is the whole of it. It does not invest Congress with power to legislate upon subjects which are within the domain of State legislation; but to provide modes of relief against State legislation, or State action, of the kind referred to. It does not authorize Congress to create a code of municipal law for the regulation of private rights; but to provide modes of redress against the operation of State laws, and the action of State officers executive or judicial, when these are subversive of the fundamental rights specified in the amendment. Positive rights and privileges are undoubtedly secured by the Fourteenth Amendment; but they are secured by way of prohibition against State laws and State proceedings affecting those rights and privileges, and by power given to Congress to legislate for the purpose of carrying such prohibition into effect: and such legislation must necessarily be predicated upon such supposed State laws or State proceedings, and be directed to the correction of their operation and effect. A quite full discussion of this aspect of the amendment may be found in *United States* v. *Cruikshank*, 92 U. S. 542; *Virginia* v. *Rives*, 100 U. S. 313; and *Ex parte Virginia*, 100 U. S. 339.

An apt illustration of this distinction may be found in some of the provisions of the original Constitution. Take the subject of contracts, for example. The Constitution prohibited the States from passing any law impairing the obligation of contracts. This did not give to Congress power to provide laws for the general enforcement of contracts; nor power to invest the courts of the United States with jurisdiction over contracts, so as to enable parties to sue upon them in those courts. It did, however, give the power to provide remedies by which the impairment of contracts by State legislation might be counteracted and corrected: and this power was exercised. The remedy which Congress actually provided was that contained in the 25th section of the Judiciary Act of 1789, 1 Stat. 85, giving to the Supreme Court of the United States jurisdiction by writ of error to review the final decisions of State

courts whenever they should sustain the validity of a State statute or authority alleged to be repugnant to the Constitution or laws of the United States. By this means, if a State law was passed impairing the obligation of a contract, and the State tribunals sustained the validity of the law, the mischief could be corrected in this court. The legislation of Congress, and the proceedings provided for under it, were corrective in their character. No attempt was made to draw into the United States courts the litigation of contracts generally; and no such attempt would have been sustained. We do not say that the remedy provided was the only one that might have been provided in that case. Probably Congress had power to pass a law giving to the courts of the United States direct jurisdiction over contracts alleged to be impaired by a State law; and under the broad provisions of the Act of March 3d, 1875, ch. 137, 18 Stat. 470, giving to the circuit courts jurisdiction of all cases arising under the Constitution and laws of the United States, it is possible that such jurisdiction now exists. But under that, or any other law, it must appear as well by allegation, as proof at the trial, that the Constitution had been violated by the action of the State legislature. Some obnoxious State law passed, or that might be passed, is necessary to be assumed in order to lay the foundation of any Federal remedy in the case; and for the very sufficient reason, that the constitutional prohibition is against State laws impairing the obligation of contracts.

And so in the present case, until some State law has been passed, or some State action through its officers or agents has been taken, adverse to the rights of citizens sought to be protected by the Fourteenth Amendment, no legislation of the United States under said amendment, nor any proceeding under such legislation, can be called into activity: for the prohibitions of the amendment are against State laws and acts done under State authority. Of course, legislation may, and should be, provided in advance to meet the exigency when it arises; but it should be adapted to the mischief and wrong which the amendment was intended to provide against; and that is, State laws, or State action of some kind, adverse to the rights of the citizen secured by the amendment. Such legislation cannot properly cover the whole domain of rights appertaining to life, liberty and property, defining them and providing for their vindication. That would be to establish a code of municipal law regulative of all private rights between man and man in society. It would be to make Congress take the place of the State legislatures and to supersede them. It is absurd to affirm that, because the rights of life, liberty and property (which include all civil rights that men have), are by the amendment sought to be protected against invasion on the part of the State without due process of law, Congress may therefore provide due process of law for their vindication in every case; and that, because the denial by a State to any persons, of the equal protection of the laws, is prohibited by the amendment, therefore Congress may establish laws for their equal protection. In fine, the legislation

which Congress is authorized to adopt in this behalf is not general legislation upon the rights of the citizen, but corrective legislation, that is, such as may be necessary and proper for counteracting such laws as the States may adopt or enforce, and which, by the amendment, they are prohibited from making or enforcing, or such acts and proceedings as the States may commit or take, and which, by the amendment, they are prohibited from committing or taking. It is not necessary for us to state, if we could, what legislation would be proper for Congress to adopt. It is sufficient for us to examine whether the law in question is of that character.

An inspection of the law shows that it makes no reference whatever to any supposed or apprehended violation of the Fourteenth Amendment on the part of the States. It is not predicated on any such view. It proceeds *ex directo* to declare that certain acts committed by individuals shall be deemed offences, and shall be prosecuted and punished by proceedings in the courts of the United States. It does not profess to be corrective of any constitutional wrong committed by the States; it does not make its operation to depend upon any such wrong committed. It applies equally to cases arising in States which have the justest laws respecting the personal rights of citizens, and whose authorities are ever ready to enforce such laws, as to those which arise in States that may have violated the prohibition of the amendment. In other words, it steps into the domain of local jurisprudence, and lays down rules for the conduct of individuals in society towards each other, and imposes sanctions for the enforcement of those rules, without referring in any manner to any supposed action of the State or its authorities.

If this legislation is appropriate for enforcing the prohibitions of the amendment, it is difficult to see where it is to stop. Why may not Congress with equal show of authority enact a code of laws for the enforcement and vindication of all rights of life, liberty, and property? If it is supposable that the States may deprive persons of life, liberty, and property without due process of law (and the amendment itself does suppose this), why should not Congress proceed at once to prescribe due process of law for the protection of every one of these fundamental rights, in every possible case, as well as to prescribe equal privileges in inns, public conveyances, and theatres? The truth is, that the implication of a power to legislate in this manner is based upon the assumption that if the States are forbidden to legislate or act in a particular way on a particular subject, and power is conferred upon Congress to enforce the prohibition, this gives Congress power to legislate generally upon that subject, and not merely power to provide modes of redress against such State legislation or action. The assumption is certainly unsound. It is repugnant to the Tenth Amendment of the Constitution, which declares that powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people.

We have not overlooked the fact that the fourth section of the Act now under consideration has been held by this court to be constitutional. That section declares "that no citizen, possessing all other qualifications which are or may be prescribed by law, shall be disqualified for service as grand or petit juror in any court of the United States, or of any State, on account of race, color, or previous condition of servitude; and any officer or other person charged with any duty in the selection or summoning of jurors who shall exclude or fail to summon any citizen for the cause aforesaid, shall, on conviction thereof, be deemed guilty of a misdemeanor, and be fined not more than five thousand dollars." In *Ex parte Virginia*, 100 U. S. 339, it was held that an indictment against a State officer under this section for excluding persons of color from the jury list is sustainable. But a moment's attention to its terms will show that the section is entirely corrective in its character. Disqualifications for service on juries are only created by the law, and the first part of the section is aimed at certain disqualifying laws, namely, those which make mere race or color a disqualification; and the second clause is directed against those who, assuming to use the authority of the State government, carry into effect such a rule of disqualification. In the Virginia case, the State, through its officer, enforced a rule of disqualification which the law was intended to abrogate and counteract. Whether the statute-book of the State actually laid down any such rule of disqualification, or not, the State, through its officer, enforced such a rule: and it is against such State action, through its officers and agents, that the last clause of the section is directed. This aspect of the law was deemed sufficient to divest it of any unconstitutional character, and makes it differ widely from the first and second sections of the same Act which we are now considering.

These sections, in the objectionable features before referred to, are different also from the law ordinarily called the "Civil Rights Bill," originally passed April 9th, 1866, 14 Stat. 27, ch. 31, and re-enacted with some modifications in sections 16, 17, 18, of the Enforcement Act, passed May 31st, 1870, 16 Stat. 140, ch. 114. That law, as re-enacted, after declaring that all persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceed[illegible] for the security of persons and property as is enjoyed by white c[illegible]ns, and shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind, and none other, any law, statute, ordinance, regulation or custom to the contrary notwithstanding, proceeds to enact, that any person who, under color of any law, statute, ordinance, regulation, or custom, shall subject, or cause to be subjected, any inhabitant of any State or Territory to the deprivation of any rights secured or protected by the preceding section (above quoted), or to different punishment, pains, or penalties, on account of such person

being an alien, or by reason of his color or race, than is prescribed for the punishment of citizens, shall be deemed guilty of a misdemeanor, and subject to fine and imprisonment as specified in the Act. This law is clearly corrective in its character, intended to counteract and furnish redress against State laws and proceedings, and customs having the force of law, which sanction the wrongful acts specified. In the Revised Statutes, it is true, a very important clause, to wit, the words "any law, statute, ordinance, regulation or custom to the contrary notwithstanding," which gave the declaratory section its point and effect, are omitted; but the penal part, by which the declaration is enforced, and which is really the effective part of the law, retains the reference to State laws, by making the penalty apply only to those who should subject parties to a deprivation of their rights under color of any statute, ordinance, custom, etc., of any State or Territory: thus preserving the corrective character of the legislation. Rev. St. §§ 1977, 1978, 1979, 5510. The Civil Rights Bill here referred to is analogous in its character to what a law would have been under the original Constitution, declaring that the validity of contracts should not be impaired, and that if any person bound by a contract should refuse to comply with it, under color or pretence that it had been rendered void or invalid by a State law, he should be liable to an action upon it in the courts of the United States, with the addition of a penalty for setting up such an unjust and unconstitutional defence.

In this connection it is proper to state that civil rights, such as are guaranteed by the Constitution against State aggression, cannot be impaired by the wrongful acts of individuals, unsupported by State authority in the shape of laws, customs, or judicial or executive proceedings. The wrongful act of an individual, unsupported by any such authority, is simply a private wrong, or a crime of that individual; an invasion of the rights of the injured party, it is true, whether they affect his person, his property, or his reputation; but if not sanctioned in some way by the State, or not done under State authority, his rights remain in full force, and may presumably be vindicated by resort to the laws of the State for redress. An individual cannot deprive a man of his right to vote, to hold property, to buy and sell, to sue in the courts, or to be a witness or a juror; he may, by force or fraud, interfere with the enjoyment of the right in a particular case; he may commit an assault against the person, or commit murder, or use ruffian violence at the polls, or slander the good name of a fellow-citizen; but, unless protected in these wrongful acts by some shield of State law or State authority, he cannot destroy or injure the right; he will only render himself amenable to satisfaction or punishment; and amenable therefor to the laws of the State where the wrongful acts are committed. Hence, in all those cases where the Constitution seeks to protect the rights of the citizen against discriminative and unjust laws of the State by prohibiting such laws, it is not individual offences, but abrogation and denial of rights, which it denounces, and for which it clothes the Con-

gress with power to provide a remedy. This abrogation and denial of rights, for which the States alone were or could be responsible, was the great seminal and fundamental wrong which was intended to be remedied. And the remedy to be provided must necessarily be predicated upon that wrong. It must assume that in the cases provided for, the evil or wrong actually committed rests upon some State law or State authority for its excuse and perpetration.

Of course, these remarks do not apply to those cases in which Congress is clothed with direct and plenary powers of legislation over the whole subject, accompanied with an express or implied denial of such power to the States, as in the regulation of commerce with foreign nations, among the several States, and with the Indian tribes, the coining of money, the establishment of post-offices and post-roads, the declaring of war, etc. In these cases Congress has power to pass laws for regulating the subjects specified in every detail, and the conduct and transactions of individuals in respect thereof. But where a subject is not submitted to the general legislative power of Congress, but is only submitted thereto for the purpose of rendering effective some prohibition against particular State legislation or State action in reference to that subject, the power given is limited by its object, and any legislation by Congress in the matter must necessarily be corrective in its character, adapted to counteract and redress the operation of such prohibited State laws or proceedings of State officers.

If the principles of interpretation which we have laid down are correct, as we deem them to be (and they are in accord with the principles laid down in the cases before referred to, as well as in the recent case of *United States* v. *Harris*, 106 U. S. 629), it is clear that the law in question cannot be sustained by any grant of legislative power made to Congress by the Fourteenth Amendment. That amendment prohibits the States from denying to any person the equal protection of the laws, and declares that Congress shall have power to enforce, by appropriate legislation, the provisions of the amendment. The law in question, without any reference to adverse State legislation on the subject, declares that all persons shall be entitled to equal accommodations and privileges of inns, public conveyances, and places of public amusement, and imposes a penalty upon any individual who shall deny to any citizen such equal accommodations and privileges. This is not corrective legislation; it is primary and direct; it takes immediate and absolute possession of the subject of the right of admission to inns, public conveyances, and places of amusement. It supersedes and displaces State legislation on the same subject, or only allows it permissive force. It ignores such legislation, and assumes that the matter is one that belongs to the domain of national regulation. Whether it would not have been a more effective protection of the rights of citizens to have clothed Congress with plenary power over the whole subject, is not now the question. What we have to decide is, whether such plenary power has been conferred upon Congress by the Fourteenth Amendment; and, in our judgment, it has not.

We have discussed the question presented by the law on the assumption that a right to enjoy equal accommodation and privileges in all inns, public conveyances, and places of public amusement, is one of the essential rights of the citizen which no State can abridge or interfere with. Whether it is such a right, or not, is a different question which, in the view we have taken of the validity of the law on the ground already stated, it is not necessary to examine.

We have also discussed the validity of the law in reference to cases arising in the States only; and not in reference to cases arising in the Territories or the District of Columbia, which are subject to the plenary legislation of Congress in every branch of municipal regulation. Whether the law would be a valid one as applied to the Territories and the District is not a question for consideration in the cases before us: they all being cases arising within the limits of States. And whether Congress, in the exercise of its power to regulate commerce amongst the several States, might or might not pass a law regulating rights in public conveyances passing from one State to another, is also a question which is not now before us, as the sections in question are not conceived in any such view.

But the power of Congress to adopt direct and primary, as distinguished from corrective legislation, on the subject in hand, is sought, in the second place, from the Thirteenth Amendment, which abolishes slavery. This amendment declares "that neither slavery, nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction;" and it gives Congress power to enforce the amendment by appropriate legislation.

This amendment, as well as the Fourteenth, is undoubtedly self-executing without any ancillary legislation, so far as its terms are applicable to any existing state of circumstances. By its own unaided force and effect it abolished slavery, and established universal freedom. Still, legislation may be necessary and proper to meet all the various cases and circumstances to be affected by it, and to prescribe proper modes of redress for its violation in letter or spirit. And such legislation may be primary and direct in its character; for the amendment is not a mere prohibition of State laws establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States.

It is true that slavery cannot exist without law, any more than property in lands and goods can exist without law: and, therefore, the Thirteenth Amendment may be regarded as nullifying all State laws which establish or uphold slavery. But it has a reflex character also, establishing and decreeing universal civil and political freedom throughout the United States; and it is assumed, that the power vested in Congress to enforce the article by appropriate legislation, clothes Congress with power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States: and upon

this assumption it is claimed, that this is sufficient authority for declaring by law that all persons shall have equal accommodations and privileges in all inns, public conveyances, and places of amusement; the argument being, that the denial of such equal accommodations and privileges is, in itself, a subjection to a species of servitude within the meaning of the amendment. Conceding the major proposition to be true, that Congress has a right to enact all necessary and proper laws for the obliteration and prevention of slavery with all its badges and incidents, is the minor proposition also true, that the denial to any person of admission to the accommodations and privileges of an inn, a public conveyance, or a theatre, does subject that person to any form of servitude, or tend to fasten upon him any badge of slavery? If it does not, then power to pass the law is not found in the Thirteenth Amendment.

In a very able and learned presentation of the cognate question as to the extent of the rights, privileges and immunities of citizens which cannot rightfully be abridged by State laws under the Fourteenth Amendment, made in a former case, a long list of burdens and disabilities of a servile character, incident to feudal vassalage in France, and which were abolished by the decrees of the National Assembly, was presented for the purpose of showing that all inequalities and observances exacted by one man from another were servitudes, or badges of slavery, which a great nation, in its effort to establish universal liberty, made haste to wipe out and destroy. But these were servitudes imposed by the old law, or by long custom, which had the force of law, and exacted by one man from another without the latter's consent. Should any such servitudes be imposed by a State law, there can be no doubt that the law would be repugnant to the Fourteenth, no less than to the Thirteenth Amendment; nor any greater doubt that Congress has adequate power to forbid any such servitude from being exacted.

But is there any similarity between such servitudes and a denial by the owner of an inn, a public conveyance, or a theatre, of its accommodations and privileges to an individual, even though the denial be founded on the race or color of that individual? Where does any slavery or servitude, or badge of either, arise from such an act of denial? Whether it might not be a denial of a right which, if sanctioned by the State law, would be obnoxious to the prohibitions of the Fourteenth Amendment, is another question. But what has it to do with the question of slavery?

It may be that by the Black Code (as it was called), in the times when slavery prevailed, the proprietors of inns and public conveyances were forbidden to receive persons of the African race, because it might assist slaves to escape from the control of their masters. This was merely a means of preventing such escapes, and was no part of the servitude itself. A law of that kind could not have any such object now, however justly it might be deemed an invasion of the party's legal

right as a citizen, and amenable to the prohibitions of the Fourteenth Amendment.

The long existence of African slavery in this country gave us very distinct notions of what it was, and what were its necessary incidents. Compulsory service of the slave for the benefit of the master, restraint of his movements except by the master's will, disability to hold property, to make contracts, to have a standing in court, to be a witness against a white person, and such like burdens and incapacities, were the inseparable incidents of the institution. Severer punishments for crimes were imposed on the slave than on free persons guilty of the same offences. Congress, as we have seen, by the Civil Rights Bill of 1866, passed in view of the Thirteenth Amendment, before the Fourteenth was adopted, undertook to wipe out these burdens and disabilities, the necessary incidents of slavery, constituting its substance and visible form; and to secure to all citizens of every race and color, and without regard to previous servitude, those fundamental rights which are the essence of civil freedom, namely, the same right to make and enforce contracts, to sue, be parties, give evidence, and to inherit, purchase, lease, sell and convey property, as is enjoyed by white citizens. Whether this legislation was fully authorized by the Thirteenth Amendment alone, without the support which it afterward received from the Fourteenth Amendment, after the adoption of which it was re-enacted with some additions, it is not necessary to inquire. It is referred to for the purpose of showing that at that time (in 1866) Congress did not assume, under the authority given by the Thirteenth Amendment, to adjust what may be called the social rights of men and races in the community; but only to declare and vindicate those fundamental rights which appertain to the essence of citizenship, and the enjoyment or deprivation of which constitutes the essential distinction between freedom and slavery.

We must not forget that the province and scope of the Thirteenth and Fourteenth Amendments are different; the former simply abolished slavery: the latter prohibited the States from abridging the privileges or immunities of citizens of the United States; from depriving them of life, liberty, or property without due process of law, and from denying to any the equal protection of the laws. The amendments are different, and the powers of Congress under them are different. What Congress has power to do under one, it may not have power to do under the other. Under the Thirteenth Amendment, it has only to do with slavery and its incidents. Under the Fourteenth Amendment, it has power to counteract and render nugatory all State laws and proceedings which have the effect to abridge any of the privileges or immunities of citizens of the United States, or to deprive them of life, liberty or property without due process of law, or to deny to any of them the equal protection of the laws. Under the Thirteenth Amendment, the legislation, so far as necessary or proper to eradicate all forms and incidents of slavery and involuntary servitude, may be direct

and primary, operating upon the acts of individuals, whether sanctioned by State legislation or not; under the Fourteenth, as we have already shown, it must necessarily be, and can only be, corrective in its character, addressed to counteract and afford relief against State regulations or proceedings.

The only question under the present head, therefore, is, whether the refusal to any persons of the accommodations of an inn, or a public conveyance, or a place of public amusement, by an individual, and without any sanction or support from any State law or regulation, does inflict upon such persons any manner of servitude, or form of slavery, as those terms are understood in this country? Many wrongs may be obnoxious to the prohibitions of the Fourteenth Amendment which are not, in any just sense, incidents or elements of slavery. Such, for example, would be the taking of private property without due process of law; or allowing persons who have committed certain crimes (horse-stealing, for example) to be seized and hung by the *posse comitatus* without regular trial; or denying to any person, or class of persons, the right to pursue any peaceful avocations allowed to others. What is called class legislation would belong to this category, and would be obnoxious to the prohibitions of the Fourteenth Amendment, but would not necessarily be so to the Thirteenth, when not involving the idea of any subjection of one man to another. The Thirteenth Amendment has respect, not to distinctions of race, or class, or color, but to slavery. The Fourteenth Amendment extends its protection to races and classes, and prohibits any State legislation which has the effect of denying to any race or class, or to any individual, the equal protection of the laws.

Now, conceding, for the sake of the argument, that the admission to an inn, a public conveyance, or a place of public amusement, on equal terms with all other citizens, is the right of every man and all classes of men, is it any more than one of those rights which the States by the Fourteenth Amendment are forbidden to deny to any person? And is the Constitution violated until the denial of the right has some State sanction or authority? Can the act of a mere individual, the owner of the inn, the public conveyance or place of amusement, refusing the accommodation, be justly regarded as imposing any badge of slavery or servitude upon the applicant, or only as inflicting an ordinary civil injury, properly cognizable by the laws of the State, and presumably subject to redress by those laws until the contrary appears?

After giving to these questions all the consideration which their importance demands, we are forced to the conclusion that such an act of refusal has nothing to do with slavery or involuntary servitude, and that if it is violative of any right of the party, his redress is to be sought under the laws of the State; or if those laws are adverse to his rights and do not protect him, his remedy will be found in the corrective legislation which Congress has adopted, or may adopt, for counteracting the effect of State laws, or State action, prohibited by the Fourteenth

Amendment. It would be running the slavery argument into the ground to make it apply to every act of discrimination which a person may see fit to make as to the guests he will entertain, or as to the people he will take into his coach or cab or car, or admit to his concert or theatre, or deal with in other matters of intercourse or business. Innkeepers and public carriers, by the laws of all the States, so far as we are aware, are bound, to the extent of their facilities, to furnish proper accommodation to all unobjectionable persons who in good faith apply for them. If the laws themselves make any unjust discrimination, amenable to the prohibitions of the Fourteenth Amendment, Congress has full power to afford a remedy under that amendment and in accordance with it.

When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws, and when his rights as a citizen, or a man, are to be protected in the ordinary modes by which other men's rights are protected. There were thousands of free colored people in this country before the abolition of slavery, enjoying all the essential rights of life, liberty and property the same as white citizens; yet no one, at that time, thought that it was any invasion of his personal status as a freeman because he was not admitted to all the privileges enjoyed by white citizens, or because he was subjected to discriminations in the enjoyment of accommodations in inns, public conveyances and places of amusement. Mere discriminations on account of race or color were not regarded as badges of slavery. If, since that time, the enjoyment of equal rights in all these respects has become established by constitutional enactment, it is not by force of the Thirteenth Amendment (which merely abolishes slavery), but by force of the Fourteenth and Fifteenth Amendments.

On the whole we are of opinion, that no countenance of authority for the passage of the law in question can be found in either the Thirteenth or Fourteenth Amendment of the Constitution; and no other ground of authority for its passage being suggested, it must necessarily be declared void, at least so far as its operation in the several States is concerned.

This conclusion disposes of the cases now under consideration. In the cases of the *United States* v. *Michael Ryan*, and of *Richard A. Robinson and Wife* v. *The Memphis & Charleston Railroad Company*, the judgments must be affirmed. In the other cases, the answer to be given will be that the first and second sections of the Act of Congress of March 1st, 1875, entitled "An Act to protect all Citizens in their Civil and Legal Rights," are unconstitutional and void, and that judgment should be rendered upon the several indictments in those cases accordingly. *And it is so ordered.*[1]

[HARLAN, J., gave a dissenting opinion.]

[1] Compare *The Civil Rights Bill*, Hughes, 541 (1875), *Younger* v. *Judah*, 111 Mo. 303 (1892). — ED.

PEOPLE *v.* KING.

NEW YORK COURT OF APPEALS. 1888.

[110 *N. Y.* 418.]

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order made November 9, 1886, which affirmed a judgment of the Court of Sessions of Chenango County, entered upon a verdict convicting defendant of a misdemeanor. (Reported below, 42 Hun, 186.)

The substance of the indictment and the material facts are stated in the opinion.

E. H. Prindle, for appellant.

George P. Pudney, for respondent.

ANDREWS, J. Section 383 of the Penal Code declares that "no citizen of this State can, by reason of race, color, or previous condition of servitude, be excluded from the equal enjoyment of any accommodation, facility, or privilege furnished by innkeepers or common carriers, or by owners, managers, or lessees of theatres or other places of amusement, by teachers and officers of common schools and public institutions of learning, or by cemetery associations." The violation of this section is made a misdemeanor, punishable by fine of not less than fifty nor more than five hundred dollars.

The defendant and one Scott, in the year 1884, were the owners and proprietors of a skating-rink in the village of Norwich, in this State, erected in that year upon their own lands. Prior to June 13, 1884, they announced, through the public press and otherwise, that the rink would be opened on the evening of that day, and they arranged with the "Apollo" Club, of Binghamton, to attend the opening to give an exhibition of roller-skating, the profits of the entertainment to be divided between the club and the proprietors of the rink. Tickets of admission were sold on the evening in question by the agents of the proprietor, at the office on the premises, but persons who had not procured tickets were admitted on payment of the charge for admission at the door. Several hundred persons attended the exhibition. During the evening three colored men made application to purchase tickets at the office where tickets were sold, but the agents of the proprietors, having charge of the sale, acting in accordance with the instructions of the defendant, refused to sell them tickets, because they were persons of color, and they were so informed at the time. The defendant was indicted under the section of the Penal Code above quoted, the indictment alleging, in substance, that the defendant, being one of the owners of a skating-rink, a place of amusement, did, on the day named, exclude from said skating-rink, and from the equal enjoyment of any and all accommodation, facility, and privilege of said skating-rink, George F. Breed, William Wyckoff, Charles Robbins, and others, all being citizens of the

State, by reason of race and color, etc. The objection is now taken that the indictment is defective, in substance, in not averring the means by which the exclusion of the persons mentioned was effected. The objection is untenable. The indictment follows the statute, and it was not necessary to aver, with any greater particularity than was used, the circumstances constituting the offence. *People* v. *West*, 106 N. Y. 293. Nor is there any force in the suggestion that proof of a refusal to sell to the colored men tickets of admission at the office did not support the allegation that they were excluded from the rink. The defendant provided tickets as evidence of the right of persons having them to admission. He refused to furnish this evidence to the persons named in the indictment, which was furnished to all others who applied, placing the refusal on a ground which justified the applicants in supposing, and the jury in finding, that the defendant thereby intended to exclude them, and did thereby exclude them, from the rink.

The real question in the case arises upon the contention of the counsel for the appellant that the statute upon which the indictment is founded, so far as it undertakes to prescribe that the owner of a place of amusement shall not exclude therefrom any citizen by reason of race, color, or previous condition of servitude, is an unconstitutional interference with private rights, in that it restricts the owner of property in respect to its lawful use, and as to an incident which is not a legitimate matter of regulation by law.

The legislation in question is not without precedent. The Act of Congress of March 1, 1875, entitled "An Act to protect all Persons in their Civil Rights" (18 U. S. Stat. at Large, 335), contains a section identical in import with section 383 of the Penal Code, except that it is still broader in its scope, and secures, not to citizens only, but to all persons within the jurisdiction of the United States, the equal enjoyment of the accommodation, advantages, facilities, and privileges of "inns, public conveyances on land and water, theatres, and other places of public amusement, subject only to the limitations established by law, and applicable to citizens of every race and color, regardless of any previous condition of servitude." The Civil Rights Act of Mississippi, passed February 7, 1873, contains a similar provision. In Louisiana, the matter is made the subject of a constitutional enactment, ordaining that "all persons shall enjoy equal rights and privileges, etc., in every place of public resort;" and this was supplemented by Acts of the Legislature of Louisiana, passed in 1870 and 1871.

It is not necessary, at this day, to enter into any argument to prove that the clause in the Bill of Rights that no person shall "be deprived of life, liberty, or property without due process of law" (Const. art. 1, § 6), is to have a large and liberal interpretation, and that the fundamental principle of free government, expressed in these words, protects not only life, liberty, and property, in a strict and technical sense, against unlawful invasion by the government, in the exertion of governmental power in any of its departments, but also protects every

essential incident to the enjoyment of those rights. The interpretation of this time-honored clause has been considered, in recent cases in this court, with a fulness and completeness which leaves nothing to be said by way of support or illustration. *Wynehamer* v. *People*, 13 N. Y. 378; *Bertholf* v. *O'Reilly*, 74 Id. 509; *In re Jacobs*, 98 Id. 98; *People* v. *Marx*, 99 Id. 377.

But, as the language of the constitutional prohibition implies, life, liberty, and property may be justly affected by law, and the statutes abound in examples of legislation limiting or regulating the use of private property, restraining freedom of personal action or controlling individual conduct, which, by common consent, do not transcend the limitations of the Constitution. This legislation is under what, for lack of a better name, is called the police power of the State, — a power incapable of exact definition, but the existence of which is essential to every well-ordered government. By means of this power the legislature exercises a supervision over matters involving the common weal, and enforces the observance, by each individual member of society, of the duties which he owes to others and to the community at large. It may be exerted whenever necessary to secure the peace, good order, health, morals, and general welfare of the community, and the propriety of its exercise within constitutional limits is purely a matter of legislative discretion with which the courts cannot interfere. In short, the police power covers a wide range of particular unexpressed powers reserved to the State affecting freedom of action, personal conduct, and the use and control of property. "All property," said Shaw, C. J., in *Com.* v. *Alger*, 7 Cush. 85, "is held subject to those general regulations which are necessary to the common good and general welfare." This power, of course, is subject to limitations. The line of demarcation between its lawful and unlawful exercise it is often difficult to trace. We have held that it cannot be exerted for the destruction of property lawfully held and acquired under existing laws, or of any of the essential attributes of such property (*Wynehamer* v. *People*, *supra*); nor to deprive an individual of the right to pursue a lawful business on his own premises, not injurious to the public health, or otherwise inimical to the public interests (*In re Jacobs*, *supra*); nor to prevent the manufacture or sale of a useful article of food. *People* v. *Marx*, *supra*. But we have held that the legislature may lawfully subject the owner of premises to pecuniary liability for injuries resulting from intoxication caused in whole or in part by the use of liquor sold by the lessee therein, although the sale itself was lawful (*Bertholf* v. *O'Reilly*, *supra*); and it was held by the Supreme Court of the United States, in *Munn* v. *Illinois*, 94 U. S. 113, that a State law regulating the licensing of elevators for the handling and storage of grain, and fixing a maximum charge therefor, was not repugnant to that part of the Fourteenth Amendment of the Constitution of the United States which ordains that "no State shall deprive any person of life, liberty, or property without due process of law."

In considering whether the enactment of section 383 of the Penal Code transcends legislative power, it is important to have in mind the purpose of the enactment. It cannot be doubted that it was enacted with special reference to citizens of African descent, nor is there any doubt that the policy which dictated the legislation was to secure to such persons equal rights with white persons to the facilities furnished by carriers, innkeepers, theatres, schools, and places of public amusement. The race-prejudice against persons of color, which had its root, in part at least, in the system of slavery, was by no means extinguished when, by law, the slaves became freemen and citizens. But this great act of justice towards an oppressed and enslaved people imposed upon the nation great responsibilities. They became entitled to all the privileges of citizenship, although the great mass of them were poorly prepared to discharge its obligations. The nation secured the inviolability of the freedom of the colored race and their rights as citizens by the Thirteenth, Fourteenth, and Fifteenth Amendments of the Constitution of the United States. The Fourteenth Amendment ordained, among other things, that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, . . . nor deny to any person within its jurisdiction the equal protection of the laws." The construction of the Fourteenth Amendment has come under the consideration of the Supreme Court of the United States in several cases, among others, in two cases known as the jury cases, — *Strauder* v. *West Virginia*, 100 U. S. 303, and *Ex parte Virginia*, Id. 339. In the case first mentioned it was held that a State law confining the selection of jurors to white persons was in contravention of the Fourteenth Amendment; and in the second, that the action of the State officer invested with the power to select jurors, excluding all colored persons from the lists, was also repugnant to its provisions. In *Strauder* v. *West Virginia*, Strong, J., speaking for the majority of the court, said: "The words of the amendment, it is true, are prohibitory, but they contain a necessary implication of a positive immunity or right most valuable to the colored men, — the right of exemption from unfriendly legislation against them distinctively as colored; exemption from legal discrimination implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps toward reducing them to the condition of a subject race."

We have referred to these amendments and to the cases construing them, because they disclose the fact that, in the judgment of the nation, the public welfare required that no State should be permitted to establish by law such a discrimination against persons of color as was made by the defendant in this case, for we think it incontestable that a State law excluding colored people from admission to places of public amusement would be considered as a violation of the Federal Constitution. It would seem, indeed, in view of the Act of March 1, 1875, that, in the opinion of Congress, the amendments had a much

broader scope, and prevented not only discriminating legislation of this character by the State, but also such discrimination by individuals, since the jurisdiction of Congress to pass a law forbidding the exclusion of persons of color from places of public amusement, and annexing a penalty for its violation, must be derived, if it exists, from the Thirteenth, Fourteenth, and Fifteenth Amendments.[1] It cannot be doubted that before they were adopted the power to enact such a regulation resided exclusively in the States. But independently of the inference arising from the solemn assertion by the nation, through its action in adopting the amendments, that legal discriminations against persons of color by the action of States was opposed to the public welfare, it is not difficult to see that there is a public interest which justified the enactment of section 885 of the Code, provided it did not overstep the limits of lawful interference with the uses of private property. The members of the African race, born or naturalized in this country, are citizens of the States where they reside and of the United States. Both justice and the public interest concur in a policy which shall elevate them as individuals and relieve them from oppressive or degrading discrimination, and which shall encourage and cultivate a spirit which will make them self-respecting, contented, and loyal citizens, and give them a fair chance in the struggle of life, weighted, as they are at best, with so many disadvantages. It is evident that to exclude colored people from places of public resort on account of their race is to fix upon them a brand of inferiority, and tends to fix their position as a servile and dependent people. It is, of course, impossible to enforce social equality by law. But the law in question simply insures to colored citizens the right to admission, on equal terms with others, to public resorts and to equal enjoyment of privileges of a *quasi* public character. The law cannot be set aside, because it has no basis in the public interest, and the promotion of the public good is the main purpose for which the police power may be exerted; and whether, in a given case, it shall be exerted or not, the legislature is the sole judge, and a law will not be held invalid because, in the judgment of a court, its enactment was inexpedient or unwise.

The final question, therefore, is, does the law in question invade the right of property protected by the Constitution? The State could not pass a law making the discrimination made by the defendant. The amendments to the Federal Constitution would forbid it. May not the State impose upon individuals having places of public resort the same restriction which the Federal Constitution places upon the State? It is not claimed that that part of the statute giving to colored people equal rights, at the hands of innkeepers and common carriers, is an infraction of the Constitution. But the business of an innkeeper or a common carrier, when conducted by an individual, is a private business, receiving no special privilege or protection from the State. By the common law,

[1] See the *Civil Rights Cases*, 109 U. S. 3; *ante*, p. 554. — ED.

innkeepers and common carriers are bound to furnish equal facilities to all, without discrimination, because public policy requires them so to do. The business of conducting a theatre or place of public amusement is also a private business in which any one may engage, in the absence of any statute or ordinance. But it has been the practice, which has passed unchallenged, for the legislature to confer upon municipalities the power to regulate by ordinance the licensing of theatres and shows, and to enforce restrictions relating to such places, in the public interest, and no one claims that such statutes are an invasion of the right of liberty or property guaranteed by the Constitution.

The statute in question assumes to regulate the conduct of owners or managers of places of public resort in the respect mentioned. The principle stated by Waite, C. J., in *Munn* v. *Illinois*, *supra*, which received the assent of the majority of the court, applies in this case. "Where," says the Chief Justice, "one devotes his property to a use in which the public have an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created." In the judgment of the legislature the public had an interest to prevent race discrimination between citizens, on the part of persons maintaining places of public amusement, and the *quasi* public use to which the owner of such a place devoted his property, gives the legislature a right to interfere. If the defendant, instead of basing his exclusion of a class of citizens upon color, had made a rule excluding all Germans, or all Irishmen, or all Jews, the law as applied to such a case would have seemed entirely reasonable. *United States* v. *Newcombe* [U. S. Dist. Ct.], 4 Phila. 519. But the principle is the same, and if the law could be sustained in the one case, it may in the other. The validity of similar statutes in Mississippi and Louisiana has been sustained by the courts in those States. *Donnell* v. *The State*, 48 Miss. 661; *Joseph* v. *Bidwell*, 28 La. 382. The statute does not interfere with private entertainments, or prevent persons not engaged in the business of keeping a place of public amusement, from regulating admission to social, public, or private entertainments given by them as they may deem best, nor does it seek to compel social equality. It was, we think, a valid exercise of the police power of the State over a subject within the cognizance of the legislature.

The judgment should be affirmed.

All concur, except PECKHAM and GRAY, JJ., dissenting; RUGER, C. J., concurring in result. *Judgment affirmed.*[1]

[1] And so *Ferguson* v. *Gies*, 82 Mich. 358 (1890), as to restaurants, where the statute is said to be only declaratory of the common law, as now understood in that State; *Baylies* v. *Curry*, 128 Ill. 287 (1889). Compare *Central R. R. Co.* v. *Green*, 86 Pa. St. 427 (1878); *R. R. Co.* v. *Brown*, 17 Wall. 445 (1873). — ED.

LEHEW *v.* BRUMMELL.

SUPREME COURT OF MISSOURI. 1890.

[103 *Mo.* 546.]

E. M. Harber, for appellants.

R. A. DeBolt, for respondents.

BLACK, J. The five plaintiffs in this case reside in School District Number 4, in Grundy County, and each has children entitled to attend the public school maintained therein for the education of white children. In September, 1887, when this suit was commenced, the defendant Barr was the teacher, and three of the defendants were directors of the school district. The defendant Brummell is a man of African descent, and at the last-mentioned date had four children, all of whom resided with him in said district and were of the ages entitling them to attend the public schools. These four children were the only colored childr n of school age in the district. No separate school was ever established or maintained therein for the education of colored children; but there was such a separate school in the town of Trenton in the same county, three and one-half miles from Brummell's residence. No white child in District Number 4 had to go more than two miles to reach the schoolhouse. These colored children were permitted to attend the school maintained for white children in District Number 4 for a short time.

On the foregoing facts a temporary injunction was awarded the plaintiffs, restraining Brummell's children from attending the school so established for white children, which was made perpetual on the final hearing of the cause, and the defendants appealed.

But two questions are presented by the briefs for our consideration. The first is, that the laws of this State concerning the education of colored children are in conflict with section 1 of the Fourteenth Amendment of the Constitution of the United States, and, therefore, void.

Section 1, of article 11, of the Constitution of this State, makes it the duty of the General Assembly to establish and maintain free public schools for the gratuitous instruction of all persons in this State between the ages of six and twenty years; and section 3 of the same article declares: "Separate free public schools shall be established for the education of children of African descent."

A system of free public schools has been established by general laws throughout the State, and for all the purposes of this case it will be sufficient to notice the statutes concerning colored schools. . . .

These statute laws simply carry out and put in operation the command of that section of our Constitution before quoted, and the objection now made is levelled at the constitutional provision, and it is that which we are asked to strike down, because of the contention that it violates section 1 of the Fourteenth Amendment of the Constitution of the United States. . . .

We then come to the last clause, which is prohibitory of State action. It says, nor shall any State deny to any person within its jurisdiction the equal protection of the laws. Speaking of this clause in its application to State legislation as to colored persons, Justice Strong said: "What is this but declaring that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color?" *Strauder* v. *West Virginia*, 100 U. S. 303. We then come to the simple question whether our Constitution and the statutes passed pursuant to it, requiring colored persons to attend schools established and maintained at public expense for the education of colored persons only, deny to such persons "equal protection of the laws."

It is to be observed in the first place that these persons are not denied the advantages of the public schools. The right to attend such schools and receive instruction thereat is guaranteed to them. The framers of the Constitution and the people by their votes in adopting it, it is true, were of the opinion that it would be better to establish and maintain separate schools for colored children. The wisdom of the provision is no longer a matter of speculation. Under it, the colored children of the State have made a rapid stride in the way of education, to the great gratification of every right-minded man. The schools for white and black persons are carried on at a great public expense, and it has been found expedient and necessary to divide them into classes. That separate schools may be established for male and female pupils cannot be doubted. No one would question the right of the legislature to provide separate schools for neglected children who are too far advanced in years to attend the primary department; for such separate schools would be to the great advantage of that class of pupils. So, too, schools may be classed according to the attainments of the attendants in the branches taught. That schools may be classed on these and other grounds without violating the clause of the Federal Constitution now in question, must be conceded. But it will be said the classification now in question is one based on color, and so it is; but the color carries with it natural race peculiarities which furnish the reason for the classification. There are differences in races, and between individuals of the same race, not created by human laws, some of which can never be eradicated. These differences create different social relations recognized by all well-organized governments. If we cast aside chimerical theories and look to practical results, it seems to us it must be conceded that separate schools for colored children is a regulation to their great advantage.

It is true Brummell's children must go three and one-half miles to reach a colored school, while no white child in the district is required to go further than two miles. The distance which these children must

go to reach a colored school is a matter of inconvenience to them, but it is an inconvenience which must arise in any school system. The law does not undertake to establish a school within a given distance of any one, white or black. The inequality in distances to be travelled by the children of different families is but an incident to any classification, and furnishes no substantial ground of complaint. *People ex rel. King* v. *Gallagher*, 93 N. Y. 438–451.

The fact must be kept in mind, for it lies at the foundation of this controversy, that the laws of this State do not exclude colored children from the public schools. Such children have all the school advantages and privileges that are afforded white children. The fact that the two races are separated for the purpose of receiving instruction deprives neither of any rights. It is but a reasonable regulation of the exercise of the right. As said in the case just cited, "Equality and not identity of privileges and rights is what is guaranteed to the citizen." Our conclusion is that the Constitution and laws of this State providing for separate schools for colored children are not forbidden by, or in conflict with, the Fourteenth Amendment of the Federal Constitution; and the courts of last resort in several States have reached the same result. *People ex rel. King* v. *Gallagher*, *supra*; *State ex rel. Garnes* v. *McCann*, 21 Ohio St. 198; *Cory* v. *Carter*, 48 Ind. 328; *Ward* v. *Flood*, 48 Cal. 36.

A like result was reached in Massachusetts under a constitutional provision similar to the Fourteenth Amendment as to the question in hand. *Roberts* v. *The City of Boston*, 5 Cushing, 198. We are, also, of the opinion that our conclusion is in accord with the cases cited from the Supreme Court of the United States, the final arbiter of all such questions.[1]

[The second point, turning on the want of proper parties, is omitted.]

[1] And so *Chrisman* v. *Brookhaven*, 70 Miss. 477 (1892). In this case the court (CAMPBELL, C. J.) remarks that, "The Constitution of 1890 embodies by express provision, in s. 207, the rule which has always prevailed in this State, that 'separate schools shall be maintained for children of the white and colored races.'" The same doctrine is held as regards legislation requiring railway companies to "provide equal but separate accommodations for the white and colored races;" in *Ex parte* Plessy, 11 So. Rep. 948 (La. Dec. 1892). Compare *Louisv., &c. Ry. Co.* v. *Miss.*, 133 U. S. 587.

In *Roberts* v. *The City of Boston*, 5 Cush. 198 (1850), before the Fourteenth Amendment, a similar question was elaborately argued before the Supreme Court of Massachusetts by Charles Sumner (3 Pierce's Life of Sumner, 40, 41). In an often-cited opinion the court (SHAW, C. J.) said: "The plaintiff, a colored child of five years of age, has commenced this action, by her father and next friend, against the city of Boston, upon the statute of 1845, c. 214, which provides, that any child unlawfully excluded from public-school instruction, in this Commonwealth, shall recover damages therefor, in an action against the city or town by which such public-school instruction is supported. The question therefore is, whether, upon the facts agreed, the plaintiff has been unlawfully excluded from such instruction.

"By the agreed statement of facts, it appears, that the defendants support a class of schools called primary schools, to the number of about one hundred and sixty, designed for the instruction of children of both sexes, who are between the ages of four and

seven years. Two of these schools are appropriated by the primary school committee, having charge of that class of schools, to the exclusive instruction of colored children, and the residue to the exclusive instruction of white children.

"The plaintiff, by her father, took proper measures to obtain admission into one of these schools appropriated to white children, but pursuant to the regulations of the committee, and in conformity therewith, she was not admitted. Either of the schools appropriated to colored children was open to her; the nearest of which was about a fifth of a mile or seventy rods more distant from her father's house than the nearest primary school. It further appears, by the facts agreed, that the committee having charge of that class of schools had, a short time previously to the plaintiff's application, adopted a resolution, upon a report of a committee, that in the opinion of that board, the continuance of the separate schools for colored children, and the regular attendance of all such children upon the schools, is not only legal and just, but is best adapted to promote the instruction of that class of the population. . . .

"The plaintiff had access to a school, set apart for colored children, as well conducted in all respects, and as well fitted, in point of capacity and qualification of the instructors, to advance the education of children under seven years old, as the other primary schools; the objection is, that the schools thus open to the plaintiff are exclusively appropriated to colored children, and are at a greater distance from her home. Under these circumstances, has the plaintiff been unlawfully excluded from public-school instruction? Upon the best consideration we have been able to give the subject, the court are all of opinion that she has not.

"It will be considered that this is a question of power, or of the legal authority of the committee intrusted by the city with this department of public instruction; because, if they have the legal authority, the expediency of exercising it in any particular way is exclusively with them.

"The great principle, advanced by the learned and eloquent advocate of the plaintiff, is, that by the Constitution and laws of Massachusetts, all persons without distinction of age or sex, birth or color, origin or condition, are equal before the law. This, as a broad general principle, such as ought to appear in a declaration of rights, is perfectly sound; it is not only expressed in terms, but pervades and animates the whole spirit of our constitution of free government. But, when this great principle comes to be applied to the actual and various conditions of persons in society, it will not warrant the assertion that men and women are legally clothed with the same civil and political powers, and that children and adults are legally to have the same functions and be subject to the same treatment; but only that the rights of all, as they are settled and regulated by law, are equally entitled to the paternal consideration and protection of the law, for their maintenance and security. What those rights are, to which individuals, in the infinite variety of circumstances by which they are surrounded in society, are entitled, must depend on laws adapted to their respective relations and conditions.

"Conceding, therefore, in the fullest manner, that colored persons, the descendants of Africans, are entitled by law, in this Commonwealth, to equal rights, constitutional and political, civil and social, the question then arises, whether the regulation in question, which provides separate schools for colored children, is a violation of any of these rights.

"Legal rights must, after all, depend upon the provisions of law; certainly all those rights of individuals which can be asserted and maintained in any judicial tribunal. The proper province of a declaration of rights and constitution of government, after directing its form, regulating its organization and the distribution of its powers, is to declare great principles and fundamental truths, to influence and direct the judgment and conscience of legislators in making laws, rather than to limit and control them, by directing what precise laws they shall make. The provision, that it shall be the duty of legislatures and magistrates to cherish the interests of literature and the sciences, especially the University at Cambridge, public schools, and grammar schools, in the towns, is precisely of this character. Had the legislature failed to comply with this injunction, and neglected to provide public schools in the towns, or should they so far fail in their duty as to repeal all laws on the subject, and leave all education to depend

IN RE LOOK TIN SING.

CIRCUIT COURT OF THE UNITED STATES, CALIFORNIA. 1884.

[10 *Sawyer*, 353.]

BEFORE FIELD, Circuit Justice, SAWYER, Circuit Judge, and SABIN, District Judge.[1]

T. D. Riordan and *William M. Stewart*, for the petitioner; *S. G. Hilborn*, United States Attorney, *Carroll Cook*, Assistant United States Attorney, and *John N. Pomeroy*, for the United States.

By the Court, FIELD, CIRCUIT JUSTICE. The petitioner belongs to the

on private means, strong and explicit as the direction of the Constitution is, it would afford no remedy or redress to the thousands of the rising generation, who now depend on these schools to afford them a most valuable education, and an introduction to useful life.

"We must then resort to the law, to ascertain what are the rights of individuals, in regard to the schools. By the Rev. Sts. c. 23, the general system is provided for. . . .

"In the absence of special legislation on this subject, the law has vested the power in the committee to regulate the system of distribution and classification; and when this power is reasonably exercised, without being abused or perverted by colorable pretences, the decision of the committee must be deemed conclusive. The committee, apparently upon great deliberation, have come to the conclusion, that the good of both classes of schools will be best promoted, by maintaining the separate primary schools for colored and for white children, and we can perceive no ground to doubt, that this is the honest result of their experience and judgment.

"It is urged, that this maintenance of separate schools tends to deepen and perpetuate the odious distinction of caste, founded in a deep-rooted prejudice in public opinion. This prejudice, if it exists, is not created by law, and probably cannot be changed by law. Whether this distinction and prejudice, existing in the opinion and feelings of the community, would not be as effectually fostered by compelling colored and white children to associate together in the same schools, may well be doubted; at all events, it is a fair and proper question for the committee to consider and decide upon, having in view the best interests of both classes of children placed under their superintendence, and we cannot say, that their decision upon it is not founded on just grounds of reason and experience, and in the results of a discriminating and honest judgment.

"The increased distance, to which the plaintiff was obliged to go to school from her father's house is not such, in our opinion, as to render the regulation in question unreasonable, still less illegal.

"On the whole the court are of opinion, that upon the facts stated, the action cannot be maintained." *Plaintiff nonsuit.*

Compare *West Chester, &c. R. R. Co.* v. *Miles*, 55 Pa. St. 209 (1867). In *Board of Education* v. *Tinnon*, 26 Kans. 1 (1881), it was held that in the absence of clear legislative authority, a board of education could not establish separate schools for white and colored persons. For the purpose of the opinion it was assumed, although doubt was intimated, that the legislature might authorize such a separate system. BREWER, J., dissented.

With this case is *People* v. *The Board of Education*, 101 Ill. 308 (1882). Compare *Coger* v. *N. W. Packet Co.*, 37 Iowa, 145 (1873); *The Sue*, 22 Fed. Rep. 843 (1885); *Logwood* v. *Memphis, &c. R. Co.*, 23 Fed. Rep. 318 (1885); *The Civil Rights Bill*, Hughes, 541 (1875). — ED.

[1] JUDGE HOFFMAN did not sit on the hearing of this case, but he was on the Bench when the opinion was delivered, and concurred in the views expressed.

Chinese race, but he was born in Mendocino, in the State of California, in 1870. In 1879 he went to China, and returned to the port of San Francisco during the present month (September, 1884), and now seeks to land, claiming the right to do so as a natural-born citizen of the United States. It is admitted by an agreed statement of facts that his parents are now residing in Mendocino, in California, and have resided there for the last twenty years; that they are of the Chinese race, and have always been subjects of the Emperor of China; that his father sent the petitioner to China, but with the intention that he should return to this country; that the father is a merchant at Mendocino, and is not here in any diplomatic or other official capacity under the Emperor of China. The petitioner is without any certificate, under the Act of 1882, or of 1884, and the District Attorney of the United States, intervening for the government, objects to his landing for the want of such certificate.

The first section of the Fourteenth Amendment to the Constitution declares that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." This language would seem to be sufficiently broad to cover the case of the petitioner. He is a person born in the United States. Any doubt on the subject, if there can be any, must arise out of the words "subject to the jurisdiction thereof." They alone are subject to the jurisdiction of the United States who are within their dominions and under the protection of their laws, and with the consequent obligation to obey them, when obedience can be rendered; and only those thus subject by their birth or naturalization are within the terms of the amendment. The jurisdiction over these latter must at the time be both actual and exclusive. The words mentioned except from citizenship children born in the United States of persons engaged in the diplomatic service of foreign governments, such as ministers and ambassadors, whose residence, by a fiction of public law, is regarded as part of their own country. This extra-territoriality of their residence secures to their children born here all the rights and privileges which would inure to them had they been born in the country of their parents. Persons born on a public vessel of a foreign country, whilst within the waters of the United States, and consequently within their territorial jurisdiction, are also excepted. They are considered as born in the country to which the vessel belongs. In the sense of public law, they are not born within the jurisdiction of the United States.

The language used has also a more extended purpose. It was designed to except from citizenship persons who, though born or naturalized in the United States, have renounced their allegiance to our government, and thus dissolved their political connection with the country. The United States recognized the right of every one to expatriate himself and choose another country. This right would seem to follow from the greater right proclaimed to the world in the memorable document in which the American colonies declared their independence and separation from the British Crown, as belonging to every human being — God-given

and inalienable — the right to pursue his own happiness. The English doctrine of perpetual and unchangeable allegiance to the government of one's birth, attending the subject wherever he goes, has never taken root in this country, although there are judicial *dicta* that a citizen cannot renounce his allegiance to the United States without the permission of the government, under regulations prescribed by law; and this would seem to have been the opinion of Chancellor Kent when he published his Commentaries. But a different doctrine prevails now. The naturalization laws have always proceeded upon the theory that any one can change his home and allegiance without the consent of his government. And we adopt as citizens those belonging to our race, who, coming from other lands, manifest attachment to our institutions and desire to be incorporated with us. So profoundly convinced are we of the right of these immigrants from other countries to change their residence and allegiance, that as soon as they are naturalized they are deemed entitled, with the native-born, to all the protection which the government can extend to them wherever they may be, at home or abroad. And the same right which we accord to them to become citizens here is accorded to them as well as to the native-born, to transfer their allegiance from our government to that of other States.

In an opinion of Attorney-General Black, in the case of a native Bavarian, who came to this country, and, after being naturalized, returned to Bavaria, and desired to resume his status as a Bavarian, this doctrine is maintained. "There is," he says, "no statute or other law of the United States which prevents either a native or naturalized citizen from severing his political connection with this government, if he sees proper to do so in time of peace, and for a purpose not directly injurious to the interests of the country. There is no mode of renunciation prescribed. In my opinion, if he emigrates, carries his family and effects with him, manifests a plain intention not to return, takes up his permanent residence abroad, and assumes the obligation of a subject to a foreign government, this would imply a dissolution of his previous relations to the United States, and I do not think we could, or would, afterward claim from him any of the duties of a citizen." 9 Opin. Atty.-Gens. 62.

The doctrine thus stated has long been received in the United States as a settled rule of public law; and in the treaty of 1868 between China and this country, the right of man to change his home and allegiance is recognized as "inherent and inalienable." 16 Stats., p. 740, art. 5. And in the recital of an Act of Congress passed nearly at the same time with the signing of the treaty, this right is assumed to be "a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness;" and in the body of the Act, "any declaration, instruction, opinion, order, or decision of any officers of this government which denies, restricts, impairs, or questions the right of expatriation," is declared to be "inconsistent with the fundamental principles" of our government. 13 Stats. 223;

R. S., sect. 1999. So, therefore, if persons born or naturalized in the United States have removed from the country and renounced, in any of the ordinary modes of renunciation, their citizenship, they thenceforth cease to be subject to the jurisdiction of the United States.

With this explanation of the meaning of the words in the Fourteenth Amendment, "subject to the jurisdiction thereof," it is evident that they do not exclude the petitioner from being a citizen. He is not within any of the classes of persons excepted from citizenship; and the jurisdiction of the United States over him at the time of his birth was exclusive of that of any other country.

The clause as to citizenship was inserted in the amendment not merely as an authoritative declaration of the generally recognized law of the country so far as the white race is concerned, but also to overrule the doctrine of the *Dred Scott Case*, affirming that persons of the African race brought over to this country and sold as slaves, and their descendants, were not citizens of the United States nor capable of becoming such. 19 How. 393. The clause changed the entire status of these people. It lifted them from their condition of mere freedmen and conferred upon them, equally with all other native-born, the rights of citizenship. When it was adopted, the naturalization laws of the United States excluded colored persons from becoming citizens, and the freedmen and their descendants, not being aliens, were without the purview of those laws. So the inability of persons to become citizens under those laws in no respect impairs the effect of their birth, or of the birth of their children, upon the status of either as citizens under the amendment in question.

Independently of the constitutional provision, it has always been the doctrine of this country, except as applied to Africans brought here and sold as slaves, and their descendants, that birth within the dominions and jurisdiction of the United States of itself creates citizenship. This subject was elaborately considered by Assistant Vice-Chancellor Sandford in *Lynch* v. *Clarke*, found in the first volume of his reports. 1 Sandf. 583. In that case one Julia Lynch, born in New York, in 1819, of alien parents, during their temporary sojourn in that city, returned with them the same year to their native country, and always resided there afterwards. It was held that she was a citizen of the United States.

After an exhaustive examination of the law, the Vice-Chancellor said that he entertained no doubt that every person born within the dominions and allegiance of the United States, whatever the situation of his parents, was a natural-born citizen; and added, that this was the general understanding of the legal profession, and the universal impression of the public mind. In illustration of this general understanding, he mentions the fact, that when at an election an inquiry is made whether the person offering to vote is a citizen or an alien, if he answers that he is a native of this country the answer is received as conclusive that he is a citizen; that no one inquires further; no one asks whether his

parents were citizens or foreigners; it is enough that he was born here whatever was the status of his parents. He shows also that legislative expositions on the subject speak but one language, and he cites to that effect not only the laws of the United States, but the statutes of a great number of the States, and establishes conclusively that there is on this subject a concurrence of legislative declaration with judicial opinion, and that both accord with the general understanding of the profession and of the public.[1]

Whether it be possible for an alien, who could be naturalized under our laws, to renounce for his children, whilst under the age of majority, the right of citizenship, which by those laws he could acquire for them, it is unnecessary to consider, as no such question is presented here. Nor is the further question before us whether, if he cannot become a citizen, he can, by his act, release any right conferred upon them by the Constitution.

As to the position of the District Attorney that the Restriction Act prevents the re-entry of the petitioner into the United States, even if he be a citizen, only a word is necessary. The petitioner is the son of a merchant, and not a laborer within the meaning of the Act. Being a citizen, the law could not intend that he should ever look to the government of a foreign country for permission to return to the United States, and no citizen can be excluded from this country except in punishment for crime. Exclusion for any other cause is unknown to our laws and beyond the power of Congress. The petitioner must be allowed to land, and it is so ordered.[2]

[1] In 1855 Congress passed the following Act, securing citizenship to children of citizens of the United States born without their limits: —

CHAPTER LXXI. — *An Act to secure the Right of Citizenship to Children of Citizens of the United States born out of the Limits thereof.*

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that persons heretofore born, or hereafter to be born, out of the limits and jurisdiction of the United States, whose fathers were, or shall be at the time of their birth, citizens of the United States, shall be deemed and considered, and are hereby declared to be, citizens of the United States; provided, however, that the rights of citizenship shall not descend to persons whose fathers never resided in the United States.

SEC. 2. And be it further enacted, that any woman who might lawfully be naturalized under the existing laws, married, or who shall be married, to a citizen of the United States, shall be deemed and taken to be a citizen.

Approved February 10, 1855.

The provisions of this statute are re-enacted in the Revised Statutes in sections 1993 and 1994.

[2] Compare *McKay* v. *Campbell*, 2 Sawyer, U. S. C. C. Oregon, 118 (1871).

As to the power of the political departments of the government to keep out aliens, and to remove them, see *Chae Chan Ping* v. *U. S.*, 130 U. S. 581 (1889); *Nishimura Ekiu* v. *U. S.*, 142 U. S. 651 (1892); and *Fong Yue Ting* v. *U. S.*, 149 U. S. 699, s. c. *ante*, p. 374. — ED.

WORCESTER *v.* THE STATE OF GEORGIA.

SUPREME COURT OF THE UNITED STATES. 1832.

[6 *Pet.* 515.][1]

ERROR to the Superior Court for the county of Gwinnett in the State of Georgia. The plaintiff in error, being a missionary residing among the Cherokee Indians in Georgia by permission of the United States, was indicted under a statute of Georgia forbidding such residence without a license from the authorities of the State, and was convicted and sentenced to imprisonment.

Sergeant and *Wirt*, with whom also was *Elisha W. Chester.*

MARSHALL, C. J., delivered the opinion of the court. . . .

The treaties and laws of the United States contemplate the Indian territory as completely separated from that of the States; and provide that all intercourse with them shall be carried on exclusively by the government of the Union.

Is this the rightful exercise of power, or is it usurpation?

While these States were colonies, this power, in its utmost extent, was admitted to reside in the Crown. When our Revolutionary struggle commenced, Congress was composed of an assemblage of deputies acting under specific powers granted by the legislatures, or conventions of the several colonies. It was a great popular movement, not perfectly organized; nor were the respective powers of those who were intrusted with the management of affairs accurately defined. The necessities of our situation produced a general conviction that those measures which concerned all, must be transacted by a body in which the representatives of all were assembled, and which could command the confidence of all: Congress, therefore, was considered as invested with all the powers of war and peace, and Congress dissolved our connection with the mother country, and declared these United Colonies to be independent States. Without any written definition of powers, they employed diplomatic agents to represent the United States at the several courts of Europe; offered to negotiate treaties with them, and did actually negotiate treaties with France. From the same necessity, and on the same principles, Congress assumed the management of Indian affairs; first in the name of these United Colonies; and, afterwards, in the name of the United States. Early attempts were made at negotiation, and to regulate trade with them. These not proving successful, war was carried on under the direction, and with the forces of the United States, and the efforts to make peace, by treaty, were earnest and incessant. The confederation found Congress in the exercise of the same powers of peace and war, in our relations with Indian nations, as with those of Europe.

[1] The statement of facts is shortened. — ED.

Such was the state of things when the confederation was adopted. That instrument surrendered the powers of peace and war to Congress, and prohibited them to the States, respectively, unless a State be actually invaded, "or shall have received certain advice of a resolution being formed by some nation of Indians to invade such State, and the danger is so imminent as not to admit of delay till the United States in Congress assembled can be consulted." This instrument also gave the United States in Congress assembled the sole and exclusive right of "regulating the trade and managing all the affairs with the Indians, not members of any of the States: provided, that the legislative power of any State within its own limits be not infringed or violated."

The ambiguous phrases which follow the grant of power to the United States were so construed by the States of North Carolina and Georgia as to annul the power itself. The discontents and confusion resulting from these conflicting claims, produced representations to Congress, which were referred to a committee, who made their report in 1787. The report does not assent to the construction of the two States, but recommends an accommodation, by liberal cessions of territory, or by an admission, on their part, of the powers claimed by Congress. The correct exposition of this article is rendered unnecessary by the adoption of our existing Constitution. That instrument confers on Congress the powers of war and peace; of making treaties, and of regulating commerce with foreign nations, and among the several States, and with the Indian tribes. These powers comprehend all that is required for the regulation of our intercourse with the Indians. They are not limited by any restrictions on their free actions. The shackles imposed on this power, in the confederation, are discarded.

The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial, with the single exception of that imposed by irresistible power, which excluded them from intercourse with any other European potentate than the first discoverer of the coast of the particular region claimed: and this was a restriction which those European potentates imposed on themselves, as well as on the Indians. The very term "nation," so generally applied to them, means "a people distinct from others." The Constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and consequently admits their rank among those powers who are capable of making treaties. The words "treaty" and "nation" are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves, having each a definite and well-understood meaning. We have applied them to Indians, as we have applied them to the other nations of the earth. They are applied to all in the same sense.

Georgia, herself, has furnished conclusive evidence that her former opinions on this subject concurred with those entertained by her sister

States, and by the government of the United States. Various Acts of her Legislature have been cited in the argument, including the contract of cession made in the year 1802, all tending to prove her acquiescence in the universal conviction that the Indian nations possessed a full right to the lands they occupied, until that right should be extinguished by the United States, with their consent: that their territory was separated from that of any State within whose chartered limits they might reside, by a boundary line, established by treaties: that, within their boundary, they possessed rights with which no State could interfere: and that the whole power of regulating the intercourse with them, was vested in the United States. A review of these Acts, on the part of Georgia, would occupy too much time, and is the less necessary, because they have been accurately detailed in the argument at the Bar. Her new series of laws, manifesting her abandonment of these opinions, appears to have commenced in December, 1828.

In opposition to this original right, possessed by the undisputed occupants of every country; to this recognition of that right, which is evidenced by our history, in every change through which we have passed; is placed the charters granted by the monarch of a distant and distinct region, parcelling out a territory in possession of others whom he could not remove and did not attempt to remove, and the cession made of his claims by the treaty of peace.

The actual state of things at the time, and all history since, explain these charters; and the King of Great Britain, at the treaty of peace, could cede only what belonged to his crown. These newly asserted titles can derive no aid from the articles so often repeated in Indian treaties; extending to them, first, the protection of Great Britain, and afterwards that of the United States. These articles are associated with others, recognizing their title to self-government. The very fact of repeated treaties with them recognizes it; and the settled doctrine of the law of nations is, that a weaker power does not surrender its independence — its right to self-government, by associating with a stronger, and taking its protection. A weak State, in order to provide for its safety, may place itself under the protection of one more powerful, without stripping itself of the right of government, and ceasing to be a State. Examples of this kind are not wanting in Europe. "Tributary and feudatory States," says Vattel, "do not thereby cease to be sovereign and independent States, so long as self-government and sovereign and independent authority are left in the administration of the State." At the present day, more than one State may be considered as holding its right of self-government under the guarantee and protection of one or more allies.

The Cherokee nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the Acts of Congress. The whole

intercourse between the United States and this nation, is, by our Constitution and laws, vested in the government of the United States.

The Act of the State of Georgia, under which the plaintiff in error was prosecuted, is consequently void, and the judgment a nullity. Can this court revise, and reverse it?

If the objection to the system of legislation, lately adopted by the Legislature of Georgia, in relation to the Cherokee nation, was confined to its extra-territorial operation, the objection, though complete, so far as respected mere right, would give this court no power over the subject. But it goes much further. If the review which has been taken be correct, and we think it is, the Acts of Georgia are repugnant to the Constitution, laws, and treaties of the United States.

They interfere forcibly with the relations established between the United States and the Cherokee nation, the regulation of which, according to the settled principles of our Constitution, are committed exclusively to the government of the Union.

They are in direct hostility with treaties, repeated in a succession of years, which mark out the boundary that separates the Cherokee country from Georgia; guarantee to them all the land within their boundary; solemnly pledge the faith of the United States to restrain their citizens from trespassing on it; and recognize the pre-existing power of the nation to govern itself.

They are in equal hostility with the Acts of Congress for regulating this intercourse, and giving effect to the treaties.

The forcible seizure and abduction of the plaintiff in error, who was residing in the nation with its permission, and by authority of the President of the United States, is also a violation of the Acts which authorize the chief magistrate to exercise this authority.

Will these powerful considerations avail the plaintiff in error? We think they will. He was seized, and forcibly carried away, while under guardianship of treaties guaranteeing the country in which he resided, and taking it under the protection of the United States. He was seized while performing, under the sanction of the chief magistrate of the Union, those duties which the humane policy adopted by Congress had recommended. He was apprehended, tried, and condemned, under color of a law which has been shown to be repugnant to the Constitution, laws, and treaties of the United States. Had a judgment, liable to the same objections, been rendered for property, none would question the jurisdiction of this court. It cannot be less clear when the judgment affects personal liberty, and inflicts disgraceful punishment, if punishment could disgrace when inflicted on innocence. The plaintiff in error is not less interested in the operation of this unconstitutional law than if it affected his property. He is not less entitled to the protection of the Constitution, laws, and treaties of his country.

This point has been elaborately argued and, after deliberate consideration, decided, in the case of *Cohens* v. *The Commonwealth of Virginia*, 6 Wheat. 264.

It is the opinion of this court that the judgment of the Superior Court for the county of Gwinnett, in the State of Georgia, condemning Samuel A. Worcester to hard labor, in the penitentiary of the State of Georgia, for four years, was pronounced by that court under color of a law which is void, as being repugnant to the Constitution, treaties, and laws of the United States, and ought, therefore, to be reversed and annulled.

[The concurring opinions of McLEAN, J. and WASHINGTON, J., and the dissenting opinion of BALDWIN, J., are omitted.][1]

IN *Elk* v. *Wilkins*, 112 U. S. 94 (1884), on error to the Circuit Court of the United States for the District of Nebraska, the plaintiff, an Indian, had brought an action against the defendant, the registrar of a ward in Omaha, for refusing to register him as a qualified voter. The case turned on the question whether the plaintiff was a citizen of the United States. The court (GRAY, J.) in holding that he was not, said: "The question then is, whether an Indian, born a member of one of the Indian tribes within the United States, is, merely by reason of his birth within the United States, and of his afterwards voluntarily separating himself from his tribe and taking up his residence among white citizens, a citizen of the United States, within the meaning of the first section of the Fourteenth Amendment of the Constitution.

"Under the Constitution of the United States, as originally established, 'Indians not taxed' were excluded from the persons according to whose numbers representatives and direct taxes were apportioned among the several States; and Congress had and exercised the power to regulate commerce with the Indian tribes, and the members thereof, whether within or without the boundaries of one of the States of the Union. The Indian tribes, being within the territorial limits of the United States, were not, strictly speaking, foreign States; but they were alien nations, distinct political communities, with whom the United States might and habitually did deal, as they thought fit, either through treaties made by the President and Senate, or through Acts of Congress in the ordinary forms of legislation. The members of those tribes owed immediate allegiance to their several tribes, and were not part of the people of the United States. They were in a dependent condition, a state of pupilage, resembling that of a ward to his guardian. Indians and their property, exempt from taxation by treaty or statute of the United States, could not be taxed by any State. General Acts of Congress did not apply to Indians, unless so expressed as to clearly manifest an intention to include them. . . .

"The alien and dependent condition of the members of the Indian tribes could not be put off at their own will, without the action or assent of the United States, they were never deemed citizens of the United States, except under explicit provisions of treaty or statute to that effect, either declaring a certain tribe, or such members of

[1] See *Cherokee Nation* v. *Ga.*, 5 Pet. 1 (1831). — ED.

it as chose to remain behind on the removal of the tribe westward, to be citizens, or authorizing individuals of particular tribes to become citizens on application to a court of the United States for naturalization, and satisfactory proof of fitness for civilized life. . . .

"The distinction between citizenship by birth and citizenship by naturalization is clearly marked in the provisions of the Constitution, by which 'no person, except a natural-born citizen, or a citizen of the United States at the time of the adoption of this Constitution, shall be eligible to the office of President;' and 'the Congress shall have power to establish an uniform rule of naturalization.' Constitution, art. 2, sect. 1; art. 1, sect. 8. . . .

"This section [Amendment XIV., s. 1] contemplates two sources of citizenship, and two sources only: birth and naturalization. The persons declared to be citizens are 'all persons born or naturalized in the United States, and subject to the jurisdiction thereof.' The evident meaning of these last words is, not merely subject in some respect or degree to the jurisdiction of the United States, but completely subject to their political jurisdiction, and owing them direct and immediate allegiance. And the words relate to the time of birth in the one case, as they do to the time of naturalization in the other. Persons not thus subject to the jurisdiction of the United States at the time of birth cannot become so afterwards, except by being naturalized, either individually, as by proceedings under the Naturalization Acts, or collectively, as by the force of a treaty by which foreign territory is acquired.

"Indians born within the territorial limits of the United States, members of, and owing immediate allegiance to, one of the Indian tribes (an alien, though dependent, power), although in a geographical sense born in the United States, are no more 'born in the United States and subject to the jurisdiction thereof,' within the meaning of the first section of the Fourteenth Amendment, than the children of subjects of any foreign government born within the domain of that government, or the children born within the United States, of ambassadors or other public ministers of foreign nations. . . .

"Such Indians, then, not being citizens by birth, can only become citizens in the second way mentioned in the Fourteenth Amendment, by being 'naturalized in the United States,' by or under some treaty or statute. . . .

"Since the ratification of the Fourteenth Amendment, Congress has passed several Acts for naturalizing Indians of certain tribes, which would have been superfluous if they were, or might become, without any action of the government, citizens of the United States. . . .

"There is nothing in the statutes or decisions, referred to by counsel, to control the conclusion to which we have been brought by a consideration of the language of the Fourteenth Amendment, and of the condition of the Indians at the time of its proposal and ratification.

"The Act of July 27, 1868, ch. 249, declaring the right of expatriation

to be a natural and inherent right of all people, and reciting that 'in the recognition of this principle this government has freely received emigrants from all nations, and invested them with the rights of citizenship,' while it affirms the right of every man to expatriate himself from one country, contains nothing to enable him to become a citizen of another, without being naturalized under its authority. 15 Stat. 223; Rev. Stat. § 1999.

"The provision of the Act of Congress of March 3, 1871, ch. 120, that 'hereafter no Indian nation or tribe within the Territory of the United States shall be acknowledged or recognized as an independent nation, tribe or power with whom the United States may contract by treaty,' is coupled with a provision that the obligation of any treaty already lawfully made is not to be thereby invalidated or impaired; and its utmost possible effect is to require the Indian tribes to be dealt with for the future through the legislative and not through the treaty-making power. 16 Stat. 566; Rev. Stat. § 2079.

"In the case of *United States* v. *Elm*, 23 Int. Rev. Rec. 419, decided by Judge Wallace in the District Court of the United States for the Northern District of New York, the Indian who was held to have a right to vote in 1876 was born in the State of New York, one of the remnants of a tribe which had ceased to exist as a tribe in that State; and by a statute of the State it had been enacted that any native Indian might purchase, take, hold and convey lands, and, whenever he should have become a freeholder to the value of one hundred dollars, should be liable to taxation, and to the civil jurisdiction of the courts, in the same manner and to the same extent as a citizen. N. Y. Stat. 1843, ch. 87. The condition of the tribe from which he derived his origin, so far as any fragments of it remained within the State of New York, resembled the condition of those Indian nations of which Mr. Justice Johnson said in *Fletcher* v. *Peck*, 6 Cranch, 87, 146, that they 'have totally extinguished their national fire, and submitted themselves to the laws of the States;' and which Mr. Justice McLean had in view, when he observed in *Worcester* v. *Georgia*, 6 Pet. 515, 580, that in some of the old States, 'where small remnants of tribes remain, surrounded by white population, and who, by their reduced numbers, had lost the power of self-government, the laws of the State had been extended over them, for the protection of their persons and property.' See also, as to the condition of Indians in Massachusetts, remnants of tribes never recognized by the treaties or legislative or executive Acts of the United States as distinct political communities, *Danzell* v. *Webquish*, 108 Mass. 133; *Pells* v. *Webquish*, 129 Mass. 469; Mass. Stat. 1862, ch. 184; 1869, ch. 463.

"The passages cited as favorable to the plaintiff from the opinions delivered in *Ex parte Kenyon*, 5 Dillon, 385, 390, in *Ex parte Reynolds*, 5 Dillon, 394, 397, and in *United States* v. *Crook*, 5 Dillon, 453, 464, were *obiter dicta*. The *Case of Reynolds* was an indictment in the Circuit Court of the United States for the Western District of

Arkansas for a murder in the Indian country, of which that court had jurisdiction if either the accused or the dead man was not an Indian, and was decided by Judge Parker in favor of the jurisdiction, upon the ground that both were white men, and that, conceding the one to be an Indian by marriage, the other never was an Indian in any sense. 5 Dillon, 397, 404. Each of the other two cases was a writ of *habeas corpus;* and any person, whether a citizen or not, unlawfully restrained of his liberty, is entitled to that writ. *Case of the Hottentot Venus*, 13 East, 195; *Case of Dos Santos*, 2 Brock. 493; *In re Kaine*, 14 How. 103. In *Kenyon's Case*, Judge Parker held that the court in which the prisoner had been convicted had no jurisdiction of the subject-matter, because the place of the commission of the act was beyond the territorial limits of its jurisdiction, and, as was truly said, 'this alone would be conclusive of this case.' 5 Dillon, 390. In *United States* v. *Crook*, the Ponca Indians were discharged by Judge Dundy because the military officers who held them were taking them to the Indian Territory by force and without any lawful authority (5 Dillon, 468), and in the case at bar, as the record before us shows, that learned judge concurred in the judgment below for the defendant.

"The law upon the question before us has been well stated by Judge Deady in the District Court of the United States for the District of Oregon. In giving judgment against the plaintiff in a case resembling the case at bar, he said: 'Being born a member of "an independent political community" ... he Chinook — he was not born subject to the jurisdiction of the Unit... States — not born in its allegiance.' *McKay* v. *Campbell*, 2 Sawyer, 1.., 134. And in a later case he said: 'But an Indian cannot make himself a citizen of the United States without the consent and co-operation of the government. The fact that he has abandoned his nomadic life or tribal relations, and adopted the habits and manners of civilized people, may be a good reason why he should be made a citizen of the United States, but does not of itself make him one. To be a citizen of the United States is a political privilege which no one, not born to, can assume without its consent in some form. The Indians in Oregon, not being born subject to the jurisdiction of the United States, were not born citizens thereof, and I am not aware of any law or treaty by which any of them have been made so since.' *United States* v. *Osborne*, 6 Sawyer, 406, 409.

"Upon the question whether any action of a State can confer rights of citizenship on Indians of a tribe still recognized by the United States as retaining its tribal existence, we need not, and do not, express an opinion, because the State of Nebraska is not shown to have taken any action affecting the condition of this plaintiff. See *Chirac* v. *Chirac*, 2 Wheat. 259; *Fellows* v. *Blacksmith*, 19 How. 366; *United States* v. *Holliday*, 3 Wall. 407, 420; *United States* v. *Joseph*, 94 U. S. 614, 618.

"The plaintiff, not being a citizen of the United States under the Fourteenth Amendment of the Constitution, has been deprived of no

right secured by the Fifteenth Amendment, and cannot maintain this action." *Judgment affirmed.*

[HARLAN, J., for himself, and WOODS, J., gave a dissenting opinion in which it was said that "according to the doctrines of the court, in this case — if we do not wholly misapprehend the effect of its decision — the plaintiff, if born while his parents were members of an Indian tribe, would not be embraced by the amendment, even had he been, at the time it was adopted, a permanent resident of one of the States, subject to taxation, and, in fact, paying property and personal taxes, to the full extent required of the white race in the same State."] [1]

UNITED STATES *v.* KAGAMA.

SUPREME COURT OF THE UNITED STATES. 1886.

[118 *U. S.* 375.]

Mr. Solicitor-General, for plaintiff in error. *Mr. Joseph D. Redding,* for defendants in error.

MR. JUSTICE MILLER delivered the opinion of the court.

The case is brought here by certificate of division of opinion between the Circuit Judge and the District Judge holding the Circuit Court of the United States for District of California.

The questions certified arise on a demurrer to an indictment against two Indians for murder committed on the Indian reservation of Hoopa Valley, in the State of California, the person murdered being also an Indian of said reservation.

Though there are six questions certified as the subject of difference, the point of them all is well set out in the third and sixth, which are as follows: —

"3. Whether the provisions of said section 9 (of the Act of Congress of March 3, 1885), making it a crime for one Indian to commit murder

[1] By the United States Land-in-Severalty Act of February 8, 1887, s. 6 (1 Supp. to Rev. St. U. S. 536), "Every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States."

As to the status of tribal Indians in the different States, see *Danzell* v. *Webquish*, 108 Mass. 133; *Seneca Nation* v. *Christie*, 126 N. Y. 122; *State* v. *Newell*, 24 Atl. Rep. 943 (Maine, 1892); *The Cherokee Trust Funds*, 117 U. S. 288, 303. In the last-named case it is said of eleven or twelve hundred Cherokees who remained at the East when the "Nation" was removed to the West, "They ceased to be a part of the Cherokee Nation, and henceforth they became citizens of and were subject to the laws of the State in which they resided." In *State* v. *Newell*, this language is quoted as applicable to all the Indians of Maine. In Massachusetts by a statute of 1869 (c. 463, s. 1) all Indians in the State were declared to be "citizens of the Commonwealth." — ED.

upon another Indian, upon an Indian reservation situated wholly within the limits of a State of the Union, and making such Indian so committing the crime of murder within and upon such Indian reservation 'subject to the same laws' and subject to be 'tried in the same courts, and in the same manner, and subject to the same penalties as are all other persons' committing the crime of murder 'within the exclusive jurisdiction of the United States,' is a constitutional and valid law of the United States?"

"6. Whether the courts of the United States have jurisdiction or authority to try and punish an Indian belonging to an Indian tribe for committing the crime of murder upon another Indian belonging to the same Indian tribe, both sustaining the usual tribal relations, said crime having been committed upon an Indian reservation made and set apart for the use of the Indian tribe to which said Indians both belong?"

The indictment sets out in two counts that Kagama, alias Pactah Billy, an Indian, murdered Iyouse, alias Ike, another Indian, at Humboldt County, in the State of California, within the limits of the Hoopa Valley Reservation, and it charges Mahawaha, alias Ben, also an Indian, with aiding and abetting in the murder.

The law referred to in the certificate is the last section of the Indian Appropriation Act of that year, and is as follows: —

"§ 9. That immediately upon and after the date of the passage of this Act all Indians committing against the person or property of another Indian or other person any of the following crimes, namely, murder, manslaughter, rape, assault with intent to kill, arson, burglary and larceny, within any Territory of the United States, and either within or without the Indian reservation, shall be subject therefor to the laws of said Territory relating to said crimes, and shall be tried therefor in the same courts and in the same manner, and shall be subject to the same penalties, as are all other persons charged with the commission of the said crimes, respectively; and the said courts are hereby given jurisdiction in all such cases; and all such Indians committing any of the above crimes against the person or property of another Indian or other person, within the boundaries of any State of the United States, and within the limits of any Indian reservation, shall be subject to the same laws, tried in the same courts and in the same manner, and subject to the same penalties, as are all other persons committing any of the above crimes within the exclusive jurisdiction of the United States." 23 Stat. ch. 341, 362; § 9, 385.

The above enactment is clearly separable into two distinct definitions of the conditions under which Indians may be punished for the same crimes as defined by the common law. The first of these is where the offence is committed within the limits of a territorial government, whether on or off an Indian reservation. In this class of cases the Indian charged with the crime shall be judged by the laws of the Territory on that subject, and tried by its courts. This proposition itself is new in legislation of Congress, which has heretofore only undertaken to punish

an Indian who sustains the usual relation to his tribe, and who commits the offence in the Indian country, or on an Indian reservation, in exceptional cases; as where the offence was against the person or property of a white man, or was some violation of the trade and intercourse regulations imposed by Congress on the Indian tribes. It is new, because it now proposes to punish these offences when they are committed by one Indian on the person or property of another.

The second is where the offence is committed by one Indian against the person or property of another, within the limits of a State of the Union, but on an Indian reservation. In this case, of which the State and its tribunals would have jurisdiction if the offence was committed by a white man outside an Indian reservation, the courts of the United States are to exercise jurisdiction as if the offence had been committed at some place within the exclusive jurisdiction of the United States. The first clause subjects all Indians guilty of these crimes committed within the limits of a Territory, to the laws of that Territory, and to its courts for trial. The second, which applies solely to offences by Indians which are committed within the limits of a State and the limits of a reservation, subjects the offenders to the laws of the United States passed for the government of places under the exclusive jurisdiction of those laws, and to trial by the courts of the United States. This is a still further advance, as asserting this jurisdiction over the Indians within the limits of the States of the Union.

Although the offence charged in this indictment was committed within a State and not within a Territory, the considerations which are necessary to a solution of the problem in regard to the one must in a large degree affect the other.

The Constitution of the United States is almost silent in regard to the relations of the government which was established by it to the numerous tribes of Indians within its borders.

In declaring the basis on which representation in the lower branch of the Congress and direct taxation should be apportioned, it was fixed that it should be according to numbers, excluding Indians not taxed, which, of course, excluded nearly all of that race, but which meant that if there were such within a State as were taxed to support the government, they should be counted for representation, and in the computation for direct taxes levied by the United States. This expression, excluding Indians not taxed, is found in the XIVth amendment, where it deals with the same subject under the new conditions produced by the emancipation of the slaves. Neither of these shed much light on the power of Congress over the Indians in their existence as tribes, distinct from the ordinary citizens of a State or Territory.

The mention of Indians in the Constitution which has received most attention is that found in the clause which gives Congress "power to regulate commerce with foreign nations and among the several States, and with the Indian tribes."

This clause is relied on in the argument in the present case, the

proposition being that the statute under consideration is a regulation of commerce with the Indian tribes. But we think it would be a very strained construction of this clause, that a system of criminal laws for Indians living peaceably in their reservations, which left out the entire code of trade and intercourse laws justly enacted under that provision, and established punishments for the common-law crimes of murder, manslaughter, arson, burglary, larceny, and the like, without any reference to their relation to any kind of commerce, was authorized by the grant of power to regulate commerce with the Indian tribes. While we are not able to see, in either of these clauses of the Constitution and its amendments, any delegation of power to enact a code of criminal law for the punishment of the worst class of crimes known to civilized life when committed by Indians, there is a suggestion in the manner in which the Indian tribes are introduced into that clause, which may have a bearing on the subject before us. The commerce with foreign nations is distinctly stated as submitted to the control of Congress. Were the Indian tribes foreign nations? If so, they came within the first of the three classes of commerce mentioned, and did not need to be repeated as Indian tribes. Were they nations, in the minds of the framers of the Constitution? If so, the natural phrase would have been "foreign nations and Indian nations," or, in the terseness of language uniformly used by the framers of the instrument, it would naturally have been "foreign and Indian nations." And so in the case of *The Cherokee Nation* v. *The State of Georgia*, 5 Pet. 1, 20, brought in the Supreme Court of the United States, under the declaration that the judicial power extends to suits between a State and foreign States, and giving to the Supreme Court original jurisdiction where a State is a party, it was conceded that Georgia as a State came within the clause, but held that the Cherokees were not a State or nation within the meaning of the Constitution, so as to be able to maintain the suit.

But these Indians are within the geographical limits of the United States. The soil and the people within these limits are under the political control of the government of the United States, or of the States of the Union. There exist within the broad domain of sovereignty but these two. There may be cities, counties, and other organized bodies with limited legislative functions, but they are all derived from, or exist in, subordination to one or the other of these. The territorial governments owe all their powers to the statutes of the United States conferring on them the powers which they exercise, and which are liable to be withdrawn, modified, or repealed at any time by Congress. What authority the State governments may have to enact criminal laws for the Indians will be presently considered. But this power of Congress to organize territorial governments, and make laws for their inhabitants, arises not so much from the clause in the Constitution in regard to disposing of and making rules and regulations concerning the Territory and other property of the United States, as from the ownership of the country in which the Territories are, and the right of

exclusive sovereignty which must exist in the national government, and can be found nowhere else. *Murphy* v. *Ramsey*, 114 U. S. 15, 44.

In the case of *American Ins. Co.* v. *Canter*, 1 Pet. 511, 542, in which the condition of the people of Florida, then under a territorial government, was under consideration, Marshall, Chief Justice, said: "Perhaps the power of governing a Territory belonging to the United States, which has not, by becoming a State, acquired the means of self-government, may result necessarily from the fact that it is not within the jurisdiction of any particular State, and is within the power and jurisdiction of the United States. The right to govern may be the inevitable consequence of the right to acquire territory. Whichever may be the source whence the power is derived, the possession of it is unquestioned."

In the case of the *United States* v. *Rogers*, 4 How. 567, 572, where a white man pleaded in abatement to an indictment for murder committed in the country of the Cherokee Indians, that he had been adopted by and become a member of the Cherokee tribe, Chief Justice Taney said: "The country in which the crime is charged to have been committed is a part of the territory of the United States, and not within the limits of any particular State. It is true it is occupied by the Cherokee Indians. But it has been assigned to them by the United States as a place of domicil for the tribe, and they hold with the assent of the United States, and under their authority." After referring to the policy of the European nations and the United States in asserting dominion over all the country discovered by them, and the justice of this course, he adds: "But had it been otherwise, and were the right and the propriety of exercising this power now open to question, yet it is a question for the law-making and political departments of the government, and not for the judicial. It is our duty to expound and execute the law as we find it, and we think it too firmly and clearly established to admit of dispute, that the Indian tribes, residing within the territorial limits of the United States, are subject to their authority, and when the country occupied by one of them is not within the limits of one of the States, Congress may by law punish any offence committed there, no matter whether the offender be a white man or an Indian."

The Indian reservation in the case before us is land bought by the United States from Mexico by the treaty of Guadaloupe Hidalgo, and the whole of California, with the allegiance of its inhabitants, many of whom were Indians, was transferred by that treaty to the United States.

The relation of the Indian tribes living within the borders of the United States, both before and since the Revolution, to the people of the United States has always been an anomalous one and of a complex character.

Following the policy of the European governments in the discovery of America towards the Indians who were found here, the colonies before the Revolution and the States and the United States since, have recognized in the Indians a possessory right to the soil over which they

roamed and hunted and established occasional villages. But they asserted an ultimate title in the land itself, by which the Indian tribes were forbidden to sell or transfer it to other nations or peoples without the consent of this paramount authority. When a tribe wished to dispose of its land, or any part of it, or the State or the United States wished to purchase it, a treaty with the tribe was the only mode in which this could be done. The United States recognized no right in private persons, or in other nations, to make such a purchase by treaty or otherwise. With the Indians themselves these relations are equally difficult to define. They were, and always have been, regarded as having a semi-independent position when they preserved their tribal relations; not as States, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the State within whose limits they resided.

Perhaps the best statement of their position is found in the two opinions of this court by Chief Justice Marshall in the case of *The Cherokee Nation* v. *Georgia*, 5 Pet. 1, and in the case of *Worcester* v. *State of Georgia*, 6 Pet. 515, 536. These opinions are exhaustive; and in the separate opinion of Mr. Justice Baldwin, in the former, is a very valuable resumé of the treaties and statutes concerning the Indian tribes previous to and during the confederation.

In the first of the above cases it was held that these tribes were neither States nor nations, had only some of the attributes of sovereignty, and could not be so far recognized in that capacity as to sustain a suit in the Supreme Court of the United States. In the second case it was said that they were not subject to the jurisdiction asserted over them by the State of Georgia, which, because they were within its limits, where they had been for ages, had attempted to extend her laws and the jurisdiction of her courts over them.

In the opinions in these cases they are spoken of as "wards of the nation," "pupils," as local dependent communities. In this spirit the United States has conducted its relations to them from its organization to this time. But, after an experience of a hundred years of the treaty-making system of government, Congress has determined upon a new departure — to govern them by Acts of Congress. This is seen in the Act of March 3, 1871, embodied in § 2079 of the Revised Statutes:

"No Indian nation or tribe, within the territory of the United States, shall be acknowledged or recognized as an independent nation, tribe, or power, with whom the United States may contract by treaty; but no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March third, eighteen hundred and seventy-one, shall be hereby invalidated or impaired."

The case of *Crow Dog*, 109 U. S. 556, in which an agreement with the Sioux Indians, ratified by an Act of Congress, was supposed to extend over them the laws of the United States and the jurisdiction of

its courts, covering murder and other grave crimes, shows the purpose of Congress in this new departure. The decision in that case admits that if the intention of Congress had been to punish, by the United States courts, the murder of one Indian by another, the law would have been valid. But the court could not see, in the agreement with the Indians sanctioned by Congress, a purpose to repeal § 2146 of the Revised Statutes, which expressly excludes from that jurisdiction the case of a crime committed by one Indian against another in the Indian country. The passage of the Act now under consideration was designed to remove that objection, and to go further by including such crimes on reservations lying within a State.

Is this latter fact a fatal objection to the law? The statute itself contains no express limitation upon the powers of a State or the jurisdiction of its courts. If there be any limitation in either of these, it grows out of the implication arising from the fact that Congress has defined a crime committed within the State, and made it punishable in the courts of the United States. But Congress *has* done this, and *can* do it, with regard to all offences relating to matters to which the Federal authority extends. Does that authority extend to this case?

It will be seen at once that the nature of the offence (murder) is one which in almost all cases of its commission is punishable by the laws of the States, and within the jurisdiction of their courts. The distinction is claimed to be that the offence under the statute is committed by an Indian, that it is committed on a reservation set apart within the State for residence of the tribe of Indians by the United States, and the fair inference is that the offending Indian shall belong to that or some other tribe. It does not interfere with the process of the State courts within the reservation, nor with the operation of State laws upon white people found there. Its effect is confined to the acts of an Indian of some tribe, of a criminal character, committed within the limits of the reservation.

It seems to us that this is within the competency of Congress. These Indian tribes *are* the wards of the nation. They are communities *dependent* on the United States. Dependent largely for their daily food. Dependent for their political rights. They owe no allegiance to the States, and receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the Federal government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive and by Congress, and by this court, whenever the question has arisen.

In the case of *Worcester* v. *The State of Georgia*, above cited, it was held that, though the Indians had by treaty sold their land within that State, and agreed to remove away, which they had failed to do, the State could not, while they remained on those lands, extend its laws, criminal and civil, over the tribes; that the duty and power to compel

their removal was in the United States, and the tribe was under their protection, and could not be subjected to the laws of the State and the process of its courts.

The same thing was decided in the case of *Fellows* v. *Blacksmith & Others*, 19 How. 366. In this case, also, the Indians had sold their lands under supervision of the States of Massachusetts and of New York, and had agreed to remove within a given time. When the time came a suit to recover some of the land was brought in the Supreme Court of New York, which gave judgment for the plaintiff. But this court held, on writ of error, that the State could not enforce this removal, but the duty and the power to do so was in the United States. See also the case of the *Kansas Indians*, 5 Wall. 737; *New York Indians*, 5 Wall. 761.

The power of the general government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that government, because it never has existed anywhere else, because the theatre of its exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its laws on all the tribes.

We answer the questions propounded to us, that the 9th section of the Act of March, 1885, *is a valid law in both its branches, and that the Circuit Court of the United States for the District of California has jurisdiction of the offence charged in the indictment in this case.*[1]

[1] See also *Gon-shay-ee*, Pet'r, 130 U. S. 343 (1889), and *U. S.* v. *Osborne*, 6 Sawyer, U. S. C. C. Rep. (Oregon) 406 (1880).

The legal and political condition of the tribal Indians was carefully treated, in 1891, in two articles entitled "A People without Law," in the October and November numbers of the "Atlantic Monthly," Vol. 68, pp. 540, 676. Of the leading modern statutes, of general application, relating to these people, it is there said (p. 676): "Three important laws regarding the Indians remain to be mentioned, one of which was incorporated in the Revised Statutes.

"(*a*) A statute of March 3, 1871, reads: 'No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty,' — saving, however, the obligation of previous treaties. . . . Yet we do make 'agreements' with them as with a separate people; and the chief result of this law is, and was intended to be, that it is no longer the President and Senate (the treaty-making power) that conclude these measures, but the legislative body, Congress. This statute was the result of a struggle on the part of the House of Representatives to share in these proceedings, and was forced upon the Senate on the last day of a session by putting it into an appropriation bill. It was thought at the time by so competent an observer as General Walker, formerly Commissioner of Indian Affairs, to be 'a deadly blow at the tribal autonomy;' and so it was, in the logic of it. But the step was not then followed up, for it did not represent any clear determination of Congress to end the old methods; and this strange notion of refusing to make treaties with a people with whom we continue to go to war has remained on our statute-book as another of the many anomalies that mark our Indian policy. . . .

"(*b*) The second statute is that of March 3, 1885. It followed up timidly the logic of the law of 1871, though for only a step or two; but it marked the greatest advance yet

reached in the process of assuming the direct government of the Indians. The law provided that thereafter Indians should be punished for committing upon Indians or others any one of seven leading crimes (murder, manslaughter, assault with intent to kill, rape, arson, burglary, or larceny): if in a Territory (whether on or off a reservation), under the territorial laws and in the territorial courts; and if in a State and on a reservation, then under the same laws and in the same courts as if the act were done in a place within the exclusive jurisdiction of the United States. This is a very important statute. In principle it claims for the United States full jurisdiction over the Indians upon their reservations, whether in a State or Territory. Heretofore, the laws, for example, the statute of 1817 and the renewals of it, had excepted the acts of Indians committed upon their fellows within the Indian country. The acts of Indians against white persons or of whites against Indians had been dealt with, but the internal economy of Indian government was not invaded in its dealing or refusing to deal with the relations of members of the tribe to one another. The constitutionality, even, of such legislation as this of 1885 had been denied. Judges had been careful to avoid asserting this full power in cases where the reservation was in a State. Thus the Supreme Court of the United States, in 1845, in holding good the law of 1817, which punished (in this particular case) the act of a white man against a white man in the Indian country, among the Cherokees, said: 'Where the country occupied by them is not within the limits of one of the States, Congress may by law punish any offence committed there, no matter whether the offender be a white man or an Indian.' In 1834, Mr. Justice McLean had denied the power of Congress to legislate in this way for an Indian reservation in a State, while admitting it in a Territory; and in December, 1870, the judiciary committee of the Senate of the United States even went so far as to say, 'An Act of Congress which should assume to treat the members of a tribe as subject to the municipal jurisdiction of the United States would be unconstitutional and void.' But the air was at last cleared in 1886, when the Supreme Court of the United States had to deal with the indictment, under this statute, of one Indian for the murder of another Indian on a reservation in the State of California. . . .

"The existence of this right and power, and the clear and authoritative declaration of it by the Supreme Court of the United States for the first time in 1886, have brought home to the Congress of the United States and to us all, now within these recent years, a great weight of responsibility. It may have been thought possible before to deny the legal power fully to govern the Indians. It cannot be denied now. Under such circumstances, the mere neglect or refusal to act is itself action, and action of the worst kind.

"(c) The third and last of these statutes — and the last upon which I shall comment — is the General Land-in-Severalty Law (often known as the Dawes Bill). This was passed in February, 1887, within nine months of the great decision upon which I have just been remarking: the dates are May 10, 1886, and February 8, 1887. But it was pending in Congress at the time of that decision, and had long been pending there under bitter opposition. This great enactment opens the way, within a generation or two, to settle the whole Indian question. Whether it is to be regarded as a good law or a bad one, however, depends on the moderation with which it is administered. The peculiarity of it is not that its methods are new, for similar arrangements had repeatedly been made, for a score of years before, in the case of particular tribes, as the Winnebagoes in 1863, the Stockbridge Munsee Indians in 1871, the Utes in 1880, and the Omahas in 1882. But now, by a general law applicable to all reservations, the President is given power to make almost every reservation Indian outside the civilized tribes a land-owner in severalty and a citizen of the United States *against his will*. The right of citizenship is made to follow the ownership of land."

See also a valuable article on "The Legal Status of the Indian," by George F. Canfield, Esq., now of the Bar of the City of New York, in 15 Am. Law Rev. 21 (1881). — Ed.

DEN d. MURRAY ET AL. v. THE HOBOKEN LAND, ETC. COMPANY.

SUPREME COURT OF THE UNITED STATES. 1855.

[18 *How.* 272.] [1]

Mr. Van Winkle and *Mr. Wood*, for the plaintiffs. *Mr. Zabriskie*, *Mr. Gillett*, *Mr. Butler*, and *Mr. Bradley*, for the defendants.

MR. JUSTICE CURTIS delivered the opinion of the court.

This case comes before us on a certificate of division of opinion of the judges of the Circuit Court of the United States for the District of New Jersey. It is an action of ejectment, in which both parties claim title under Samuel Swartwout — the plaintiffs, under the levy of an execution on the 10th day of April, 1839, and the defendants, under a sale made by the marshal of the United States for the District of New Jersey, on the 1st day of June, 1839 — by virtue of what is denominated a distress warrant, issued by the solicitor of the treasury under the Act of Congress of May 15, 1820, entitled, "An Act providing for the Better Organization of the Treasury Department." This Act having provided, by its first section, that a lien for the amount due should exist on the lands of the debtor from the time of the levy and record thereof in the office of the District Court of the United States for the proper district, and the date of that levy in this case being prior to the date of the judgment under which the plaintiffs' title was made, the question occurred in the Circuit Court, "whether the said warrant of distress in the special verdict mentioned, and the proceedings thereon and anterior thereto, under which the defendants claim title, are sufficient, under the Constitution of the United States and the law of the land, to pass and transfer the title and estate of the said Swartwout in and to the premises in question, as against the lessors of the plaintiff." Upon this question, the judges being of opposite opinions, it was certified to this court, and has been argued by counsel.

No objection has been taken to the warrant on account of any defect or irregularity in the proceedings which preceded its issue. It is not denied that they were in conformity with the requirements of the Act of Congress. The special verdict finds that Swartwout was collector of the customs for the port of New York for eight years before the 29th of March, 1838: that, on the 10th of November, 1838, his account, as such collector, was audited by the first auditor, and certified by the first comptroller of the treasury; and for the balance thus found, amounting to the sum of $1,374,119 $\frac{88}{100}$, the warrant in question was issued by the solicitor of the treasury. Its validity is denied by the plaintiffs, upon the ground that so much of the Act of Congress as authorized it, is in conflict with the Constitution of the United States.

[1] The statement of facts is omitted. — ED.

In support of this position, the plaintiff relies on that part of the first section of the third article of the Constitution which requires the judicial power of the United States to be vested in one Supreme Court and in such inferior courts as Congress may, from time to time, ordain and establish; the judges whereof shall hold their offices during good behavior, and shall, at stated times, receive for their services a compensation, which shall not be diminished during their continuance in office. Also, on the second section of the same article, which declares that the judicial power shall extend to controversies to which the United States shall be a party.

It must be admitted that, if the auditing of this account, and the ascertainment of its balance, and the issuing of this process, was an exercise of the judicial power of the United States, the proceeding was void; for the officers who performed these Acts could exercise no part of that judicial power. They neither constituted a court of the United States, nor were they, or either of them, so connected with any such court as to perform even any of the ministerial duties which arise out of judicial proceedings.

The question, whether these Acts were an exercise of the judicial power of the United States, can best be considered under another inquiry, raised by the further objection of the plaintiff, that the effect of the proceedings authorized by the Act in question is to deprive the party, against whom the warrant issues, of his liberty and property, "without due process of law;" and, therefore, is in conflict with the fifth article of the amendments of the Constitution.

Taking these two objections together, they raise the questions, whether, under the Constitution of the United States, a collector of the customs, from whom a balance of account has been found to be due by accounting officers of the treasury, designated for that purpose by law, can be deprived of his liberty, or property, in order to enforce payment of that balance, without the exercise of the judicial power of the United States, and yet by due process of law, within the meaning of those terms in the Constitution; and if so, then, secondly, whether the warrant in question was such due process of law?

The words, "due process of law," were undoubtedly intended to convey the same meaning as the words, "by the law of the land," in Magna Charta. Lord Coke, in his commentary on those words (2 Inst. 50), says they mean due process of law. The constitutions which had been adopted by the several States before the formation of the Federal Constitution, following the language of the great charter more closely, generally contained the words, "but by the judgment of his peers, or the law of the land." The ordinance of Congress of July 13, 1787, for the government of the territory of the United States northwest of the river Ohio, used the same words.

The Constitution of the United States, as adopted, contained the provision, that "the trial of all crimes, except in cases of impeachment, shall be by jury." When the fifth article of amendment contain-

ing the words now in question was made, the trial by jury in criminal cases had thus already been provided for. By the sixth and seventh articles of amendment, further special provisions were separately made for that mode of trial in civil and criminal cases. To have followed, as in the State constitutions, and in the ordinance of 1787, the words of Magna Charta, and declared that no person shall be deprived of his life, liberty, or property but by the judgment of his peers or the law of the land, would have been in part superfluous and inappropriate. To have taken the clause, "law of the land," without its immediate context, might possibly have given rise to doubts, which would be effectually dispelled by using those words which the great commentator on Magna Charta had declared to be the true meaning of the phrase, "law of the land," in that instrument, and which were undoubtedly then received as their true meaning.

That the warrant now in question is legal process, is not denied. It was issued in conformity with an Act of Congress. But is it "due process of law"? The Constitution contains no description of those processes which it was intended to allow or forbid. It does not even declare what principles are to be applied to ascertain whether it be due process. It is manifest that it was not left to the legislative power to enact any process which might be devised. The article is a restraint on the legislative as well as on the executive and judicial powers of the government, and cannot be so construed as to leave Congress free to make any process "due process of law," by its mere will. To what principles, then, are we to resort to ascertain whether this process, enacted by Congress, is due process? To this the answer must be twofold. We must examine the Constitution itself, to see whether this process be in conflict with any of its provisions. If not found to be so, we must look to those settled usages and modes of proceeding existing in the common and statute law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country. We apprehend there has been no period, since the establishment of the English monarchy, when there has not been, by the law of the land, a summary method for the recovery of debts due to the Crown, and especially those due from receivers of the revenues. It is difficult, at this day, to trace with precision all the proceedings had for these purposes in the earliest ages of the common law. That they were summary and severe, and had been used for purposes of oppression, is inferable from the fact that one chapter of Magna Charta treats of their restraint. It declares: "We or our bailiffs shall not seize any land or rent for any debt as long as the present goods and chattels of the debtor do suffice to pay the debt; and the debtor himself be ready to satisfy therefor. Neither shall the pledges of the debtor be distrained, as long as the principal debtor is sufficient for the payment of the debt; and if the principal debtor fail in payment of the debt, having nothing wherewith to pay, or will

not pay where he is able, the pledges shall answer for the debt. And if they will, they shall have the lands and rents of the debtor until they be satisfied of the debt which they before paid for him, except that the principal debtor can show himself to be acquitted against the said sureties."

By the common law, the body, lands, and goods of the king's debtor were liable to be levied on to obtain payment. In conformity with the above provision of Magna Charta, a conditional writ was framed, commanding the sheriff to inquire of the goods and chattels of the debtor, and, if they were insufficient, then to extend on the lands. 3 Co. 12 *b;* Com. Dig., Debt, G. 2; 2 Inst. 19. But it is said that since the statute 33 Hen. VIII. c. 39, the practice has been to issue the writ in an absolute form, without requiring any previous inquisition as to the goods. Gilbert's Exch. 127.

To authorize a writ of extent, however, the debt must be matter of record in the king's exchequer. The 33 Hen. VIII. c. 39, §50, made all specialty debts due to the king of the same force and effect as debts by statute staple, thus giving to such debts the effect of debts of record. In regard to debts due upon simple contract, other than those due from collectors of the revenue and other accountants of the Crown, the practice, from very ancient times, has been to issue a commission to inquire as to the existence of the debt.

This commission being returned, the debt found was thereby evidenced by a record, and an extent could issue thereon. No notice was required to be given to the alleged debtor of the execution of this commission (2 Tidd's Pr. 1047), though it seems that, in some cases, an order for notice might be obtained. 1 Ves. 269. Formerly, no witnesses were examined by the commission (Chitty's Prerog. 267; West, 22); the affidavit prepared to obtain an order for an immediate extent being the only evidence introduced. But this practice has been recently changed. 11 Price, 29. By the statute 13 Eliz. ch. 4, balances due from receivers of the revenue and all other accountants of the Crown were placed on the same footing as debts acknowledged to be due by statute staple. These balances were found by auditors, the particular officers acting thereon having been, from time to time, varied by legislation and usage. The different methods of accounting in ancient and modern times are described in Mr. Price's Treatise on the Law and Practice of the Exchequer, ch. 9. Such balances, when found, were certified to what was called the pipe office, to be given in charge to the sheriffs for their levy. Price, 231.

If an accountant failed to render his accounts, a process was issued, termed a *capias nomine districtionis*, against the body, goods, and lands of the accountant. Price, 162, 233, note 3.

This brief sketch of the modes of proceeding to ascertain and enforce payment of balances due from receivers of the revenue in England, is sufficient to show that the methods of ascertaining the existence and amount of such debts, and compelling their payment, have varied

widely from the usual course of the common law on other subjects; and that, as respects such debts due from such officers, "the law of the land" authorized the employment of auditors, and an inquisition without notice, and a species of execution bearing a very close resemblance to what is termed a warrant of distress in the Act of 1820, now in question.

It is certain that this diversity in "the law of the land" between public defaulters and ordinary debtors was understood in this country, and entered into the legislation of the colonies and provinces, and more especially of the States, after the Declaration of Independence and before the formation of the Constitution of the United States. Not only was the process of distress in nearly or quite universal use for the collection of taxes, but what was generally termed a warrant of distress, running against the body, goods, and chattels of defaulting receivers of public money, was issued to some public officer, to whom was committed the power to ascertain the amount of the default, and by such warrant proceed to collect it. Without a wearisome repetition of details, it will be sufficient to give one section from the Massachusetts Act of 1786: "That if any constable or collector, to whom any tax or assessment shall be committed to collect, shall be remiss and negligent of his duty, in not levying and paying unto the treasurer and receiver-general such sum or sums of money as he shall from time to time have received, and as ought by him to have been paid within the respective time set and limited by the assessor's warrant, pursuant to law, the treasurer and receiver-general is hereby empowered, after the expiration of the time so set, by warrant under his hand and seal, directed to the sheriff or his deputy, to cause such sum and sums of money to be levied by distress and sale of such deficient constable or collector's estate, real and personal, returning the overplus, if any there be; and, for want of such estate, to take the body of such constable or collector, and imprison him until he shall pay the same; which warrant the sheriff or his deputy is hereby empowered and required to execute accordingly." Then follows another provision, that if the deficient sum shall not be made by the first warrant, another shall issue against the town; and if its proper authorities shall fail to take the prescribed means to raise and pay the same, a like warrant of distress shall go against the estates and bodies of the assessors of such town. Laws of Massachusetts, vol. i. p. 266. Provisions not distinguishable from these in principle may be found in the Acts of Connecticut, Revision of 1784, p. 198; of Pennsylvania, 1782, 2 Laws of Penn. 13; of South Carolina, 1788, 5 Stats. of S. C. 55; New York, 1788, 1 Jones & Varick's Laws, 34; see also 1 Henning's Stats. of Virginia, 319, 343; 12 Ibid. 562; Laws of Vermont, 1797, 1800, 340. Since the formation of the Constitution of the United States, other States have passed similar laws. See 7 Louis. An. R. 192. Congress, from an early period, and in repeated instances, has legislated in a similar manner. By the fifteenth section of the "Act to lay and collect a direct tax

within the United States," of July 14, 1798, the supervisor of each district was authorized and required to issue a warrant of distress against any delinquent collector and his sureties, to be levied upon the goods and chattels, and for want thereof upon the body of such collector; and, failing of satisfaction thereby, upon the goods and chattels of the sureties. 1 Stats. at Large, 602. And again, in 1813, 3 Stats. at Large, 33, § 28, and 1815, 3 Stats. at Large, 177, § 33, the comptroller of the treasury was empowered to issue a similar warrant against collectors of the customs and their sureties. This legislative construction of the Constitution, commencing so early in the government, when the first occasion for this manner of proceeding arose, continued throughout its existence, and repeatedly acted on by the judiciary and the executive, is entitled to no inconsiderable weight upon the question whether the proceeding adopted by it was "due process of law." *Prigg* v. *Pennsylvania*, 16 Pet. 621; *United States* v. *Nourse*, 9 Pet. 8; *Randolph's Case*, 2 Brock. 447; *Nourse's Case*, 4 Cranch, C. C. R. 151; *Bullock's Case*, cited 6 Pet. 485, note.

Tested by the common and statute law of England prior to the emigration of our ancestors, and by the laws of many of the States at the time of the adoption of this amendment, the proceedings authorized by the Act of 1820 cannot be denied to be due process of law, when applied to the ascertainment and recovery of balances due to the government from a collector of customs, unless there exists in the Constitution some other provision which restrains Congress from authorizing such proceedings. For, though "due process of law" generally implies and includes, *actor*, *reus*, *judex*, regular allegations, opportunity to answer, and a trial according to some settled course of judicial proceedings (2 Inst. 47, 50; *Hoke* v. *Henderson*, 4 Dev. N. C. Rep. 15; *Taylor* v. *Porter*, 4 Hill, 146; *Van Zandt* v. *Waddel*, 2 Yerger, 260; *State Bank* v. *Cooper*, Ibid. 599; *Jones's Heirs* v. *Perry*, 10 Ibid. 59; *Greene* v. *Briggs*, 1 Curtis, 311), yet, this is not universally true. There may be, and we have seen that there are, cases, under the law of England after Magna Charta, and as it was brought to this country and acted on here, in which process, in its nature final, issues against the body, lands, and goods of certain public debtors without any such trial; and this brings us to the question, whether those provisions of the Constitution which relate to the judicial power are incompatible with these proceedings?

That the auditing of the accounts of a receiver of public moneys may be, in an enlarged sense, a judicial act, must be admitted. So are all those administrative duties the performance of which involves an inquiry into the existence of facts and the application to them of rules of law. In this sense the act of the President in calling out the militia under the Act of 1795, 12 Wheat. 19, or of a commissioner who makes a certificate for the extradition of a criminal, under a treaty, is judicial. But it is not sufficient to bring such matters under the judicial power, that they involve the exercise of judgment upon law and fact. *United*

States v. *Ferreira*, 13 How. 40. It is necessary to go further, and show not only that the adjustment of the balances due from accounting officers may be, but from their nature must be, controversies to which the United States is a party, within the meaning of the second section of the third article of the Constitution. We do not doubt the power of Congress to provide by law that such a question shall form the subject-matter of a suit in which the judicial power can be exerted. The Act of 1820 makes such a provision for reviewing the decision of the accounting officers of the treasury. But, until reviewed, it is final and binding; and the question is, whether its subject-matter is necessarily, and without regard to the consent of Congress, a judicial controversy. And we are of opinion it is not.

Among the legislative powers of Congress are the powers "to lay and collect taxes, duties, imposts, and excises, to pay the debts, and provide for the common defence and welfare of the United States; to raise and support armies; to provide and maintain a navy; and to make all laws which may be necessary and proper for carrying into execution those powers." What officers should be appointed to collect the revenue thus authorized to be raised, and to disburse it in payment of the debts of the United States; what duties should be required of them; when and how, and to whom they should account, and what security they should furnish, and to what remedies they should be subjected to enforce the proper discharge of their duties, Congress was to determine. In the exercise of their powers, they have required collectors of customs to be appointed; made it incumbent on them to account, from time to time, with certain officers of the treasury department, and to furnish sureties, by bond, for the payment of all balances of the public money which may become due from them. And by the Act of 1820, now in question, they have undertaken to provide summary means to compel these officers — and in case of their default, their sureties — to pay such balances of the public money as may be in their hands.

The power to collect and disburse revenue, and to make all laws which shall be necessary and proper for carrying that power into effect, includes all known and appropriate means of effectually collecting and disbursing that revenue, unless some such means should be forbidden in some other part of the Constitution. The power has not been exhausted by the receipt of the money by the collector. Its purpose is to raise money and use it in payment of the debts of the government: and, whoever may have possession of the public money, until it is actually disbursed, the power to use those known and appropriate means to secure its due application continues.

As we have already shown, the means provided by the Act of 1820, do not differ in principle from those employed in England from remote antiquity — and in many of the States, so far as we know without objection — for this purpose, at the time the Constitution was formed. It may be added, that probably there are few governments which do or can permit their claims for public taxes, either on the citizen or the

officer employed for their collection or disbursement, to become subjects of judicial controversy, according to the course of the law of the land. Imperative necessity has forced a distinction between such claims and all others, which has sometimes been carried out by summary methods of proceeding, and sometimes by systems of fines and penalties, but always in some way observed and yielded to.

It is true that in England all these proceedings were had in what is denominated the Court of Exchequer, in which Lord Coke says, 4 Inst. 115, the barons are the sovereign auditors of the kingdom. But the barons exercise in person no judicial power in auditing accounts, and it is necessary to remember that the Exchequer includes two distinct organizations, one of which has charge of the revenues of the Crown, and the other has long been in fact, and now is for all purposes, one of the judicial courts of the kingdom, whose proceedings are and have been as distinct, in most respects, from those of the revenue side of the Exchequer, as the proceedings of the Circuit Court of this district are from those of the treasury; and it would be an unwarrantable assumption to conclude that, because the accounts of receivers of revenue were settled in what was denominated the Court of Exchequer, they were judicial controversies between the king and his subjects, according to the ordinary course of the common law or equity. The fact, as we have already seen, was otherwise.

It was strongly urged by the plaintiff's counsel, that though the government might have the rightful power to provide a summary remedy for the recovery of its public dues, aside from any exercise of the judicial power, yet it had not done so in this instance. That it had enabled the debtor to apply to the judicial power, and having thus brought the subject-matter under its cognizance, it was not for the government to say that the subject-matter was not within the judicial power. That if it were not in its nature a judicial controversy, Congress could not make it such, nor give jurisdiction over it to the district courts. In short, the argument is, that if this were not, in its nature, a judicial controversy, Congress could not have conferred on the district court power to determine it upon a bill filed by the collector. If it be such a controversy, then it is subject to the judicial power alone; and the fact that Congress has enabled the district court to pass upon it, is conclusive evidence that it is a judicial controversy.

We cannot admit the correctness of the last position. If we were of opinion that this subject-matter cannot be the subject of a judicial controversy, and that, consequently, it cannot be made a subject of judicial cognizance, the consequence would be, that the attempt to bring it under the jurisdiction of a court of the United States would be ineffectual. But the previous proceedings of the executive department would not necessarily be affected thereby. They might be final, instead of being subject to judicial review.

But the argument leaves out of view an essential element in the case, and also assumes something which cannot be admitted.

It assumes that the entire subject-matter is or is not, in every mode of presentation, a judicial controversy, essentially and in its own nature, aside from the will of Congress to permit it to be so; and it leaves out of view the fact that the United States is a party.

It is necessary to take into view some settled rules.

Though, generally, both public and private wrongs are redressed through judicial action, there are more summary extra-judicial remedies for both. An instance of extra-judicial redress of a private wrong is, the recapture of goods by their lawful owner; of a public wrong, by a private person, is the abatement of a public nuisance; and the recovery of public dues by a summary process of distress, issued by some public officer authorized by law, is an instance of redress of a particular kind of public wrong, by the act of the public through its authorized agents. There is, however, an important distinction between these. Though a private person may retake his property, or abate a nuisance, he is directly responsible for his acts to the proper judicial tribunals. His authority to do these acts depends not merely on the law, but upon the existence of such facts as are, in point of law, sufficient to constitute that authority; and he may be required, by an action at law, to prove those facts; but a public agent, who acts pursuant to the command of a legal precept, can justify his act by the production of such precept. He cannot be made responsible in a judicial tribunal for obeying the lawful command of the government; and the government itself, which gave the command, cannot be sued without its own consent.

At the same time there can be no doubt that the mere question, whether a collector of the customs is indebted to the United States, may be one of judicial cognizance. It is competent for the United States to sue any of its debtors in a court of law. It is equally clear that the United States may consent to be sued, and may yield this consent upon such terms and under such restrictions as it may think just. Though both the marshal and the government are exempt from suit, for anything done by the former in obedience to legal process, still, Congress may provide by law, that both, or either, shall, in a particular class of cases, and under such restrictions as they may think proper to impose, come into a court of law or equity and abide by its determination. The United States may thus place the government upon the same ground which is occupied by private persons who proceed to take extra-judicial remedies for their wrongs, and they may do so to such extent, and with such restrictions, as may be thought fit.

When, therefore, the Act of 1820 enacts, that after the levy of the distress warrant has been begun, the collector may bring before a district court the question, whether he is indebted as recited in the warrant, it simply waives a privilege which belongs to the government, and consents to make the legality of its future proceedings dependent on the judgment of the court; as we have already stated in case of a private person, every fact upon which the legality of the extra-judicial

remedy depends may be drawn in question by a suit against him. The United States consents that this fact of indebtedness may be drawn in question by a suit against them. Though they might have withheld their consent, we think that, by granting it, nothing which may not be a subject of judicial cognizance is brought before the court.

To avoid misconstruction upon so grave a subject, we think it proper to state that we do not consider Congress can either withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty; nor, on the other hand, can it bring under the judicial power a matter which, from its nature, is not a subject for judicial determination. At the same time there are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which Congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper. Equitable claims to land by the inhabitants of ceded territories form a striking instance of such a class of cases; and as it depends upon the will of Congress whether a remedy in the courts shall be allowed at all, in such cases, they may regulate it and prescribe such rules of determination as they may think just and needful. Thus it has been repeatedly decided in this class of cases, that upon their trial the acts of executive officers, done under the authority of Congress, were conclusive, either upon particular facts involved in the inquiry or upon the whole title. *Foley* v. *Harrison*, 15 How. 433; *Burgess* v. *Gray*, 16 How. 48; —— v. *The Minnesota Mining Company* at the present term.

It is true, also, that even in a suit between private persons to try a question of private right, the action of the executive power, upon a matter committed to its determination by the Constitution and laws, is conclusive. *Luther* v. *Borden*, 7 How. 1; *Doe* v. *Braden*, 16 How. 635.

To apply these principles to the case before us, we say that, though a suit may be brought against the marshal for seizing property under such a warrant of distress, and he may be put to show his justification; yet the action of the executive power in issuing the warrant, pursuant to the Act of 1820, passed under the powers to collect and disburse the revenue granted by the Constitution, is conclusive evidence of the facts recited in it, and of the authority to make the levy; that though no suit can be brought against the United States without the consent of Congress, yet Congress may consent to have a suit brought, to try the question whether the collector be indebted, that being a subject capable of judicial determination, and may empower a court to act on that determination, and restrain the levy of the warrant of distress within the limits of the debt judicially found to exist.

It was further urged that, by thus subjecting the proceeding to the determination of a court, it did conclusively appear that there was no such necessity for a summary remedy, by the action of the executive

power, as was essential to enable Congress to authorize this mode of proceeding.

But it seems to us that the just inference from the entire law is, that there was such a necessity for the warrant and the commencement of the levy, but not for its completion, if the collector should interpose, and file his bill and give security. The provision that he may file his bill and give security, and thus arrest the summary proceedings, only proves that Congress thought it not necessary to pursue them, after such security should be given, until a decision should be made by the court. It has no tendency to prove they were not, in the judgment of Congress, of the highest necessity under all other circumstances; and of this necessity Congress alone is the judge.

The remaining objection to this warrant is, that it was issued without the support of an oath or affirmation, and so was forbidden by the fourth article of the amendments of the Constitution. But this article has no reference to civil proceedings for the recovery of debts, of which a search-warrant is not made part. The process, in this case, is termed, in the Act of Congress, a warrant of distress. The name bestowed upon it cannot affect its constitutional validity. In substance, it is an extent authorizing a levy for the satisfaction of a debt; and as no other authority is conferred, to make searches or seizures, than is ordinarily embraced in every execution issued upon a recognizance, or a stipulation in the admiralty, we are of opinion it was not invalid for this cause.[1] . . .

DAVIDSON *v.* NEW ORLEANS.

SUPREME COURT OF THE UNITED STATES. 1877.

[96 *U. S.* 97.]

ERROR to the Supreme Court of the State of Louisiana.

On the 7th of December, 1871, the petition of the city of New Orleans and the administrators thereof was filed in the Seventh District Court for the parish of Orleans, setting forth an assessment on certain real estate, made under the statutes of Louisiana, for draining the swamp lands within the parishes of Carroll and Orleans; and asking that the assessment should be homologated by the judgment of the court. The estate of John Davidson was assessed for various parcels in different places for about $50,000. His widow and testamentary executrix appeared in that court and filed exceptions to the assessment: and the court refused the order of homologation, and set aside the entire assessment, with leave to the plaintiffs to present a new tableau.

On appeal from this decree, the Supreme Court of Louisiana reversed it, and ordered the dismissal of the oppositions, and decreed that the

[1] And so *Palmer* v. *McMahon*, 133 U. S. 660, 669 (1889). — ED.

assessment-roll presented be approved and homologated, and that the approval and homologation so ordered should operate as a judgment against the property described in the assessment-roll, and also against the owner or owners thereof. Mrs. Davidson then sued out the writ of error by which this judgment is now brought here for review.

Mr. James D. Hill and *Mr. John D. McPherson*, for the plaintiff in error.

Mr. Philip Phillips, *contra*.

Mr. Justice Miller delivered the opinion of the court.

The objections raised in the State courts to the assessment were numerous and varied, including constitutional objections to the statute under which the assessment was made, and alleged departures from the requirements of the statute itself. And although counsel for the plaintiff in error concede, in the first sentence of their brief, that the only Federal question is, whether the judgment is not in violation of that provision of the Constitution which declares that "no State shall deprive any person of life, liberty, or property without due process of law," the argument seems to suppose that this court can correct any other error which may be found in the record.

1. It is said that the legislature had no right to organize a private corporation to do the work, and, by statute, to fix the price at which the work should be done.

2. That the price so fixed is exorbitant.

3. That there may be a surplus collected under the assessment beyond what is needed for the work, which must in that event go into the city treasury.

Can it be necessary to say, that if the work was one which the State had authority to do, and to pay for it by assessments on the property interested, that on such questions of method and detail as these the exercise of the power is not regulated or controlled by the Constitution of the United States?

Of a similar character is the objection much insisted on, that, under the statute, the assessment is actually made before, instead of after, the work is done. As a question of wisdom, — of judicious economy, — it would seem better in this, as in other works which require the expenditure of large sums of money, to secure the means of payment before becoming involved in the enterprise; and if this is not due process of law, it ought to be.

There are other objections urged by counsel which may be referred to hereafter, but we pause here to consider a moment the clause of the Constitution relied on by plaintiff in error. It is part of sect. 1 of the Fourteenth Amendment. The section consists of two sentences. The first defines citizenship of the States and of the United States. The next reads as follows: —

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due pro-

cess of law, nor deny to any person within its jurisdiction the equal protection of the law."

The section was the subject of very full and mature consideration in *Slaughter-House Cases*, 16 Wall. 36. In those cases, an Act of the Louisiana Legislature, which had granted to a corporation created for the purpose the exclusive right to erect and maintain a building for the slaughter of live animals within the city, was assailed as being in conflict with this section. The right of the State to use a private corporation and confer upon it the necessary powers to carry into effect sanitary regulations was affirmed, and the decision is applicable to a similar objection in the case now before us. The argument of counsel and the opinion of the court in those cases were mainly directed to that part of the section which related to the privileges and immunities of citizens; and, as the court said in the opinion, the argument was not much pressed, that the statute deprived the butchers of their property without due process of law. The court held that the provision was inapplicable to the case.

The prohibition against depriving the citizen or subject of his life, liberty, or property without due process of law, is not new in the constitutional history of the English race. It is not new in the constitutional history of this country, and it was not new in the Constitution of the United States when it became a part of the Fourteenth Amendment, in the year 1866.

The equivalent of the phrase "due process of law," according to Lord Coke, is found in the words "law of the land," in the Great Charter, in connection with the writ of *habeas corpus*, the trial by jury, and other guarantees of the rights of the subject against the oppression of the Crown. In the series of amendments to the Constitution of the United States, proposed and adopted immediately after the organization of the government, which were dictated by the jealousy of the States as further limitations upon the power of the Federal government, it is found in the fifth, in connection with other guarantees of personal rights of the same character. Among these are protection against prosecutions for crimes, unless sanctioned by a grand jury; against being twice tried for the same offence; against the accused being compelled, in a criminal case, to testify against himself; and against taking private property for public use without just compensation.

Most of these provisions, including the one under consideration, either in terms or in substance, have been embodied in the constitutions of the several States, and in one shape or another have been the subject of judicial construction.

It must be confessed, however, that the constitutional meaning or value of the phrase "due process of law," remains to-day without that satisfactory precision of definition which judicial decisions have given to nearly all the other guarantees of personal rights found in the constitutions of the several States and of the United States.

It is easy to see that when the great barons of England wrung from

King John, at the point of the sword, the concession that neither their lives nor their property should be disposed of by the Crown, except as provided by the law of the land, they meant by "law of the land" the ancient and customary laws of the English people, or laws enacted by the Parliament of which those barons were a controlling element. It was not in their minds, therefore, to protect themselves against the enactment of laws by the Parliament of England. But when, in the year of grace 1866, there is placed in the Constitution of the United States a declaration that "no State shall deprive any person of life, liberty, or property without due process of law," can a State make anything due process of law which, by its own legislation, it chooses to declare such? To affirm this is to hold that the prohibition to the States is of no avail, or has no application where the invasion of private rights is effected under the forms of State legislation. It seems to us that a statute which declares in terms, and without more, that the full and exclusive title of a described piece of land, which is now in A., shall be and is hereby vested in B., would, if effectual, deprive A. of his property without due process of law, within the meaning of the constitutional provision.

A most exhaustive judicial inquiry into the meaning of the words "due process of law," as found in the Fifth Amendment, resulted in the unanimous decision of this court, that they do not necessarily imply a regular proceeding in a court of justice, or after the manner of such courts. *Murray's Lessee et al.* v. *Hoboken Land and Improvement Co.*, 18 How. 272. . . . [Here follows a statement of this case.]

It is not a little remarkable, that while this provision has been in the Constitution of the United States, as a restraint upon the authority of the Federal government, for nearly a century, and while, during all that time, the manner in which the powers of that government have been exercised has been watched with jealousy, and subjected to the most rigid criticism in all its branches, this special limitation upon its powers has rarely been invoked in the judicial forum or the more enlarged theatre of public discussion. But while it has been a part of the Constitution, as a restraint upon the power of the States, only a very few years, the docket of this court is crowded with cases in which we are asked to hold that State courts and State legislatures have deprived their own citizens of life, liberty, or property without due process of law. There is here abundant evidence that there exists some strange misconception of the scope of this provision as found in the Fourteenth Amendment. In fact, it would seem, from the character of many of the cases before us, and the arguments made in them, that the clause under consideration is looked upon as a means of bringing to the test of the decision of this court the abstract opinions of every unsuccessful litigant in a State court of the justice of the decision against him, and of the merits of the legislation on which such a decision may be founded. If, therefore, it were possible to define what it is for a State to deprive a person of life, liberty, or property without due process of law, in terms

which would cover every exercise of power thus forbidden to the State, and exclude those which are not, no more useful construction could be furnished by this or any other court to any part of the fundamental law.

But, apart from the imminent risk of a failure to give any definition which would be at once perspicuous, comprehensive, and satisfactory, there is wisdom, we think, in the ascertaining of the intent and application of such an important phrase in the Federal Constitution, by the gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require, with the reasoning on which such decisions may be founded. This court is, after an experience of nearly a century, still engaged in defining the obligation of contracts, the regulation of commerce, and other powers conferred on the Federal government, or limitations imposed upon the States.

As contributing, to some extent, to this mode of determining what class of cases do not fall within its provision, we lay down the following proposition, as applicable to the case before us: —

That whenever by the laws of a State, or by State authority, a tax, assessment, servitude, or other burden is imposed upon property for the public use, whether it be for the whole State or of some more limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed, in the ordinary courts of justice, with such notice to the person, or such proceeding in regard to the property as is appropriate to the nature of the case, the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections.

It may violate some provision of the State Constitution against unequal taxation; but the Federal Constitution imposes no restraints on the States in that regard. If private property be taken for public uses without just compensation, it must be remembered that, when the Fourteenth Amendment was adopted, the provision on that subject, in immediate juxtaposition in the Fifth Amendment with the one we are construing, was left out, and this was taken. It may possibly violate some of those principles of general constitutional law, of which we could take jurisdiction if we were sitting in review of a circuit court of the United States, as we were in *Loan Association* v. *Topeka*, 20 Wall. 655. But however this may be, or under whatever other clause of the Federal Constitution we may review the case, it is not possible to hold that a party has, without due process of law, been deprived of his property, when, as regards the issues affecting it, he has, by the laws of the State, a fair trial in a court of justice, according to the modes of proceeding applicable to such a case. This was clearly stated by this court, speaking by the Chief Justice, in *Kennard* v. *Morgan*, 92 U. S. 480, and, in substance, repeated at the present term, in *McMillan* v. *Anderson*, 95 U. S. 37.

This proposition covers the present case. Before the assessment could

be collected, or become effectual, the statute required that the tableau of assessments should be filed in the proper District Court of the State; that personal service of notice, with reasonable time to object, should be served on all owners who were known and within reach of process, and due advertisement made as to those who were unknown, or could not be found. This was complied with; and the party complaining here appeared, and had a full and fair hearing in the court of the first instance, and afterwards in the Supreme Court. If this be not due process of law, then the words can have no definite meaning as used in the Constitution.

One or two errors assigned, and not mentioned in the earlier part of this opinion, deserve a word or two.

It is said that the plaintiff's property had previously been assessed for the same purpose, and the assessment paid. If this be meant to deny the right of the State to tax or assess property twice for the same purpose, we know of no provision in the Federal Constitution which forbids this, or which forbids unequal taxation by the States. If the Act under which the former assessment was made is relied on as a contract against further assessments for the same purpose, we concur with the Supreme Court of Louisiana in being unable to discover such a contract.

It is also said that part of the property or plaintiff which was assessed is not benefited by the improvement. This is a matter of detail with which this court cannot interfere, if it were clearly so; but it is hard to fix a limit within these two parishes where property would not be benefited by the removal of the swamps and marshes which are within their bounds.

And lastly, and most strongly, it is urged that the court rendered a personal judgment against the owner for the amount of the tax, while it also made it a charge upon the land. It is urged with force, — and some highly respectable authorities are cited to support the proposition, — that while for such improvements as this a part, or even the whole, of a man's property connected with the improvement may be taken, no personal liability can be imposed on him in regard to it. If this were a proposition coming before us sitting in a State court, or, perhaps, in a circuit court of the United States, we might be called upon to decide it; but we are unable to see that any of the provisions of the Federal Constitution authorizes us to reverse the judgment of a State court on that question. It is not one which is involved in the phrase "due process of law," and none other is called to our attention in the present case.

As there is no error in the judgment of the Supreme Court of Louisiana, of which this court has cognizance, it is *Affirmed.*

MR. JUSTICE BRADLEY gave a concurring opinion, in which he said: "I think it [the opinion of the court] narrows the scope of inquiry as to what is due process of law more than it should do. . . . I think,

therefore, we are entitled, under the Fourteenth Amendment, not only to see that there is some process of law, but 'due process of law,' provided by the State law when a citizen is deprived of his property; and that, in judging what is 'due process of law,' respect must be had to the cause and object of the taking, whether under the taxing power, the power of eminent domain, or the power of assessment for local improvements, or none of these: and if found to be suitable or admissible in the special case, it will be adjudged to be 'due process of law;' but if found to be arbitrary, oppressive, and unjust, it may be declared to be not 'due process of law.' Such an examination may be made without interfering with that large discretion which every legislative power has of making wide modifications in the forms of procedure in each case, according as the laws, habits, customs, and preferences of the people of the particular State may require."

HURTADO *v.* CALIFORNIA.

SUPREME COURT OF THE UNITED STATES. 1883.

[110 *U. S.* 516.]

THE Constitution of the State of California, adopted in 1879, in Article I., section 8, provides as follows: —

"Offences heretofore required to be prosecuted by indictment shall be prosecuted by information, after examination and commitment by a magistrate, or by indictment, with or without such examination and commitment as may be prescribed by law. A grand jury shall be drawn and summoned at least once a year in each county." . . .

[Hurtado was charged with murder, by an information filed by the District Attorney of Sacramento County in the local court, in February, 1882; on his arraignment pleaded not guilty; and was tried by jury, found guilty, and sentenced to be hanged. He filed objections to the execution of this judgment, to the effect, among other things, that the proceeding, upon information, was contrary to the Fourteenth Amendment. These objections were overruled by the local court and, on appeal, by the Supreme Court of California; and they were now brought up, on error, to the Supreme Court of the United States.]

Mr. A. L. Hart, for plaintiff in error.

Mr. John T. Cary, for defendant in error.

MR. JUSTICE MATTHEWS delivered the opinion of the court. After reciting the facts in the foregoing language, he continued: —

It is claimed on behalf of the prisoner that the conviction and sentence are void, on the ground that they are repugnant to that clause of the Fourteenth Article of Amendment of the Constitution of the United States, which is in these words: —

"Nor shall any State deprive any person of life, liberty, or property without due process of law."

The proposition of law we are asked to affirm is that an indictment or presentment by a grand jury, as known to the common law of England, is essential to that "due process of law," when applied to prosecutions for felonies, which is secured and guaranteed by this provision of the Constitution of the United States, and which accordingly it is forbidden to the States respectively to dispense with in the administration of criminal law. . . .

It is maintained on behalf of the plaintiff in error that the phrase "due process of law" is equivalent to "law of the land," as found in the 29th chapter of Magna Charta; that by immemorial usage it has acquired a fixed, definite, and technical meaning; that it refers to and includes, not only the general principles of public liberty and private right, which lie at the foundation of all free government, but the very institutions which, venerable by time and custom, have been tried by experience and found fit and necessary for the preservation of those principles, and which, having been the birthright and inheritance of every English subject, crossed the Atlantic with the colonists and were transplanted and established in the fundamental laws of the State; that, having been originally introduced into the Constitution of the United States as a limitation upon the powers of the government, brought into being by that instrument, it has now been added as an additional security to the individual against oppression by the States themselves; that one of these institutions is that of the grand jury, an indictment or presentment by which against the accused in cases of alleged felonies is an essential part of due process of law, in order that he may not be harassed or destroyed by prosecutions founded only upon private malice or popular fury.

This view is certainly supported by the authority of the great name of Chief Justice Shaw and of the court in which he presided, which, in *Jones* v. *Robbins*, 8 Gray, 329, decided that the 12th article of the Bill of Rights of Massachusetts, a transcript of Magna Charta in this respect, made an indictment or presentment of a grand jury essential to the validity of a conviction in cases of prosecutions for felonies. . . . [Here follows a consideration of this case and of certain language of Coke.]

This view of the meaning of Lord Coke is the one taken by Merrick, J., in his dissenting opinion in *Jones* v. *Robbins*, 8 Gray, 329, who states his conclusions in these words: "It is the forensic trial, under a broad and general law, operating equally upon every member of our community, which the words 'by the law of the land,' in Magna Charta, and in every subsequent declaration of rights which has borrowed its phraseology, make essential to the safety of the citizen, securing thereby both his liberty and his property, by preventing the unlawful arrest of his person or any unlawful interference with his estate." See also *State* v. *Starling*, 15 Rich. (S. C.) Law, 120.

Mr. Reeve, in 2 History of Eng. Law, 43, translates the phrase, *nisi per legale judicium parium suorum vel per legem terræ*, "But by the judgment of his peers, or by some other legal process or proceeding adapted by the law to the nature of the case."

Chancellor Kent, 2 Com. 13, adopts this mode of construing the phrase. Quoting the language of Magna Charta, and referring to Lord Coke's comment upon it, he says: "The better and larger definition of *due process of law* is that it means law in its regular course of administration through courts of justice."

This accords with what is said in *Westervelt* v. *Gregg*, 12 N. Y. 202, by Denio, J., p. 212: "The provision was designed to protect the citizen against all mere acts of power, whether flowing from the legislative or executive branches of the government."

The principal and true meaning of the phrase has never been more tersely or accurately stated than by Mr. Justice Johnson, in *Bank of Columbia* v. *Okely*, 4 Wheat. 235–244: "As to the words from Magna Charta, incorporated into the Constitution of Maryland, after volumes spoken and written with a view to their exposition, the good sense of mankind has at last settled down to this: that they were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private right and distributive justice."

And the conclusion rightly deduced is, as stated by Mr. Cooley, Constitutional Limitations, 356: "The principles, then, upon which the process is based, are to determine whether it is 'due process' or not, and not any considerations of mere form. Administrative and remedial process may be changed from time to time, but only with due regard to the landmarks established for the protection of the citizen."

It is urged upon us, however, in argument, that the claim made in behalf of the plaintiff in error is supported by the decision of this court in *Murray's Lessee* v. *Hoboken Land & Improvement Company*, 18 How. 272. . . . [Here follows a passage from this opinion.]

This, it is argued, furnishes an indispensable test of what constitutes "due process of law;" that any proceeding otherwise authorized by law, which is not thus sanctioned by usage, or which supersedes and displaces one that is, cannot be regarded as due process of law.

But this inference is unwarranted. The real syllabus of the passage quoted is, that a process of law, which is not otherwise forbidden, must be taken to be due process of law, if it can show the sanction of settled usage both in England and in this country; but it by no means follows that nothing else can be due process of law. The point in the case cited arose in reference to a summary proceeding, questioned on that account, as not due process of law. The answer was: however exceptional it may be, as tested by definitions and principles of ordinary procedure, nevertheless, this, in substance, has been immemorially the actual law of the land, and, therefore, is due process of law. But to hold that such a characteristic is essential to due process of law, would

be to deny every quality of the law but its age, and to render it incapable of progress or improvement. It would be to stamp upon our jurisprudence the unchangeableness attributed to the laws of the Medes and Persians.

This would be all the more singular and surprising, in this quick and active age, when we consider that, owing to the progressive development of legal ideas and institutions in England, the words of Magna Charta stood for very different things at the time of the separation of the American colonies from what they represented originally. . . .

The Constitution of the United States was ordained, it is true, by descendants of Englishmen, who inherited the traditions of English law and history; but it was made for an undefined and expanding future, and for a people gathered and to be gathered from many nations and of many tongues. And while we take just pride in the principles and institutions of the common law, we are not to forget that in lands where other systems of jurisprudence prevail, the ideas and processes of civil justice are also not unknown. Due process of law, in spite of the absolutism of continental governments, is not alien to that code which survived the Roman Empire as the foundation of modern civilization in Europe, and which has given us that fundamental maxim of distributive justice, — *suum cuique tribuere.* There is nothing in Magna Charta, rightly construed as a broad charter of public right and law, which ought to exclude the best ideas of all systems and of every age; and as it was the characteristic principle of the common law to draw its inspiration from every fountain of justice, we are not to assume that the sources of its supply have been exhausted. On the contrary, we should expect that the new and various experiences of our own situation and system will mould and shape it into new and not less useful forms.

The concessions of Magna Charta were wrung from the king as guarantees against the oppressions and usurpations of his prerogative. It did not enter into the minds of the barons to provide security against their own body or in favor of the Commons by limiting the power of Parliament; so that bills of attainder, *ex post facto* laws, laws declaring forfeitures of estates, and other arbitrary acts of legislation which occur so frequently in English history, were never regarded as inconsistent with the law of the land; for notwithstanding what was attributed to Lord Coke in *Bonham's Case,* 8 Rep. 115, 118 *a,* the omnipotence of Parliament over the common law was absolute, even against common right and reason. The actual and practical security for English liberty against legislative tyranny was the power of a free public opinion represented by the Commons.

In this country written constitutions were deemed essential to protect the rights and liberties of the people against the encroachments of power delegated to their governments, and the provisions of Magna Charta were incorporated into bills of rights. They were limitations upon all the powers of government, legislative as well as executive and judicial.

It necessarily happened, therefore, that as these broad and general maxims of liberty and justice held in our system a different place and performed a different function from their position and office in English constitutional history and law, they would receive and justify a corresponding and more comprehensive interpretation. Applied in England only as guards against executive usurpation and tyranny, here they have become bulwarks also against arbitrary legislation; but, in that application, as it would be incongruous to measure and restrict them by the ancient customary English law, they must be held to guarantee, not particular forms of procedure, but the very substance of individual rights to life, liberty, and property.

Restraints that could be fastened upon executive authority with precision and detail, might prove obstructive and injurious when imposed on the just and necessary discretion of legislative power; and, while in every instance, laws that violated express and specific injunctions and prohibitions might, without embarrassment, be judicially declared to be void, yet, any general principle or maxim, founded on the essential nature of law, as a just and reasonable expression of the public will and of government, as instituted by popular consent and for the general good, can only be applied to cases coming clearly within the scope of its spirit and purpose, and not to legislative provisions merely establishing forms and modes of attainment. Such regulations, to adopt a sentence of Burke's, "may alter the mode and application, but have no power over the substance of original justice." Tract on the Popery Laws, 6 Burke's Works, ed. Little & Brown, 323.

Such is the often-repeated doctrine of this court. . . . [Here follow citations from *Munn* v. *Ill.*, 94 U. S. 113; *Walker* v. *Savinet*, 92 U. S. 90; *Kennard* v. *Louisiana*, 92 U. S. 480; *Davidson* v. *N. O.*, 96 U. S. 97.]

We are to construe this phrase in the Fourteenth Amendment by the *usus loquendi* of the Constitution itself. The same words are contained in the Fifth Amendment. That article makes specific and express provision for perpetuating the institution of the grand jury, so far as relates to prosecutions for the more aggravated crimes under the laws of the United States. It declares that, —

"No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall he be compelled in any criminal case to be witness against himself." [It then immediately adds:] "Nor be deprived of life, liberty, or property without due process of law."

According to a recognized canon of interpretation, especially applicable to formal and solemn instruments of constitutional law, we are forbidden to assume, without clear reason to the contrary, that any part of this most important amendment is superfluous. The natural and obvious

inference is, that in the sense of the Constitution, "due process of law" was not meant or intended to include, *ex vi termini*, the institution and procedure of a grand jury in any case. The conclusion is equally irresistible, that when the same phrase was employed in the Fourteenth Amendment to restrain the action of the States, it was used in the same sense and with no greater extent; and that if in the adoption of that amendment it had been part of its purpose to perpetuate the institution of the grand jury in all the States, it would have embodied, as did the Fifth Amendment, express declarations to that effect. Due process of law in the latter refers to that law of the land which derives its authority from the legislative powers conferred upon Congress by the Constitution of the United States, exercised within the limits therein prescribed, and interpreted according to the principles of the common law. In the Fourteenth Amendment, by parity of reason, it refers to that law of the land in each State which derives its authority from the inherent and reserved powers of the State, exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions, and the greatest security for which resides in the right of the people to make their own laws, and alter them at their pleasure. . . .

But it is not to be supposed that these legislative powers are absolute and despotic, and that the amendment prescribing due process of law is too vague and indefinite to operate as a practical restraint. It is not every act, legislative in form, that is law. Law is something more than mere will exerted as an act of power. It must be not a special rule for a particular person or a particular case, but, in the language of Mr. Webster, in his familiar definition, "the general law, a law which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial," so "that every citizen shall hold his life, liberty, property, and immunities under the protection of the general rules which govern society;" and thus excluding, as not due process of law, acts of attainder, bills of pains and penalties, acts of confiscation, acts reversing judgments, and acts directly transferring one man's estate to another, legislative judgments and decrees, and other similar special, partial, and arbitrary exertions of power under the forms of legislation. Arbitrary power, enforcing its edicts to the injury of the persons and property of its subjects, is not law, whether manifested as the decree of a personal monarch or of an impersonal multitude. And the limitations imposed by our constitutional law upon the action of the governments, both State and national, are essential to the preservation of public and private rights, notwithstanding the representative character of our political institutions. The enforcement of these limitations by judicial process is the device of self-governing communities to protect the rights of individuals and minorities, as well against the power of numbers as against the violence of public agents transcending the limits of lawful authority, even when acting in the name and wielding the force of the government.

The Supreme Court of Mississippi, in a well-considered case, — *Brown* v. *Levee Commissioners*, 50 Miss. 468, — speaking of the meaning of the phrase "due process of law," says: "The principle does not demand that the laws existing at any point of time shall be irrepealable, or that any forms of remedies shall necessarily continue. It refers to certain fundamental rights which that system of jurisprudence, of which ours is a derivative, has always recognized. If any of these are disregarded in the proceedings by which a person is condemned to the loss of life, liberty, or property, then the deprivation has not been by 'due process of law.'" . . .

It follows that any legal proceeding enforced by public authority, whether sanctioned by age and custom, or newly devised in the discretion of the legislative power, in furtherance of the general public good, which regards and preserves these principles of liberty and justice, must be held to be due process of law.

The Constitution of Connecticut, adopted in 1818 and in force when the Fourteenth Amendment took effect, requires an indictment or presentment of a grand jury only in cases where the punishment of the crime charged is death or imprisonment for life, and yet it also declares that no person shall "be deprived of life, liberty, or property but by due course of law." It falls short, therefore, of that measure of protection which it is claimed is guaranteed by Magna Charta to the right of personal liberty; notwithstanding which, it is no doubt justly said in Swift's Digest, 17, that "this sacred and inestimable right, without which all others are of little value, is enjoyed by the people of this State in as full extent as in any country on the globe, and in as high a degree as is consistent with the nature of civil government. No individual or body of men has a discretionary or arbitrary power to commit any person to prison: no man can be restrained of his liberty, be prevented from removing himself from place to place as he chooses, be compelled to go to a place contrary to his inclination, or be in any way imprisoned or confined, unless by virtue of the express laws of the land."

Tried by these principles, we are unable to say that the substitution for a presentment or indictment by a grand jury of the proceeding by information, after examination and commitment by a magistrate, certifying to the probable guilt of the defendant, with the right on his part to the aid of counsel, and to the cross-examination of the witnesses produced for the prosecution, is not due process of law. It is, as we have seen, an ancient proceeding at common law, which might include every case of an offence of less grade than a felony, except misprision of treason; and in every circumstance of its administration, as authorized by the statute of California, it carefully considers and guards the substantial interest of the prisoner. It is merely a preliminary proceeding, and can result in no final judgment, except as the consequence of a regular judicial trial, conducted precisely as in cases of indictments.

In reference to this mode of proceeding at the common law, and

which he says "is as ancient as the common law itself," Blackstone adds (4 Com. 305): —

"And as to those offences in which informations were allowed as well as indictments, so long as they were confined to this high and respectable jurisdiction, and were carried on in a legal and regular course in his Majesty's Court of King's Bench, the subject had no reason to complain. The same notice was given, the same process was issued, the same pleas were allowed, the same trial by jury was had, the same judgment was given by the same judges, as if the prosecution had originally been by indictment."

For these reasons, finding no error therein, the judgment of the Supreme Court of California is *Affirmed.*[1]

[HARLAN, J., gave a dissenting opinion.]

BARBIER *v.* CONNOLLY.

SUPREME COURT OF THE UNITED STATES. 1885.

[113 *U. S.* 27.]

ON the 8th of April, 1884, the Board of Supervisors of the city and county of San Francisco, the legislative authority of that municipality, passed an ordinance reciting that the indiscriminate establishment of public laundries and wash-houses, where clothes and other articles were cleansed for hire, endangered the public health and the public safety, prejudiced the well-being and comfort of the community, and depreciated the value of property in their neighborhood; and then ordaining, pursuant to authority alleged to be vested in the Board under provisions of the State Constitution, and of the Act of April 19, 1856, consolidating the government of the city and county, that after its passage it should be unlawful for any person to establish, maintain, or carry on the business of a public laundry or of a public wash-house within certain designated limits of the city and county, without first having obtained a certificate, signed by the health officer of the municipality, that the premises were properly and sufficiently drained, and that all proper arrangements were made to carry on the business without injury to the sanitary condition of the neighborhood; also a certificate signed by the Board of Fire Wardens of the municipality, that the stoves, washing and drying apparatus, and the appliances for heating smoothing-irons, were in good condition, and that their use was not dangerous to the surrounding property from fire, and that all proper precautions were taken to comply with the provisions of the ordinance defining the fire limits of

[1] And so *Hallinger* v. *Davis*, 146 U. S. 314. See also the full discussions in *Wynehamer* v. *The People*, 13 N. Y. 378 (1856). — ED.

the city and county, and making regulations concerning the erection and use of buildings therein.

The ordinance required the health officer and Board of Fire Wardens, upon application of any one to open or conduct the business of a public laundry, to inspect the premises in which it was proposed to carry on the business, in order to ascertain whether they are provided with proper drainage and sanitary appliances, and whether the provisions of the fire ordinance have been complied with; and, if found satisfactory in all respects, to issue to the applicant the required certificates without charge for the services rendered. Its fourth section declared that no person owning or employed in a public laundry or a public wash-house within the prescribed limits shall wash or iron clothes between the hours of ten in the evening and six in the morning or upon any portion of Sunday; and its fifth section, that no person engaged in the laundry business within those limits should permit any one suffering from an infectious or contagious disease to lodge, sleep, or remain upon the premises. The violation of any of these several provisions was declared to be a misdemeanor, and penalties were prescribed differing in degree according to the nature of the offence. The establishing, maintaining, or carrying on the business, without obtaining the certificates, was punishable by fine of not more than $1,000, or by imprisonment of not more than six months, or by both. Carrying on the business outside of the hours prescribed, or permitting persons with contagious diseases on the premises, was punishable by fine of not less than $5 or more than $50, or by imprisonment of not more than one month, or by both such fine and imprisonment.

The petitioner in the court below, the plaintiff in error here, was convicted in the Police Judge's Court of the City and County of San Francisco, under the fourth section of the ordinance, of washing and ironing clothes in a public laundry, within the prescribed limits, between the hours of ten o'clock in the evening of May 1, 1884, and six o'clock in the morning of the following day, and was sentenced to imprisonment in the county jail for five days, and was accordingly committed, in execution of the sentence, to the custody of the sheriff of the city and county, who was keeper of the county jail. That court had jurisdiction to try him for the alleged offence, if the ordinance was valid and binding. But, alleging that his arrest and imprisonment were illegal, he obtained from the Superior Court of the city and county a writ of *habeas corpus*, in obedience to which his body was brought before the court by the sheriff, who returned that he was held under the commitment of the police judge upon a conviction of a misdemeanor, the commitment and sentence being produced.

The petitioner thereupon moved for his discharge on the ground that the fourth section of the ordinance violates the Fourteenth Amendment to the Constitution of the United States, and certain sections of the Constitution of the State. The particulars stated in which such alleged violations consist were substantially these, — omitting the repetition of

the same position, — that the section discriminated between the class of laborers engaged in the laundry business and those engaged in other kinds of business; that it discriminated between laborers beyond the designated limits and those within them; that it deprived the petitioner of the right to labor, and, as a necessary consequence, of the right to acquire property; that it was not within the power of the Board of Supervisors of the city and county of San Francisco; and that it was unreasonable in its requirements. The Superior Court overruled the positions and dismissed the writ, and the petitioner brought this writ of error.

Mr. A. C. Searle, *Mr. H. G. Sieberst*, and *Mr. Alfred Clarke*, for plaintiff in error.

No appearance for defendant in error.

Mr. Justice Field delivered the opinion of the court. He recited the facts as above stated, and continued:

In this case we can only consider whether the fourth section of the ordinance of the city and county of San Francisco is in conflict with the Constitution or laws of the United States. We cannot pass upon the conformity of that section with the requirements of the Constitution of the State. Our jurisdiction is confined to a consideration of the Federal question involved, which arises upon an alleged conflict of the fourth section in question with the first section of the Fourteenth Amendment of the Constitution of the United States. No other part of the amendment has any possible application.

That fourth section, so far as it is involved in the case before the police judge, was simply a prohibition to carry on the washing and ironing of clothes in public laundries and wash-houses, within certain prescribed limits of the city and county, from ten o'clock at night until six o'clock on the morning of the following day. The prohibition against labor on Sunday is not involved. The provision is purely a police regulation within the competency of any municipality possessed of the ordinary powers belonging to such bodies. And it would be an extraordinary usurpation of the authority of a municipality, if a Federal tribunal should undertake to supervise such regulations. It may be a necessary measure of precaution in a city composed largely of wooden buildings like San Francisco, that occupations in which fires are constantly required, should cease after certain hours at night until the following morning; and of the necessity of such regulations the municipal bodies are the exclusive judges; at least any correction of their action in such matters can come only from State legislation or State tribunals. The same municipal authority which directs the cessation of labor must necessarily prescribe the limits within which it shall be enforced, as it does the limits in a city within which wooden buildings cannot be constructed. There is no invidious discrimination against any one within the prescribed limits by such regulations. There is none in the regulation under consideration. The specification of the limits within which the business cannot be carried on without the certificates of the health

officer and Board of Fire Wardens is merely a designation of the portion of the city in which the precautionary measures against fire and to secure proper drainage must be taken for the public health and safety. It is not legislation discriminating against any one. All persons engaged in the same business within it are treated alike; are subject to the same restrictions and are entitled to the same privileges under similar conditions.

The Fourteenth Amendment, in declaring that no State "shall deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws," undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of any one except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition, and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offences. But neither the amendment — broad and comprehensive as it is — nor any other amendment, was designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the State, develop its resources, and add to its wealth and prosperity. From the very necessities of society, legislation of a special character, having these objects in view, must often be had in certain districts, such as for draining marshes and irrigating arid plains. Special burdens are often necessary for general benefits — for supplying water, preventing fires, lighting districts, cleaning streets, opening parks, and many other objects. Regulations for these purposes may press with more or less weight upon one than upon another, but they are designed, not to impose unequal or unnecessary restrictions upon any one, but to promote, with as little individual inconvenience as possible, the general good. Though, in many respects, necessarily special in their character, they do not furnish just ground of complaint if they operate alike upon all persons and property under the same circumstances and conditions. Class legislation, discriminating against some and favoring others, is prohibited, but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment.

In the execution of admitted powers unnecessary proceedings are often

required which are cumbersome, dilatory, and expensive, yet, if no discrimination against any one be made and no substantial right be impaired by them, they are not obnoxious to any constitutional objection. The inconveniencies arising in the administration of the laws from this cause are matters entirely for the consideration of the State; they can be remedied only by the State. In the case before us the provisions requiring certificates from the health officer and the Board of Fire Wardens may, in some instances, be unnecessary, and the changes to be made to meet the conditions prescribed may be burdensome, but, as we have said, this is a matter for the determination of the municipality in the execution of its police powers, and not a violation of any substantial right of the individual. *Judgment affirmed.*[1]

In the Matter of THE APPLICATION OF JACOBS.

New York Court of Appeals. 1885.

[98 *N. Y.* 98.]

Peter B. Olney, District Attorney, for appellant.

Wm. M. Evarts, *A. J. Dittenhoeffer*, and *Morris S. Wise*, for respondent.

Earl, J. The relator Jacobs was arrested on the 14th day of May, 1884, on a warrant issued by a police justice in the city of New York under the Act chapter 272 of the Laws of 1884, passed May 12, entitled "An Act to improve the Public Health by prohibiting the Manufacture of Cigars and Preparation of Tobacco in any form in Tenement-houses in certain Cases, and regulating the Use of Tenement-houses in certain Cases." On the evidence of the complainant he was by the justice committed for trial, and thereafter upon his petition, a justice of the Supreme Court granted a writ of *habeas corpus*, to which a return was made, and upon the hearing thereon the justice made an order dismissing the writ and remanding him to prison. From that order he appealed to the General Term of the Supreme Court, which reversed the order and discharged him from prison, on the ground that the Act under which he was arrested was unconstitutional and therefore void. The district attorney on behalf of the people then appealed to this court, and the sole question for our determination is, whether the Act of 1884 creating the offence for which the relator was arrested was a constitutional exercise of legislative power.

The facts as they appeared before the police justice were as follows: The relator at the time of his arrest lived with his wife and two children in a tenement-house in the city of New York in which three other families also lived. There were four floors in the house, and seven rooms on each floor, and each floor was occupied by one family living

[1] And so *Soon Hing* v. *Crowley*, 113 U. S. 703. — Ed.

independently of the others, and doing their cooking in one of the rooms so occupied. The relator at the time of his arrest was engaged in one of his rooms in preparing tobacco and making cigars, but there was no smell of tobacco in any part of the house except the room where he was thus engaged.

These facts showed a violation of the provisions of the Act which took effect immediately upon its passage and the material portions of which are as follows: "Section 1. The manufacture of cigars or preparation of tobacco in any form on any floor, or in any part of any floor, in any tenement-house is hereby prohibited, if such floor or any part of such floor is by any person occupied as a home or residence for the purpose of living, sleeping, cooking, or doing any household work therein. Section 2. Any house, building, or portion thereof occupied as the home or residence of more than three families living independently of one another, and doing their cooking upon the premises, is a tenement-house within the meaning of this Act. Section 3. The first floor of said tenement-house on which there is a store for the sale of cigars and tobacco shall be exempt from the prohibition provided in section one of this Act. Section 5. Every person who shall be found guilty of a violation of this Act, or of having caused another to commit such violation, shall be deemed guilty of a misdemeanor, and shall be punished for every offence by a fine of not less than ten dollars and not more than one hundred dollars or by imprisonment for not less than ten days and not more than six months, or both such fine and imprisonment. Section 6. This Act shall apply only to cities having over five hundred thousand inhabitants."

What does this Act attempt to do? In form, it makes it a crime for a cigar-maker in New York and Brooklyn, the only cities in the State having a population exceeding 500,000, to carry on a perfectly lawful trade in his own home. Whether he owns the tenement-house or has hired a room therein for the purpose of prosecuting his trade, he cannot manufacture therein his own tobacco into cigars for his own use or for sale, and he will become a criminal for doing that which is perfectly lawful outside of the two cities named — everywhere else, so far as we are able to learn, in the whole world. He must either abandon the trade by which he earns a livelihood for himself and family, or, if able, procure a room elsewhere, or hire himself out to one who has a room upon such terms as, under the fierce competition of trade and the inexorable laws of supply and demand, he may be able to obtain from his employer. He may choose to do his work where he can have the supervision of his family and their help, and such choice is denied him. He may choose to work for himself rather than for a taskmaster, and he is left without freedom of choice. He may desire the advantage of cheap production in consequence of his cheap rent and family help, and of this he is deprived. In the unceasing struggle for success and existence which pervades all societies of men, he may be deprived of that which will enable him to maintain his hold, and to survive. He may go to a tenement-

house, and finding no one living, sleeping, cooking, or doing any household work upon one of the floors, hire a room upon such floor to carry on his trade, and afterward some one may commence to sleep or to do some household work upon such floor, even without his knowledge, and he at once becomes a criminal in consequence of another's act. He may go to a tenement-house, and finding but two families living therein independently, hire a room, and afterward by subdivision of the families, or a change in their mode of life, or in some other way, a fourth family begins to live therein independently, and thus he may become a criminal without the knowledge, or possibly the means of knowledge that he was violating any law. It is, therefore, plain that this law interferes with the profitable and free use of his property by the owner or lessee of a tenement-house who is a cigar-maker, and trammels him in the application of his industry and the disposition of his labor, and thus, in a strictly legitimate sense, it arbitrarily deprives him of his property and of some portion of his personal liberty.

The constitutional guarantee that no person shall be deprived of his property without due process of law may be violated without the physical taking of property for public or private use. Property may be destroyed, or its value may be annihilated; it is owned and kept for some useful purpose and it has no value unless it can be used. Its capability for enjoyment and adaptability to some use are essential characteristics and attributes without which property cannot be conceived; and hence any law which destroys it or its value, or takes away any of its essential attributes, deprives the owner of his property.

The constitutional guarantee would be of little worth, if the legislature could, without compensation, destroy property or its value, deprive the owner of its use, deny him the right to live in his own house, or to work at any lawful trade therein. If the legislature has the power under the Constitution to prohibit the prosecution of one lawful trade in a tenement-house, then it may prevent the prosecution of all trades therein. "Questions of power," says Chief Justice Marshall in *Brown* v. *State of Maryland*, 12 Wheat. 419, "do not depend upon the degree to which it may be exercised. If it may be exercised at all it must be exercised at the will of those in whose hands it is placed." Blackstone in his classification of fundamental rights says: "The third absolute right inherent in every Englishman is that of property which consists in the free use, enjoyment, and disposal of all his acquisitions without any control or diminution, save only by the law of the land." 1 Com. 138. In *Pumpelly* v. *Green Bay Co.*, 13 Wall. 166, 177, Miller, J., says: "There may be such serious interruption to the common and necessary use of property as will be equivalent to a taking within the meaning of the Constitution." In *Wynehamer* v. *People*, 13 N. Y. 378, 398, Comstock, J., says: "When a law annihilates the value of property and strips it of its attributes, by which alone it is distinguished as property, the owner is deprived of it according to the plainest interpretation, and certainly within the constitutional provision

intended expressly to shield personal rights from the exercise of arbitrary power." In *People* v. *Otis*, 90 N. Y. 48, Andrews, J., says: "Depriving an owner of property of one of its attributes is depriving him of his property within the constitutional provision."

So, too, one may be deprived of his liberty and his constitutional rights thereto violated without the actual imprisonment or restraint of his person. Liberty, in its broad sense as understood in this country, means the right, not only of freedom from actual servitude, imprisonment, or restraint, but the right of one to use his faculties in all lawful ways, to live and work where he will, to earn his livelihood in any lawful calling, and to pursue any lawful trade or avocation. All laws, therefore, which impair or trammel these rights, which limit one in his choice of a trade or profession, or confine him to work or live in a specified locality, or exclude him from his own house, or restrain his otherwise lawful movements (except as such laws may be passed in the exercise by the legislature of the police power, which will be noticed later), are infringements upon his fundamental rights of liberty, which are under constitutional protection. In *Butchers' Union Company* v. *Crescent City Co.*, 111 U. S. 746, Field, J., says: That among the inalienable rights as proclaimed in the Declaration of Independence "is the right of men to pursue any lawful business or vocation in any manner not inconsistent with the equal rights of others, which may increase their property or develop their faculties, so as to give them their highest enjoyment. The common business and callings of life, the ordinary trades and pursuits which are innocent in themselves, and have been followed in all communities from time immemorial, must, therefore, be free in this country to all alike upon the same terms. The right to pursue them without let or hindrance, except that which is applied to all persons of the same age, sex, and condition, is a distinguishing privilege of citizens of the United States, and an essential element of that freedom which they claim as their birthright." In the same case Bradley, J., says: "I hold that the liberty of pursuit, the right to follow any of the ordinary callings of life, is one of the privileges of a citizen of the United States," of which he cannot be deprived without invading his right to liberty within the meaning of the Constitution. In *Live-Stock, etc., Association* v. *Crescent City, etc., Company*, 1 Abb. U. S. 388, 398, the learned presiding justice says: "There is no more sacred right of citizenship than the right to pursue unmolested a lawful employment in a lawful manner. It is nothing more nor less than the sacred right of labor." In *Wynehamer* v. *People*, Johnson, J., says: "That a law which should make it a crime for men either to live in, or rent or sell their houses," would violate the constitutional guarantee of personal liberty. In *Bertholf* v. *O'Reilly*, 74 N. Y. 509, 515, Andrews, J., says: That one could "be deprived of his liberty in a constitutional sense without putting his person in confinement," and that a man's right to liberty included "the right to exercise his faculties, and to follow a lawful avocation for the support of life." . . .

These citations are sufficient to show that the police power is not without limitations, and that in its exercise the legislature must respect the great fundamental rights guaranteed by the Constitution. If this were otherwise, the power of the legislature would be practically without limitation. In the assumed exercise of the police power in the interest of the health, the welfare, or the safety of the public, every right of the citizen might be invaded and every constitutional barrier swept away.

Generally it is for the legislature to determine what laws and regulations are needed to protect the public health and secure the public comfort and safety, and while its measures are calculated, intended, convenient, and appropriate to accomplish these ends, the exercise of its discretion is not subject to review by the courts. But they must have some relation to these ends. Under the mere guise of police regulations, personal rights and private property cannot be arbitrarily invaded, and the determination of the legislature is not final or conclusive. If it passes an Act ostensibly for the public health, and thereby destroys or takes away the property of a citizen, or interferes with his personal liberty, then it is for the courts to scrutinize the Act and see whether it really relates to and is convenient and appropriate to promote the public health. It matters not that the legislature may in the title to the Act, or in its body, declare that it is intended for the improvement of the public health. Such a declaration does not conclude the courts, and they must yet determine the fact declared and enforce the supreme law. . . .

It is plain that this is not a health law, and that it has no relation whatever to the public health. Under the guise of promoting the public health the legislature might as well have banished cigar-making from all the cities of the State, or confined it to a single city or town, or have placed under a similar ban the trade of a baker, of a tailor, of a shoemaker, of a woodcarver, or of any other of the innocuous trades carried on by artisans in their own homes. The power would have been the same, and its exercise, so far as it concerns fundamental, constitutional rights, could have been justified by the same arguments. Such legislation may invade one class of rights to-day and another to-morrow, and if it can be sanctioned under the Constitution, while far removed in time we will not be far away in practical statesmanship from those ages when governmental prefects supervised the building of houses, the rearing of cattle, the sowing of seed, and the reaping of grain, and governmental ordinances regulated the movements and labor of artisans, the rate of wages, the price of food, the diet and clothing of the people, and a large range of other affairs long since in all civilized lands regarded as outside of governmental functions. Such governmental interferences disturb the normal adjustments of the social fabric, and usually derange the delicate and complicated machinery of industry and cause a score of ills while attempting the removal of one. . . .

The order should be affirmed. All concur. *Order affirmed.*

PEOPLE v. MARX.

NEW YORK COURT OF APPEALS. 1885.

[99 *N. Y.* 377.]

F. R. Coudert and *Wheeler H. Peckham*, for appellant.
Samuel Hand, for respondent.

RAPALLO, J. The defendant was convicted in the Court of General Sessions of the city and county of New York, of a violation of the sixth section of an Act entitled "An Act to prevent Deception in Sales of Dairy Products." Chap. 202 of the Laws of 1884. On appeal to the General Term of the Supreme Court in the first department, the conviction was affirmed, and the defendant now appeals to this court from the judgment of affirmance.

The main ground of the appeal is that the section in question is unconstitutional and void.

The section provides as follows:

"§ 6. No person shall manufacture out of any oleaginous substances, or any compound of the same, other than that produced from unadulterated milk or of cream from the same, any article designed to take the place of butter or cheese produced from pure unadulterated milk or cream of the same, or shall sell or offer to sell the same as an article of food. This provision shall not apply to pure skim-milk cheese produced from pure skim-milk." The rest of the section subjects to heavy punishments by fine and imprisonment, "whoever violates the provisions of this section."

The indictment charged the defendant with having on the 31st of October, 1884, at the city of New York, sold one pound of a certain article manufactured out of divers oleaginous substances and compounds thereof, other than those produced from unadulterated milk, to one J. M., as an article of food, the article so sold being designed to take the place of butter produced from pure unadulterated milk or cream. It is not charged that the article so sold was represented to be butter, or was sold as such, or that there was any intent to deceive or defraud, or that the article was in any respect unwholesome or deleterious, but simply that it was an article designed to take the place of butter made from pure milk or cream.

On the trial the prosecution proved the sale by the defendant of the article known as oleomargarine or oleomargarine butter. That it was sold at about half the price of ordinary dairy butter. The purchaser testified that the sale was made at a kind of factory, having on the outside a large sign "Oleomargarine." That he knew he could not get butter there, but knew that oleomargarine was sold there. And the district attorney stated that it would not be claimed that there was any fraudulent intent on the part of the defendant, but that the whole

claim on the part of the prosecution was that the sale of oleomargarine as a substitute for dairy butter was prohibited by the statute.

On the part of the defendant it was proved by distinguished chemists that oleomargarine was composed of the same elements as dairy butter. That the only difference between them was that it contained a smaller proportion of a fatty substance known as butterine. That this butterine exists in dairy butter only in a small proportion — from three to six per cent. That it exists in no other substance than butter made from milk and it is introduced into oleomargarine butter by adding to the oleomargarine stock some milk, cream or butter, and churning, and when this is done it has all the elements of natural butter, but there must always be a smaller percentage of butterine in the manufactured product than in butter made from milk. The only effect of the butterine is to give flavor to the butter, having nothing to do with its wholesomeness. That the oleaginous substances in the oleomargarine are substantially identical with those produced from milk or cream. Professor Chandler testified that the only difference between the two articles was that dairy butter had more butterine. That oleomargarine contained not over one per cent of that substance, while dairy butter might contain four or five per cent, and that if four or five per cent of butterine were added to the oleomargarine, there would be no difference; it would be butter; irrespective of the sources, they would be the same substances. According to the testimony of Professor Morton, whose statement was not controverted or questioned, oleomargarine, so far from being an article devised for purposes of deception in trade, was devised in 1872 or 1873 by an eminent French scientist who had been employed by the French government to devise a substitute for butter.

Further testimony as to the character of the article being offered, the district attorney announced that he did not propose to controvert that already given. Testimony having been given to the effect that oleomargarine butter was precisely as wholesome as dairy butter, it was, on motion of the district attorney, stricken out, and the defendant's counsel excepted. The broad ground was taken at the trial, and boldly maintained on the argument of this appeal, that the manufacture or sale of any oleaginous compound, however pure and wholesome, as an article of food, if it is designed to take the place of dairy butter, is by this act made a crime. The result of the argument is that if, in the progress of science, a process is discovered of preparing beef tallow, lard, or any other oleaginous substance, and communicating to it a palatable flavor so as to render it serviceable as a substitute for dairy butter, and equally nutritious and valuable, and the article can be produced at a comparatively small cost, which will place it within the reach of those who cannot afford to buy dairy butter, the ban of this statute is upon it. Whoever engages in the business of manufacturing or selling the prohibited product is guilty of a crime; the industry must be suppressed; those who could make a livelihood

by it are deprived of that privilege, the capital invested in the business must be sacrificed, and such of the people of the State as cannot afford to buy dairy butter must eat their bread unbuttered.

The references which have been here made to the testimony on the trial are not with the view of instituting any comparison between the relative merits of oleomargarine and dairy butter, but rather as illustrative of the character and effect of the statute whose validity is in question. The indictment upon which the defendant was convicted does not mention oleomargarine, neither does the section (§ 6) of the statute, although the article is mentioned in other statutes, which will be referred to. All the witnesses who have testified as to the qualities of oleomargarine may be in error, still that would not change a particle the nature of the question, or the principles by which the validity of the act is to be tested. Section 6 is broad enough in its terms to embrace not only oleomargarine, but any other compound, however wholesome, valuable, or cheap, which has been or may be discovered or devised for the purpose of being used as a substitute for butter. Every such product is rigidly excluded from manufacture or sale in this State.

One of the learned judges who delivered opinions at the General Term endeavored to sustain the Act on the ground that it was intended to prohibit the sale of any artificial compound, as genuine butter or cheese made from unadulterated milk or cream. That it was that design to deceive which the law rendered criminal. If that were a correct interpretation of the Act, we should concur with the learned judge in his conclusion as to its validity, but we could not concur in his further view that such an offence was charged in the indictment, or proved upon the trial. The express concessions of the prosecuting officer are to the contrary. We do not think that section 6 is capable of the construction claimed. The prohibition is not of the manufacture or sale of an article designed as an imitation of dairy butter or cheese, or intended to be passed off as such, but of an article designed to take the place of dairy butter or cheese. The artificial product might be green, red, or white instead of yellow, and totally dissimilar in appearance to ordinary dairy butter, yet it might be designed as a substitute for butter, and if so, would fall within the prohibition of the statute. Simulation of butter is not the act prohibited. There are other statutory provisions fully covering that subject. Chapter 215 of the Laws of 1882, entitled "An Act to regulate the Manufacture and Sale of Oleomargarine, or any Form of Imitation Butter and Lard, or any Form of Imitation Cheese, for the Prevention of Fraud, and the Better Protection of the Public Health," by its first section prohibits the introduction of any substance into imitation butter or cheese for the purpose of imparting thereto a color resembling that of yellow butter or cheese. The second section prohibits the sale of oleomargarine or imitation butter thus colored, and the third section prohibits the sale of any article in semblance of natural cheese, not the

legitimate product of the dairy, unless plainly marked "imitation cheese." Chapter 238 of the Laws of 1882 is entitled "An Act for the Protection of Dairymen, and to prevent Deception in the Sales of Butter and Cheese," and provides (§ 1) that every person who shall manufacture for sale, or offer for sale, or export any article in semblance of butter or cheese, not the legitimate product of the dairy, must distinctly and durably stamp on the side of every cheese, and on the top and side of every tub, firkin, or package, the words "oleomargarine butter," or if containing cheese, "imitation cheese," and chapter 246 of the Laws of 1882, entitled "An Act to prevent Fraud in the sale of Oleomargarine, Butterine, Suine, or other Substance not Butter," makes it a misdemeanor to sell at wholesale or retail any of the above articles representing them to be butter. These enactments seem to cover the entire subject of fraudulent imitations of butter, and of sales of other compounds as dairy products, and they are not repealed by the Act of 1884, although that Act contains an express repeal of nine other statutes, eight of which are directed against impure or adulterated dairy products, and one against the use of certain coloring matter in oleomargarine. The provisions of this last Act are covered by one of the Acts of 1882 above cited, and the provisions of the repealed Acts in relation to dairy products are covered by substituted provisions in the Act of 1884, but the statutes directed against fraudulent simulations of butter, and the sale of any such simulations as dairy butter, are left to stand. Further statutes to the same effect were enacted in 1885. Consequently, if the provisions of section 6 should be held invalid, there would still be ample protection in the statutes against fraudulent imitations of dairy butter, or sales of such imitations as genuine.

It appears to us quite clear that the object and effect of the enactment under consideration were not to supplement the existing provisions against fraud and deception by means of imitations of dairy butter, but to take a further and bolder step, and by absolutely prohibiting the manufacture or sale of any article which could be used as a substitute for it, however openly and fairly the character of the substitute might be avowed and published, to drive the substituted article from the market, and protect those engaged in the manufacture of dairy products, against the competition of cheaper substances, capable of being applied to the same uses, as articles of food.

The learned counsel for the respondent frankly meets this view, and claims in his points, as he did orally upon the argument, that even if it were certain that the sole object of the enactment was to protect the dairy industry in this State against the substitution of a cheaper article made from cheaper materials, this would not be beyond the power of the legislature. This we think is the real question presented in the case. Conceding that the only limits upon the legislative power of the State are those imposed by the State Constitution and that of the United States, we are called upon to determine whether or not

those limits are transgressed by an enactment of this description. These limitations upon legislative power are necessarily very general in their terms, but are at the same time very comprehensive. The Constitution of the State provides (art. 1, § 1), that no member of this State shall be disfranchised, or deprived of any of the rights and privileges secured to any citizen thereof, unless by the law of the land, or the judgment of his peers. Section 6 of article 1 provides that no person shall be deprived of life, liberty, or property, without due process of law. And the Fourteenth Amendment to the Constitution of the United States provides that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." These constitutional safeguards have been so thoroughly discussed in recent cases that it would be superfluous to do more than refer to the conclusions which have been reached, bearing upon the question now under consideration. Among these no proposition is now more firmly settled than that it is one of the fundamental rights and privileges of every American citizen to adopt and follow such lawful industrial pursuit, not injurious to the community, as he may see fit. *Live-Stock Ass'n* v. *The Crescent City, etc.* 1 Abb. [U.S.] 398; *Slaughter-House Cases*, 16 Wall. 106; *Corfield* v. *Coryell*, 4 Wash. C. C. 380; *Matter of Jacobs*, 98 N. Y. 98. The term "liberty," as protected by the Constitution, is not cramped into a mere freedom from physical restraint of the person of the citizen, as by incarceration, but is deemed to embrace the right of man to be free in the enjoyment of the faculties with which he has been endowed by his Creator, subject only to such restraints as are necessary for the common welfare. In the language of Andrews, J., in *Bertholf* v. *O'Reilly*, 74 N. Y. 515, the right to liberty embraces the right of man "to exercise his faculties and to follow a lawful avocation for the support of life," and as expressed by Earl, J., in *In re Jacobs*, "one may be deprived of his liberty, and his constitutional right thereto violated, without the actual restraint of his person. Liberty in its broad sense, as understood in this country, means the right not only of freedom from servitude, imprisonment, or restraint, but the right of one to use his faculties in all lawful ways, to live and work where he will, to earn his livelihood in any lawful calling, and to pursue any lawful trade or avocation."

Who will have the temerity to say that these constitutional principles are not violated by an enactment which absolutely prohibits an important branch of industry for the sole reason that it competes with another, and may reduce the price of an article of food for the human race?

Measures of this kind are dangerous even to their promoters. If the argument of the respondent in support of the absolute power of

the legislature to prohibit one branch of industry for the purpose of protecting another with which it competes can be sustained, why could not the oleomargarine manufacturers, should they obtain sufficient power to influence or control the legislative councils, prohibit the manufacture or sale of dairy products? Would arguments then be found wanting to demonstrate the invalidity under the Constitution of such an act? The principle is the same in both cases. The numbers engaged upon each side of the controversy cannot influence the question here. Equal rights to all are what are intended to be secured by the establishment of constitutional limits to legislative power, and impartial tribunals to enforce them.

Illustrations might be indefinitely multiplied of the evils which would result from legislation which should exclude one class of citizens from industries, lawful in other respects, in order to protect another class against competition. We cannot doubt that such legislation is violative of the letter, as well as of the spirit of the constitutional provisions before referred to, nor that such is the character of the enactment under which the appellant was convicted.

The judgment of the General Term and of the Court of Sessions should be reversed.

All concur. *Judgment reversed.*[1]

POWELL *v.* PENNSYLVANIA.

SUPREME COURT OF THE UNITED STATES. 1888.

[127 *U. S.* 678.]

THE case is stated in the opinion.

Mr. D. T. Watson and *Mr. Lyman D. Gilbert*, for plaintiff in error. *Mr. W. B. Rodgers* was with them on the brief.

Mr. Wayne Mac Veagh, for defendant in error. *Mr. A. H. Wintersteen* was with him on the brief.

MR. JUSTICE HARLAN delivered the opinion of the court.

This writ of error brings up for review a judgment of the Supreme Court of Pennsylvania, sustaining the validity of a statute of that Commonwealth relating to the manufacture and sale of what is commonly called oleomargarine butter. That judgment, the plaintiff in error contends, denies to him certain rights and privileges specially claimed under the Fourteenth Amendment to the Constitution of the United States.

By Acts of the General Assembly of Pennsylvania, one approved May 22, 1878, and entitled "An Act to prevent Deception in the Sale of Butter and Cheese," and the other approved May 24, 1883, and entitled

[1] And so *People* v. *Gillson*, 109 N. Y. 389 (1888). Compare *People* v. *Rosenberg*, 138 N. Y. 410 (1893). — ED.

"An Act for the Protection of Dairymen, and to prevent Deception in Sales of Butter and Cheese," provision was made for the stamping, branding, or marking, in a prescribed mode, manufactured articles or substances in semblance or imitation of butter or cheese, not the legitimate product of the dairy, and not made exclusively of milk or cream, but into which oil, lard, or fat, not produced from milk or cream, entered as a component part, or into which melted butter or any oil thereof had been introduced to take the place of cream. Laws of Pennsylvania, 1878, p. 87; 1883, p. 43.

But this legislation, we presume, failed to accomplish the objects intended by the legislature. For, by a subsequent Act, approved May 21, 1885, and which took effect July 1, 1885, entitled "An Act for the Protection of the Public Health and to prevent Adulteration of Dairy Products and Fraud in the Sale thereof," Laws of Pennsylvania, 1885, p. 22, No. 25, it was provided, among other things, as follows:

"SECTION 1. That no person, firm, or corporate body shall manufacture out of any oleaginous substance or any compound of the same, other than that produced from unadulterated milk or of cream from the same, any article designed to take the place of butter or cheese produced from pure unadulterated milk or cream from the same, or of any imitation or adulterated butter or cheese, nor shall sell or offer for sale, or have in his, her, or their possession, with intent to sell the same, as an article of food.

"SECTION 2. Every sale of such article or substance, which is prohibited by the first section of this Act, made after this Act shall take effect, is hereby declared to be unlawful and void, and no action shall be maintained in any of the courts in this State to recover upon any contract for the sale of any such article or substance.

"SECTION 3. Every person, company, firm, or corporate body who shall manufacture, sell, or offer or expose for sale or have in his, her, or their possession with intent to sell, any substance, the manufacture and sale of which is prohibited by the first section of this Act, shall, for every such offence, forfeit and pay the sum of one hundred dollars, which shall be recoverable with costs by any person suing in the name of the Commonwealth as debts of like amounts are by law recoverable; one half of which sum, when so recovered, shall be paid to the proper county treasurer for the use of the county in which suit is brought and the other half to the person or persons at whose instance such a suit shall or may be commenced and prosecuted to recovery.

"SECTION 4. Every person who violates the provisions of the first section of this Act, shall be deemed guilty of a misdemeanor, and upon conviction shall be punished by a fine of not less than one hundred dollars, nor more than three hundred, or by imprisonment in the county jail for not less than ten nor more than thirty days, or both such fine and imprisonment for the first offence, and imprisonment for one year for every subsequent offence."

The plaintiff in error was indicted, under the last statute, in the

Court of Quarter Sessions of the Peace in Dauphin County, Pennsylvania. The charge in the first count of the indictment is, that he unlawfully sold, "as an article of food, two cases, containing five pounds each, of an article designed to take the place of butter produced from pure, unadulterated milk or cream from milk, the said article so sold, as aforesaid, being an article manufactured out of certain oleaginous substances and compounds of the same other than that produced from unadulterated milk or cream from milk, and said article so sold, as aforesaid, being an imitation butter." In the second count the charge is that he unlawfully had in his possession, "with intent to sell the same, as an article of food, a quantity, *viz.*, one hundred pounds, of imitation butter, designed to take the place of butter produced from pure, unadulterated milk or cream from the same, manufactured out of certain oleaginous substances, or compounds of the same other than that produced from milk or cream from the same."

It was agreed, for the purposes of the trial, that the defendant, on July 10, 1885, in the city of Harrisburg, sold to the prosecuting witness, as an article of food, two original packages of the kind described in the first count; that such packages were sold and bought as butterine, and not as butter produced from pure, unadulterated milk or cream from unadulterated milk; and that each of said packages was, at the time of sale, marked with the words, "Oleomargarine Butter," upon the lid and side in a straight line, in Roman letters half an inch long.

It was also agreed that the defendant had in his possession one hundred pounds of the same article, with intent to sell it as an article of food.

This was the case made by the Commonwealth.

The defendant then offered to prove by Prof. Hugo Blanck that he saw manufactured the article sold to the prosecuting witness; that it was made from pure animal fats; that the process of manufacture was clean and wholesome, the article containing the same elements as dairy butter, the only difference between them being that the manufactured article contained a smaller proportion of the fatty substance known as butterine; that this butterine existed in dairy butter in the proportion of from three to seven per cent, and in the manufactured article in a smaller proportion, and was increased in the latter by the introduction of milk and cream; that this having been done, the article contained all the elements of butter produced from pure unadulterated milk or cream from the same except that the percentage of butterine was slightly smaller; that the only effect of butterine was to give flavor to the butter and that it had nothing to do with its wholesomeness; that the oleaginous substances in the manufactured article were substantially identical with those produced from milk or cream; and that the article sold to the prosecuting witness was a wholesome and nutritious article of food, in all respects as wholesome as butter produced from pure unadulterated milk or cream from unadulterated milk.

The defendant also offered to prove that he was engaged in the grocery and provision business in the city of Harrisburg, and that the

article sold by him was part of a large and valuable quantity manufactured prior to the 21st of May, 1885, in accordance with the laws of this Commonwealth relating to the manufacture and sale of said article, and so sold by him; that for the purpose of prosecuting that business large investments were made by him in the purchase of suitable real estate, in the erection of proper buildings, and in the purchase of the necessary machinery and ingredients; that in his traffic in said article he made large profits; and, if prevented from continuing it, the value of his property employed therein would be entirely lost, and he be deprived of the means of livelihood.

To each offer the Commonwealth objected upon the ground that the evidence proposed to be introduced was immaterial and irrelevant.

The purpose of these offers of proof was avowed to be: (1) To show that the article sold was a new invention, not an adulteration of dairy products, nor injurious to the public health, but wholesome and nutritious as an article of food, and that its manufacture and sale were in conformity to the Acts of May 22, 1878, and May 24, 1883. (2) To show that the statute upon which the prosecution was founded, was unconstitutional, as not a lawful exercise of police power, and, also, because it deprived the defendant of the lawful use "of his property, liberty, and faculties, and destroys his property without making compensation."

The court sustained the objection to each offer, and excluded the evidence. An exception to that ruling was duly taken by the defendant.

A verdict of guilty having been returned, and motions in arrest of judgment and for a new trial having been overruled, the defendant was adjudged to pay a fine of one hundred dollars and costs of prosecution, or give bail to pay the same in ten days, and be in custody until the judgment was performed. That judgment was affirmed by the Supreme Court of the State. 114 Penn. St. 265.

This case, in its important aspects, is governed by the principles announced in *Mugler* v. *Kansas*, 123 U. S. 623.

It is immaterial to inquire whether the acts with which the defendant is charged were authorized by the statute of May 22, 1878, or by that of May 24, 1883. The present prosecution is founded upon the statute of May 21, 1885; and if that statute be not in conflict with the Constitution of the United States, the judgment of the Supreme Court of Pennsylvania must be affirmed.

It is contended that the last statute is void in that it deprives all coming within its provisions of rights of liberty and property without due process of law, and denies to them the equal protection of the laws; rights which are secured by the Fourteenth Amendment to the Constitution of the United States.

It is scarcely necessary to say that if this statute is a legitimate exercise of the police power of the State for the protection of the health of the people, and for the prevention of fraud, it is not inconsistent with that amendment; for it is the settled doctrine of this court that, as overnment is organized for the purpose, among others, of preserving

the public health and the public morals, it cannot divest itself of the power to provide for those objects; and that the Fourteenth Amendment was not designed to interfere with the exercise of that power by the States. *Mugler* v. *Kansas*, 123 U. S. 663; *Butchers' Union Co.* v. *Crescent City Co.*, 111 U. S. 746, 751; *Barbier* v. *Connolly*, 113 U. S. 27; *Yick Wo* v. *Hopkins*, 118 U. S. 356.

The question, therefore, is whether the prohibition of the manufacture out of oleaginous substances, or out of any compound thereof other than that produced from unadulterated milk or cream from unadulterated milk, of an article designed to take the place of butter or cheese produced from pure unadulterated milk or cream from unadulterated milk, or the prohibition upon the manufacture of any imitation or adulterated butter or cheese, or upon the selling or offering for sale, or having in possession with intent to sell, the same, as an article of food, is a lawful exercise by the State of the power to protect, by police regulations, the public health.

The main proposition advanced by the defendant is that his enjoyment upon terms of equality with all others in similar circumstances of the privilege of pursuing an ordinary calling or trade, and of acquiring, holding, and selling property, is an essential part of his rights of liberty and property, as guaranteed by the Fourteenth Amendment. The court assents to this general proposition as embodying a sound principle of constitutional law. But it cannot adjudge that the defendant's rights of liberty and property, as thus defined, have been infringed by the statute of Pennsylvania, without holding that, although it may have been enacted in good faith for the objects expressed in its title, namely, to protect the public health and to prevent the adulteration of dairy products and fraud in the sale thereof, it has, in fact, no real or substantial relation to those objects. *Mugler* v. *Kansas*, 123 U. S. 623, 661. The court is unable to affirm that this legislation has no real or substantial relation to such objects.

It will be observed that the offer in the court below was to show by proof that the particular articles the defendant sold, and those in his possession for sale, in violation of the statute, were, in fact, wholesome or nutritious articles of food. It is entirely consistent with that offer that many, indeed, that most kinds of oleomargarine butter in the market contain ingredients that are or may become injurious to health. The court cannot say, from anything of which it may take judicial cognizance, that such is not the fact. Under the circumstances disclosed in the record, and in obedience to settled rules of constitutional construction, it must be assumed that such is the fact. "Every possible presumption," Chief Justice Waite said, speaking for the court in Sinking Fund Cases, 99 U. S. 700, 718, "is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt. One branch of the government cannot encroach on the domain of another without danger. The safety of our institutions depends in no small degree on a strict observance of this salutary rule." See, also,

Fletcher v. *Peck*, 6 Cranch, 87, 128; *Dartmouth College* v. *Woodward*, 4 Wheat. 518, 625; *Livingston* v. *Darlington*, 101 U. S. 407.

Whether the manufacture of oleomargarine, or imitation butter, of the kind described in the statute, is, or may be, conducted in such a way, or with such skill and secrecy, as to baffle ordinary inspection, or whether it involves such danger to the public health as to require, for the protection of the people, the entire suppression of the business, rather than its regulation in such manner as to permit the manufacture and sale of articles of that class that do not contain noxious ingredients, are questions of fact and of public policy which belong to the legislative department to determine. And as it does not appear upon the face of the statute, or from any facts of which the court must take judicial cognizance, that it infringes rights secured by the fundamental law, the legislative determination of those questions is conclusive upon the courts. It is not a part of their functions to conduct investigations of facts entering into questions of public policy merely, and to sustain or frustrate the legislative will, embodied in statutes, as they may happen to approve or disapprove its determination of such questions. The power which the legislature has to promote the general welfare is very great, and the discretion which that department of the government has, in the employment of means to that end, is very large. While both its power and its discretion must be so exercised as not to impair the fundamental rights of life, liberty, and property; and while, according to the principles upon which our institutions rest, "the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself;" yet, "in many cases of mere administration, the responsibility is purely political, no appeal lying except to the ultimate tribunal of the public judgment, exercised either in the pressure of public opinion or by means of the suffrage." *Yick Wo* v. *Hopkins*, 118 U. S. 370. The case before us belongs to the latter class. The Legislature of Pennsylvania, upon the fullest investigation, as we must conclusively presume, and upon reasonable grounds, as must be assumed from the record, has determined that the prohibition of the sale, or offering for sale, or having in possession to sell, for purposes of food, of any article manufactured out of oleaginous substances or compounds other than those produced from unadulterated milk or cream from unadulterated milk, to take the place of butter produced from unadulterated milk or cream from unadulterated milk, will promote the public health, and prevent frauds in the sale of such articles. If all that can be said of this legislation is that it is unwise, or unnecessarily oppressive to those manufacturing or selling wholesome oleomargarine, as an article of food, their appeal must be to the legislature, or to the ballot-box, not to the judiciary. The latter cannot interfere without usurping powers committed to another department of government.

It is argued, in behalf of the defendant, that if the statute in question

is sustained as a valid exercise of legislative power, then nothing stands in the way of the destruction by the legislative department of the constitutional guarantees of liberty and property. But the possibility of the abuse of legislative power does not disprove its existence. That possibility exists even in reference to powers that are conceded to exist. Besides, the judiciary department is bound not to give effect to statutory enactments that are plainly forbidden by the Constitution. This duty, the court has said, is always one of extreme delicacy; for, apart from the necessity of avoiding conflicts between co-ordinate branches of the government, whether State or national, it is often difficult to determine whether such enactments are within the powers granted to or possessed by the legislature. Nevertheless, if the incompatibility of the Constitution and the statute is clear or palpable, the courts must give effect to the former. And such would be the duty of the court if the State legislature, under the pretence of guarding the public health, the public morals, or the public safety, should invade the rights of life, liberty, or property, or other rights, secured by the supreme law of the land.

The objection that the statute is repugnant to the clause of the Fourteenth Amendment forbidding the denial by the State to any person within its jurisdiction of the equal protection of the laws, is untenable. The statute places under the same restrictions, and subjects to like penalties and burdens, all who manufacture, or sell, or offer for sale, or keep in possession to sell, the articles embraced by its prohibitions; thus recognizing and preserving the principle of equality among those engaged in the same business. *Barbier* v. *Connolly*, 113 U. S. 27; *Soon Hing* v. *Crowley*, 113 U. S. 703; *Missouri Pacific Railway Co.* v. *Humes*, 115 U. S. 512, 519.

It is also contended that the Act of May 21, 1885, is in conflict with the Fourteenth Amendment in that it deprives the defendant of his property without that compensation required by law. This contention is without merit, as was held in *Mugler* v. *Kansas*.

Upon the whole case, we are of opinion that there is no error in the judgment, and it is, therefore, *Affirmed.*[1]

[FIELD, J. gave a dissenting opinion in the course of which he said: "Two questions are thus distinctly presented: first, whether a State can lawfully prohibit the manufacture of a healthy and nutritious article of food designed to take the place of butter, out of any oleaginous substance, or compound of the same, other than that produced from pure milk or cream, and its sale when manufactured? and, second, whether a State can, without compensation to the owner, prohibit the sale of an article of food, in itself healthy and nutritious, which has been manufactured in accordance with its laws?

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[1] See *Weideman* v. *The State*, 56 N. W. Rep. 688 (Minn. 1893). — ED.

"It is the clause [of the Fourteenth Amendment] declaring that no State shall 'deprive any person of life, liberty, or property without due process of law,' which applies to the present case. This provision is found in the constitutions of nearly all the States, and was designed to prevent the arbitrary deprivation of life and liberty, and the arbitrary spoliation of property. As I said on a former occasion, it means that neither can be taken, or the enjoyment thereof impaired, except in the course of the regular administration of the law in the established tribunals. It has always been supposed to secure to every person the essential conditions for the pursuit of happiness, and is therefore not to be construed in a narrow or restricted sense. *Ex parte Virginia*, 100 U. S. 339, 366.

"By 'liberty,' as thus used, is meant something more than freedom from physical restraint or imprisonment. It means freedom not merely to go wherever one may choose, but to do such acts as he may judge best for his interest not inconsistent with the equal rights of others; that is, to follow such pursuits as may be best adapted to his faculties, and which will give to him the highest enjoyment. As said by the Court of Appeals of New York, in *People* v. *Marx*, 'the term "liberty," as protected by the Constitution, is not cramped into a mere freedom from physical restraint of the person of the citizen, as by incarceration, but is deemed to embrace the right of man to be free in the enjoyment of the faculties with which he has been endowed by his Creator, subject only to such restraints as are necessary for the common welfare,' 99 N. Y. 377, 386; and again, *In the Matter of Jacobs:* 'Liberty, in its broad sense, as understood in this country, means the right not only of freedom from actual servitude, imprisonment, or restraint, but the right of one to use his faculties, in all lawful ways, to live and work where he will, to earn his livelihood in any lawful calling, and to pursue any lawful trade or vocation.' 98 N. Y. 98.

"With the gift of life there necessarily goes to every one the right to do all such acts, and follow all such pursuits, not inconsistent with the equal rights of others, as may support life and add to the happiness of its possessor. The right to pursue one's happiness is placed by the Declaration of Independence among the inalienable rights of man, with which all men are endowed, not by the grace of emperors or kings, or by force of legislative or constitutional enactments, but by their Creator; and to secure them, not to grant them, governments are instituted among men. The right to procure healthy and nutritious food, by which life may be preserved and enjoyed, and to manufacture it, is among these inalienable rights, which, in my judgment, no State can give and no State can take away except in punishment for crime. It is involved in the right to pursue one's happiness. This doctrine is happily expressed and illustrated in *People* v. *Marx*, cited above, where the precise question here was presented."][1]

[1] "Our American constitutions . . . are historical instruments, the possessions of a people with a legal history beginning, not with the Declaration of Independence, but with that of their English brethren. They are not the beginning, but the end; for

they represent the last stage in a series of changes, the great landmarks of which are the Magna Charta, the Petition of Right, the Habeas Corpus Act, and the Bill of Rights.

"It is obvious, therefore, that one who seeks to put a true construction on any part of our constitutions must have a constant eye to its history, and this is particularly the case when one is dealing with a clause in a bill of rights, because an American bill of rights is a collection of words and clauses, many of which have had a definite meaning for centuries. It may be true that if our constitutions are to meet all the requirements of a constantly advancing civilization, they must receive a broad and progressive interpretation. It is also true that upon no legal principle can an interpretation be supported, which ignores the meaning universally accorded to a word or clause for centuries, and the meaning which must, therefore, have been intended by those who inserted it in the Constitution. It is perhaps well to bear this in mind at a time when there is a manifest tendency to regard constitutional prohibitions as a panacea for moral and political evils, to look upon courts of law, as distinguished from legislatures, as the only real protectors of individual rights, and to trust to the courts for remedies for evils resulting entirely from a failure to attend to political duties, — at a time, that is to say, when there is danger of loose and unhistorical constitutional interpretation. . . .

"It may, however, be contended that although the term 'liberty' is not used in the clauses under discussion in its broadest sense to include all the rights one has in a body politic, it does include other great and important rights besides that of personal liberty, as, for example, religious liberty, liberty of speech and of press, liberty to bear arms, of petition and discussion, liberty to obtain justice in the courts, and many others, all of which are to-day regarded as fundamental rights in this country.[1] It may be argued, in other words, that the term 'liberty' is a broader one than the terms used in Magna Charta, and may well be interpreted to include other rights besides that of personal freedom, for the reason that it was probably intended so to do by the framers of our constitutions. There are several answers to this argument. In the first place, the clauses in our American constitutions are, as we have seen, mere copies of the thirty-ninth article of Magna Charta, which knows nothing of such rights as the above. In the second place, the term 'liberty,' while it was not used in the thirty-ninth article, was used in its present connection with the terms 'life' and 'property' long before the framing of our American constitutions, and when so used meant simply personal liberty. It would, therefore, naturally be used by the framers of our constitutions in that sense. To establish this it is only necessary to refer to Blackstone. In one place Blackstone remarks: 'The Great Charter protected every individual of the nation in the free enjoyment of his life, liberty, and property unless declared to be forfeited by the judgment of his peers or the law of the land,' referring, of course, to the thirty-ninth article. In another place he discusses the subject more at length, and after defining the absolute rights of individuals, 'which are usually called their liberties,' to be 'those rights which are so in their primary and strictest sense, such as would belong to their persons merely in a state of nature, and which every man is entitled to enjoy whether out of society or in it,' he goes on to enumerate them: 'These rights may be reduced to three principal or primary articles: the right of personal security' (under which he includes life, limb, health, and reputation, the same rights which Coke and other commentators on the thirty-ninth article include under the terms 'aliquo modo destruatur,' and which may fairly be included under the term 'life' in our constitutions), 'the right of personal liberty, and the right of private property, because, as there is no other known method of compulsion or of abridging man's natural free will but by an infringement of one or the other of these important rights, the preservation of these, inviolate, may justly be said to include the preservation of our civil immunities in their largest and most extensive sense.' 1 Bl. Com's, chapter on 'Absolute Rights

[1] See Judge Cooley's discussion of the Fourteenth Amendment in the Appendix of his edition of Story on the Constitution. See also his discussion of "Civil Rights" in the "Principles of Constitutional Law."

IN *Missouri Pac. R'y Co.* v. *Mackey*, 127 U. S. 205 (1888). In holding valid a law of the State of Kansas which made railroad companies responsible to their servants for injuries from the negligence or misconduct of their fellow-servants, MR. JUSTICE FIELD, for the court, said: "The objection that the law of 1874 deprives the railroad companies of the equal protection of the laws is even less tenable than the one considered. It seems to rest upon the theory that legislation which is special in its character is necessarily within the constitutional inhibition; but nothing can be further from the fact. The greater part of all legislation is special, either in the objects sought to be attained by it, or in the extent of its application. Laws for the improvement of municipalities, the opening and widening of particular streets, the introduction of water and gas, and other arrangements for the safety and convenience of their inhabitants, and laws for the irrigation and drainage of particular lands, for the construction of levees and the bridging of navigable rivers, are instances of this kind. Such legislation does

of Persons.' Blackstone defines personal liberty to be the 'power of locomotion, of changing situation, or moving one's person to whatever place one's inclination may direct, without imprisonment or restraint, unless by due course of law,' and he observes that it is perhaps the most important of all civil rights. He means by personal liberty simply freedom from restraint of the person. It is instructive to note that Blackstone, in discussing each 'absolute' right, points out that it is declared and secured by the famous article of the Great Charter. He cites the words 'nullus liber homo aliquo modo destruatur' as the constitutional security for the right of life or personal security; the words 'capiatur vel imprisonetur' for the right of personal liberty, and the words 'dissaisiatur de libero tenemento' for the right of private property. It is evident, therefore, that his classification of fundamental rights under the terms 'life,' 'liberty,' and 'property,' like that of all other commentators, is derived from the thirty-ninth article. It is evident, also, that he had no conception of religious liberty, liberty of press and speech, or political liberty (meaning thereby the right to take part in the government, *e.g.*, the right to vote) as absolute rights of individuals. They are not mentioned in his discussion of the subject. He does, indeed, name certain other important individual rights besides those of life, personal freedom, and property, such as the right of petition, of securing justice in the courts, and of bearing arms; but he says that these 'serve principally as networks or barriers to protect and maintain inviolate the three great and primary rights.'

"In 'Care's English Liberties,' a collection of important English charters which had a wide circulation in the American colonies, the fifth edition of which was published in Boston in 1721, we find the same classification of rights in the same terms, and in every case the term 'liberty' is explained to mean freedom of the person from restraint. For example, in his comment on the Habeas Corpus Act, the author says: 'There are three things which the law of England (which is a law of mercy) principally regards and taketh care of, *viz.*, life, liberty, and estate. Next to a man's life the nearest thing that concerns him is freedom of his person; for indeed, what is imprisonment but a kind of civil death? Therefore, saith Fortescue, cap. 42, the laws of England do, in all cases, favor liberty. The writ of *habeas corpus* is a remedy given by the common law, for such as were unlawfully detained in custody, to procure their liberty.' Care's English Liberties (Ed. 1721) p. 185.

"Chancellor Kent made precisely the same enumeration of fundamental rights, with religious liberty added as a distinct and separate right. Kent's Com's, vol. 2, chap. 1. There is no suggestion of its being included in the clauses in question." — *Meaning of the term "Liberty" in Federal and State Constitutions*, by CHARLES E. SHATTUCK, 4 Harv. Law Rev. 365. — ED.

not infringe upon the clause of the Fourteenth Amendment requiring equal protection of the laws, because it is special in its character; if in conflict at all with that clause, it must be on other grounds. And when legislation applies to particular bodies or associations, imposing upon them additional liabilities, it is not open to the objection that it denies to them the equal protection of the laws, if all persons brought under its influence are treated alike under the same conditions. A law giving to mechanics a lien on buildings constructed or repaired by them, for the amount of their work, and a law requiring railroad corporations to erect and maintain fences along their roads, separating them from land of adjoining proprietors so as to keep cattle off their tracks, are instances of this kind. Such legislation is not obnoxious to the last clause of the Fourteenth Amendment, if all persons subject to it are treated alike under similar circumstances and conditions in respect both of the privileges conferred and the liabilities imposed. It is conceded that corporations are persons within the meaning of the amendment. *Santa Clara County* v. *Southern Pacific Railroad Company*, 118 U. S. 394; *Pembina Consolidated Silver Mining and Milling Co.* v. *Pennsylvania*, 125 U. S. 187. But the hazardous character of the business of operating a railway would seem to call for special legislation with respect to railroad corporations, having for its object the protection of their employés as well as the safety of the public. The business of other corporations is not subject to similar dangers to their employés, and no objections, therefore, can be made to the legislation on the ground of its making an unjust discrimination. It meets a particular necessity, and all railroad corporations are, without distinction, made subject to the same liabilities. As said by the court below, it is simply a question of legislative discretion whether the same liabilities shall be applied to carriers by canal and stage coaches and to persons and corporations using steam in manufactories. See *Missouri Pacific Railway Co.* v. *Humes*, 115 U. S. 512, 523; *Barbier* v. *Connolly*, 113 U. S. 27; *Soon Hing* v. *Crowley*, 113 U. S. 703.

Judgment affirmed."

SPENCER *v.* MERCHANT.

SUPREME COURT OF THE UNITED STATES. 1888.

[125 *U. S* 345.][1]

THIS case was submitted to the general term in Kings County of the Supreme Court of the State of New York under § 1279 of the Code of Civil Procedure, without process, upon an agreed statement of facts signed by the parties, the substance of which, and of the statutes therein referred to, was as follows: . . . [The plaintiff agreed to sell certain

[1] The statement of facts is shortened. — ED.

land to the defendant, and to give a deed with a covenant against all incumbrances. The defendant paid a part of the consideration, and in examining the title found an unpaid assessment on the land for the opening of a street.]

The case stated by the parties, after setting forth the foregoing facts, continued and concluded as follows:

"The plaintiff claims that said assessment of 1881 in question is not a lien or cloud on the title to said premises; and the defendant refuses to pay the balance of said consideration until the plaintiff allows it to be deducted from the consideration money or pays the same, neither of which is the plaintiff willing to do; and the plaintiff also claims that the statute of 1881, c. 689, is unconstitutional, and therefore void, for the reason that it is an attempt made by the legislature of this State to validate a void assessment (and to do the same without giving the property-holders an opportunity to be heard as to the total amount of the assessment, only providing for a hearing on the apportionment), which was levied upon said premises under and pursuant to c. 217 of the laws of 1869, as amended by c. 619 of the laws of 1870; and that the statute of 1881 is clearly void for the further reasons that the defect in the former assessment was jurisdictional, and it has been so declared and decided by the Court of Appeals in the case of *Stuart* v. *Palmer*, 74 N. Y. 183, and is special and invidious, and unjustly and illegally apportioned upon certain individuals without reference to a uniform standard, and is an arbitrary exaction, and is levied on an individual or individuals to the exclusion of others in the same district. The defendant doubts the said claim of the plaintiff. The question submitted to the court upon this case is as follows:

"Is the assessment levied on the property in 1881 in question a good and valid lien or cloud on said property?

"If this question is answered in the affirmative, then judgment is to be rendered in favor of the defendant and against the plaintiff, requiring the plaintiff to pay said assessment to deliver a deed according to contract.

"If it be answered in the negative, then judgment is to be rendered in favor of the plaintiff, requiring the defendant to take title to said premises in accordance with the contract above mentioned, without the plaintiff paying said assessment or tax, and without deducting the same out of the consideration money."

The Supreme Court of New York gave judgment for the defendant, and the plaintiff appealed to the Court of Appeals, which affirmed the judgment and remitted the case to the Supreme Court. 100 N. Y. 585. The plaintiff sued out this writ of error, and assigned for error that it appeared by the record that both those courts held that the statute of 1881, c. 689, and the proceedings under it were constitutional and valid, "whereas the said courts should have decided that the said statute and the proceedings thereunder were in violation of the Constitution of the United States and were void, for the reason that they

deprived the said plaintiff and the other persons assessed thereunder of their property without due process of law."

Mr. Matthew Hale and *Mr. Albert Day*, for plaintiff in error.

Mr. Walter E. Ward, for defendant in error.

MR. JUSTICE GRAY, after stating the case as above reported, delivered the opinion of the court.

The leading facts of this case are as follows: The original assessment of the expenses of regulating, grading and preparing the street for travel was laid by commissioners, as directed by § 4 of the statute of 1869, upon all the lands lying within three hundred feet on either side of the street, and which, in the judgment of the commissioners, would be benefited by the improvement. After the sums so assessed upon some lots had been paid, the Court of Appeals of the State declared that assessment void, because the statute (although it made ample provision for notice of and hearing upon the previous assessment for laying out the street under § 3), provided no means by which the land-owners might have any notice or opportunity to be heard in regard to the assessment for regulating, grading, and preparing the street for travel under § 4. *Stuart* v. *Palmer*, 74 N. Y. 183. The lots, the sums assessed upon which had not been paid, were isolated parcels, not contiguous, and some of them not fronting upon the street. By the statute of 1881, a sum equal to so much of the original assessment as remained unpaid, adding a proportional part of the expenses of making that assessment, and interest since, was ordered by the legislature to be levied and equitably apportioned by the supervisors of the county upon and among these lots, after public notice to all parties interested to appear and be heard upon the question of such apportionment; and that sum was levied and assessed accordingly upon these lots, one of which was owned by the plaintiff.

The question submitted to the Supreme Court of the State was whether this assessment on the plaintiff's lot was valid. He contended that the statute of 1881 was unconstitutional and void, because it was an attempt by the legislature to validate a void assessment, without giving the owners of the lands assessed an opportunity to be heard upon the whole amount of the assessment. He thus directly, and in apt words, presented the question whether he had been unconstitutionally deprived of his property without due process of law, in violation of the first section of the Fourteenth Amendment to the Constitution of the United States, as well as of art. 1, sec. 7, of the Constitution of New York; and no specific mention of either constitutional provision was necessary in order to entitle him to a decision of the question by any court having jurisdiction to determine it. The adverse judgment of the Supreme Court, affirmed by the Court of Appeals of the State, necessarily involved a decision against a right claimed under the Fourteenth Amendment to the Constitution of the United States, which this court has jurisdiction to review. *Bridge Proprietors* v. *Hoboken Co.*, 1 Wall. 116, 142; *Murray* v. *Charleston*, 96 U. S. 432, 442; *Furman*

v. *Nichol*, 8 Wall. 44, 56; *Chicago Life Ins. Co.* v. *Needles*, 113 U. S. 574, 579.

The jurisdiction of this court, as is well understood, does not extend to a review of the judgment of the State court, so far as it depended upon the Constitution of the State. *Provident Institution for Savings* v. *Jersey City*, 113 U. S. 506, 514. Yet, as the words of the two constitutions are alike in this respect, the decisions of the highest court of the State upon the effect of these words are entitled to great weight. The substance of the former decisions, and the grounds of the judgment sought to be reviewed, can hardly be more compactly or forcibly stated than they have been by Judge Finch in delivering the opinion of the Court of Appeals, as follows:

"The Act of 1881 determines absolutely and conclusively the amount of tax to be raised, and the property to be assessed and upon which it is to be apportioned. Each of these things was within the power of the legislature, whose action cannot be reviewed in the courts upon the ground that it acted unjustly or without appropriate and adequate reason. *Litchfield* v. *Vernon*, 41 N. Y. 123, 141; *People* v. *Brooklyn*, 4 N. Y. 427; *People* v. *Flagg*, 46 N. Y. 405; *Horn* v. *New Lots*, 83 N. Y. 100; Cooley on Taxation, 450. The legislature may commit the ascertainment of the sum to be raised and of the benefited district to commissioners, but it is not bound to do so, and may settle both questions for itself; and when it does so, its action is necessarily conclusive and beyond review. Here an improvement has been ordered and made, the expense of which might justly have been imposed upon adjacent property benefited by the change. By the Act of 1881, the legislature imposes the unpaid portion of the cost and expense, with the interest thereon, upon that portion of the property benefited which has thus far borne none of the burden. In so doing, it necessarily determines two things, *viz.*, the amount to be realized, and the property specially benefited by the expenditure of that amount. The lands might have been benefited by the improvement, and so the legislative determination that they were, and to what amount or proportion of the cost, even if it may have been mistakenly unjust, is not open to our review. The question of special benefit and the property to which it extends is of necessity a question of fact, and when the legislature determines it in a case within its general power, its decision must of course be final. We can see in the determination reached possible sources of error and perhaps even of injustice, but we are not at liberty to say that the tax on the property covered by the law of 1881 was imposed without reference to special benefits. The legislature practically determined that the lands described in that Act were peculiarly benefited by the improvement to a certain specified amount which constituted a just proportion of the whole cost and expense; and while it may be that the process by which the result was reached was not the best attainable, and some other might have been more accurate and just, we cannot for that reason question an enactment within the general legislative power

That power of taxation is unlimited, except that it must be exercised for public purposes. *Weismer* v. *Douglas*, 64 N. Y. 91. Certainly if the Acts of 1869 and 1870 had never been passed, but the improvement of Atlantic Avenue had been ordered, the legislature might have imposed one part or proportion of the cost upon one designated district and the balance upon another. Practically just that was done in this case. In *Re Van Antwerp*, 56 N. Y. 261, an assessment for a street improvement had been declared void by reason of failure to procure necessary consents of property-owners. The legislature made a reassessment, imposing two thirds of the expense upon a benefited district and one third upon the city at large. The Act was held valid as a new assessment and not an effort to validate a void one.

"These views furnish also an answer to the objection that the only hearing given to the land-owner relates to the apportionment of the fixed amount among the lots assessed, and none is given as to the aggregate to be collected. No hearing would open the discretion of the legislature, or be of any avail to review or change it. A hearing is given by the Act as to the apportionment among the land-owners, which furnishes to them an opportunity to raise all pertinent and available questions, and dispute their liability, or its amount and extent. The precise wrong of which complaint is made appears to be that the land-owners now assessed never had opportunity to be heard as to the original apportionment, and find themselves now practically bound by it as between their lots and those of the owners who paid. But that objection becomes a criticism upon the action of the legislature and the process by which it determined the amount to be raised and the property to be assessed. Unless by special permission, that is a hearing never granted in the process of taxation. The legislature determines expenditures and amounts to be raised for their payment, the whole discussion and all questions of prudence and propriety and justice being confided to its jurisdiction. It may err, but the courts cannot review its discretion. In this case, it kept within its power when it fixed, first, the amount to be raised to discharge the improvement debt incurred by its direction; and, second, when it designated the lots and property, which in its judgment, by reason of special benefits, should bear the burden; and having the power, we cannot criticise the reasons or manner of its action. The land-owners were given a hearing, and so there was no constitutional objection in that respect. Nor was that hearing illusory. It opened to the land-owner an opportunity to assail the constitutional validity of the Act under which alone an apportionment could be made, and that objection failing, it opened the only other possible questions, of the mode and amounts of the apportionment itself. We think the Act was constitutional." 100 N. Y. 587-589.

The general principles, upon which that judgment rests, have been affirmed by the decisions of this court.

The power to tax belongs exclusively to the legislative branch of the government. *United States* v. *New Orleans*, 98 U. S. 381, 392; *Meri-*

wether v. *Garrett*, 102 U. S. 472. In the words of Chief Justice Chase, condensing what had been said long before by Chief Justice Marshall, "The judicial department cannot prescribe to the legislative department limitations upon the exercise of its acknowledged powers. The power to tax may be exercised oppressively upon persons; but the responsibility of the legislature is not to the courts, but to the people by whom its members are elected." *Veazie Bank* v. *Fenno*, 8 Wall. 533, 548; *McCulloch* v. *Maryland*, 4 Wheat. 316, 428; *Providence Bank* v. *Billings*, 4 Pet. 514, 563. See also *Kirtland* v. *Hotchkiss*, 100 U. S. 491, 497. Whether the estimate of the value of land for the purpose of taxation exceeds its true value, this court on writ of error to a State court cannot inquire. *Kelly* v. *Pittsburgh*, 104 U. S. 78, 80.

The legislature, in the exercise of its power of taxation, has the right to direct the whole or a part of the expense of a public improvement, such as the laying out, grading or repairing of a street, to be assessed upon the owners of lands benefited thereby; and the determination of the territorial district which should be taxed for a local improvement is within the province of legislative discretion. *Willard* v. *Presbury*, 14 Wall. 676; *Davidson* v. *New Orleans*, 96 U. S. 97; *Mobile County* v. *Kimball*, 102 U. S. 691, 703, 704; *Hagar* v. *Reclamation District*, 111 U. S. 701. If the legislature provides for notice to and hearing of each proprietor, at some stage of the proceedings, upon the question what proportion of the tax shall be assessed upon his land, there is no taking of his property without due process of law. *McMillen* v. *Anderson*, 95 U. S. 37; *Davidson* v. *New Orleans*, and *Hagar* v. *Reclamation District*, above cited.

In *Davidson* v. *New Orleans*, it was held that if the work was one which the State had the authority to do, and to pay for by assessments on the property benefited, objections that the sum raised was exorbitant, and that part of the property assessed was not benefited, presented no question under the Fourteenth Amendment to the Constitution, upon which this court could review the decision of the State court. 96 U. S. 100, 106.

In the absence of any more specific constitutional restriction than the general prohibition against taking property without due process of law, the legislature of the State, having the power to fix the sum necessary to be levied for the expense of a public improvement, and to order it to be assessed, either, like other taxes, upon property generally, or only upon the lands benefited by the improvement, is authorized to determine both the amount of the whole tax, and the class of lands which will receive the benefit and should therefore bear the burden, although it may, if it sees fit, commit the ascertainment of either or both of these facts to the judgment of commissioners.

When the determination of the lands to be benefited is intrusted to commissioners, the owners may be entitled to notice and hearing upon the question whether their lands are benefited and how much. But the legislature has the power to determine, by the statute imposing the tax,

what lands, which might be benefited by the improvement, are in fact benefited; and if it does so, its determination is conclusive upon the owners and the courts, and the owners have no right to be heard upon the question whether their lands are benefited or not, but only upon the validity of the assessment, and its apportionment among the different parcels of the class which the legislature has conclusively determined to be benefited.

In determining what lands are benefited by the improvement, the legislature may avail itself of such information as it deems sufficient, either through investigations by its committees, or by adopting as its own the estimates or conclusions of others, whether those estimates or conclusions previously had or had not any legal sanction.

In § 4 of the statute of 1869, the assessment under which was held void in *Stuart* v. *Palmer*, 74 N. Y. 183, for want of any provision whatever for notice or hearing, the authority to determine what lands, lying within three hundred feet, on either side of the street, were actually benefited, was delegated to commissioners.

But in the statute of 1881 the legislature itself determined what lands were benefited and should be assessed. By this statute the legislature, in substance and effect, assumed that all the lands within the district defined in the statute of 1869 were benefited in a sum equal to the amount of the original assessment, the expense of levying it, and interest thereon; and determined that the lots upon which no part of that assessment had been paid, and which had therefore as yet borne no share of the burden, were benefited to the extent of a certain portion of this sum. That these lots as a whole had been benefited to this extent was conclusively settled by the legislature. The statute of 1881 afforded to the owners notice and hearing upon the question of the equitable apportionment among them of the sum directed to be levied upon all of them, and thus enabled them to contest the constitutionality of the statute; and that was all the notice and hearing to which they were entitled.

It is objected to the validity of the new assessment, that it included interest upon the unpaid part of the old assessment, and a proportionate part of the expense of levying that assessment. But, as to these items, the case does not substantially differ from what it would have been if a sum equal to the whole of the original assessment, including the expense of levying it, and adding the interest, had been ordered by the statute of 1881 to be levied upon all the lands within the district, allowing to each owner, who had already paid his share of the original assessment, a credit for the sum so paid by him, with interest from the time of payment. *Judgment affirmed.*

[The dissenting opinion of MATTHEWS, J. (for himself and HARLAN, J.), is omitted.]

LENT v. TILLSON.

SUPREME COURT OF THE UNITED STATES. 1890.

[140 *U. S.* 316.]

THE case, as stated by the court, was as follows: —

This suit, which was commenced April 5, 1879, arises out of an Act of the Legislature of California, approved March 23, 1876, entitled "An Act to authorize the widening of Dupont Street in the City of San Francisco." An assessment was made to meet the cost incurred in its execution. Provision was made in the Act to issue and sell bonds to meet such cost in the first instance, and for the levy of an annual tax on the lands benefited, in proportion to benefits, to pay the interest on the bonds, and to create a sinking fund for the payment of the principal debt. Bonds, dated January 1, 1876, to the amount of one million dollars, were issued in the name of the city and county of San Francisco, and made payable to the holder in gold coin of the United States, twenty years after date, with interest, payable half yearly, at the rate of seven per cent per annum. The bonds recited that they were issued under the above Act, were to be paid out of the fund raised by taxation as therein provided, and were taken by the holder subject to the conditions expressed in its 22d section to be hereafter referred to. They were signed by the mayor, auditor, and county surveyor, and attested by the official seal of the city and county. The plaintiffs in error, who were the plaintiffs below, being owners of lots or parcels of land within the district subject to the assessment, and claiming that the statute was unconstitutional and void, brought this suit to obtain a decree perpetually enjoining the defendant in error, tax collector of the city and county of San Francisco, from selling their property under the assessment. Holders of the bonds to a large amount intervened and were made defendants. The court of original jurisdiction — the Superior Court of the city and county of San Francisco — rendered a decree giving the relief asked. Upon appeal to the Supreme Court of California that decree was reversed and the cause remanded with directions to dissolve the injunction and dismiss the complaint.

The statute in question contains many provisions. . . . [Here follows a long statement of these provisions.]

Mr. Joseph H. Choate, for plaintiffs in error. *Mr. John Garber* and *Mr. T. B. Bishop* also filed a brief for same.

Mr. A. H. Garland (with whom were *Mr. John Mullan* and *Mr. H. J. May* on the brief), for defendant in error.

MR. JUSTICE HARLAN, after making the above statement, delivered the opinion of the court.

The Chief Justice of the Supreme Court of California, under its order, made his certificate to the effect that in this suit and appeal there was drawn in question the validity of the above Act of March 23, 1876, and

the authority exercised and the proceedings taken under it, on the ground that the statute and said authority and proceedings were repugnant to the Fourteenth Amendment to the Constitution of the United States, and that the decision of that court was in favor of their validity.

The provisions of the statute, to which we have referred, sufficiently indicate its scope and effect, and enable us (without referring to others that relate to matters of mere detail) to determine whether or not the Act, upon its face or by its necessary operation, is repugnant to that clause of the Constitution declaring that no State shall deprive any person of property without due process of law.

We have seen that the statute defined the district benefited by the widening of Dupont Street, and upon which the assessment to meet the cost of the work was to be imposed; made it a condition precedent to the proposed improvement that it should be declared by resolution or order of the Board of Supervisors of the city and county to be expedient; directed that, after the passage of such a resolution or order, the Dupont Street Commissioners should publish, for not less than ten days, in two daily papers in San Francisco, a notice informing property owners along the line of the street of its organization, and inviting all persons interested in property sought to be taken, or that would be injured by the widening of that street, to present descriptions of their respective lots, and a statement in writing of their interest in them; allowed the majority in value of owners of property within the district embracing the lands of the plaintiffs, at any time within thirty days after the last publication of the above notice, by written protest filed with the Board of Commissioners, to defeat altogether the proposed widening of Dupont Street; required the board to prepare a written report showing the description and actual cash value of the several lots and subdivisions of land and buildings included in the land proposed to be taken for the widening of the street, the value and damage determined upon for the same respectively and the amount in which, according to its judgment, each lot had been or would be benefited by reason of the widening of the street, relatively to the benefits accruing to other lots of land within the designated district; and directed such report, as soon as completed, to be left at the office of the board daily, during ordinary business hours, for the free inspection of all persons interested, and notice of the same being open for inspection at such time and place published by the board daily, for twenty days, in two daily newspapers printed and published in the city and county.

But this was not all. For any person interested, and who felt himself aggrieved by the action or determination of the board, as indicated by its report, was permitted, at any time within the above thirty days, to apply by petition to the county court of the city and county, showing his interest in the proceedings of the Board of Commissioners, and his objections thereto, for an order that would bring before that court the report of the board, together with such pertinent documents or data as were in its custody, and were used in preparing its report. It was made

the duty of the party filing the petition to serve, on the same day, a copy thereof on at least one of the members of the Board of Commissioners, who were at liberty to appear by counsel, or otherwise, and make answer to it. The court was also empowered to hear the petition, and set it down for hearing within ten days from its being filed. Provision was made for the taking of testimony upon the hearing, and the court was authorized to use its process to compel the attendance of witnesses and the production of books, papers, or maps in the custody of the board, or otherwise. The discretion given to the court, after hearing and considering the application, to allow or to deny the order prayed for was, of course, to be exercised judicially, according to the showing made by the petitioners. And that complete justice might be done, the court was invested with power, not simply to approve and confirm the report of the board, but to refer it back with directions to alter or modify the same in the particulars specified by the court. Until such alterations and modifications were made, the court was under no duty to approve or confirm the report; and until it was approved and confirmed, the board was without authority to proceed at all in the work committed to it by the statute.

Were not these provisions in substantial conformity with the requirements of "due process of law" as recognized in the decisions of this court? In *Davidson* v. *New Orleans*, 96 U. S. 97, 104, it was said that "whenever, by the laws of a State, or by State authority, a tax, assessment, servitude, or other burden is imposed upon property for the public use, whether it be for the whole State or of some more limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed, in the ordinary courts of justice, with such notice to the person or such proceeding in regard to the property as is appropriate to the nature of the case, the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections." So in *Hagar* v. *Reclamation District*, 111 U. S. 701, 708: "Undoubtedly, where life and liberty are involved, due process requires that there be a regular course of judicial proceedings, which imply that the party to be affected shall have notice and an opportunity to be heard; so, also, where title or possession of property is involved. But, where the taking of property is in the enforcement of a tax, the proceeding is necessarily less formal, and whether notice to him is at all necessary may depend upon the character of the tax and the manner in which its amount is determinable. . . . As stated by Mr. Justice Bradley in his concurring opinion in *Davidson* v. *New Orleans*, 'in judging what is due process of law, respect must be had to the cause and object of the taking, whether the taxing power, the power of eminent domain or the power of assessment for local improvements, or some of these; and, if found to be suitable or admissible in the special case, it will be adjudged to be "due process of law;" but if found to be arbitrary, oppressive, and unjust, it may be declared to be not due

process of law.'" Of the different kinds of taxes which a State may impose, and of which from their nature no notice can be given, the court, in that case, enumerates poll taxes, licenses (not dependent upon the extent of business) and specific taxes on things, persons, or occupations. p. 709.

These principles were reaffirmed in *Kentucky Railroad Tax Cases*, 115 U. S. 321, 331, and in *Spencer* v. *Merchant*, 125 U. S. 345, 355, in the latter of which cases it was said that "the legislature, in the exercise of its power of taxation, has the right to direct the whole or part of the expense of a public improvement, such as the laying, grading, or repairing [and, equally, the widening] of a street, to be assessed upon the owners of lands benefited thereby;" and that, "the determination of the territorial district which should be taxed for a local improvement is within the province of legislative discretion;" also, that, "if the legislature provides for notice to and hearing of each proprietor, at some stage of the proceedings, upon the question what proportion of the tax shall be assessed upon his land, there is no taking of his property without due process of law."

Tested by these principles, the statute providing for the widening of Dupont Street cannot be held to be repugnant to the constitutional requirement of due process of law. The notice by publication to all who owned property liable to be assessed for the cost of that improvement was appropriate to the nature of the case, and was reasonable in respect to the length of time prescribed for the publication. And ample opportunity was given to all persons interested to test in a court of competent jurisdiction the fairness and legality of any assessment proposed to be made upon their property for the purposes indicated by the statute. That court had power to require such alterations or modifications of the report of the Board of Commissioners as justice demanded. It was not bound to approve any report that did not conform to its judgment as to what was right; and without such confirmation the board could not proceed in the execution of the work contemplated by the legislature.

If we had any doubt of the correctness of these views, we should accept the interpretation which the highest court of the State places upon the statute. When the inquiry is whether a State enactment under which property is proposed to be taken for a public purpose accords full opportunity to the owner, at some stage of the proceedings involving his property, to be heard as to their regularity or validity, we must assume that the inferior courts and tribunals of the State will give effect to such enactment as interpreted by the highest court of that State. The Supreme Court of California, speaking by Mr. Justice Temple, in this case, has said: "We are not considering here a statute which is silent as to the hearing. The provisions in question were undoubtedly inserted in view of the constitutional requirement, and for the purpose of affording that opportunity to be heard, without which the law would be void. To give the statute the construction contended for would not only defeat the evident purpose, but would make the whole proceeding

farcical. And I must confess, it seems to me, it requires great industry in going wrong, in view of all the circumstances, to conclude that such can be the meaning. Inapt words certainly are found in the section [§ 8], but it would not have provided so elaborately for a thorough investigation for grievances if it were not intended that redress should be awarded. The statute has apparently been patched and tinkered after it was first drawn, and incongruous matter injected into the body of it. But it still provides for a full hearing, and that the court may alter and modify. And it seems that such action is to be based upon the hearing provided for. The word 'discretion' is used in various meanings, but here, evidently, it was intended to submit the whole matter to the sound judgment of the court to be exercised according to the rules of law." 72 California, 404, 421.

It is said that the county court was without power to adjudge the statute to be unconstitutional, and had no discretion, except to confirm the report, or to require it to be altered or modified. We do not perceive that this is a material inquiry, so long as the statute is not repugnant to the Constitution. But we do not admit that the county court was without power to hold it to be unconstitutional and void — if such was its view — and to decline, upon that ground alone, to confirm any report that the Board of Commissioners might have filed. The judge or judges of that court were obliged, by their oath of office, and in fidelity to the supreme law of the land, to refuse to give effect to any statute that was repugnant to that law, anything in the statute or the Constitution of the State to the contrary notwithstanding. Upon this subject, as well as in respect to the power of the county court to consider objections of every nature that might be made to the confirmation of any report from the Board of County Commissioners, the Supreme Court of the State said: "The statute does not expressly authorize the court to pass upon the validity of the Act, or whether the Board of Supervisors had passed the necessary resolution, or the notices had been given. But the power to do this is necessarily involved in the power of the court to act at all. It may be that the court could not pass upon these questions upon which its jurisdiction depended, so as to conclude all inquiry even on a collateral attack. It was a constitutional court, invested with jurisdiction by the constitution of special cases. The parties had full notice of the proceeding, and of their right to be heard." Again: "The statute places no limit upon the objections which might be made by those deeming themselves aggrieved by the action or determination of the board as shown in the report. As all their determinations which could affect any person were required to appear in the report, this would seem to include all possible objections. The determination, for instance, might have been objected to, because, the Act being invalid or the notices not having been given, the board had no right to proceed to act at all. If this contention were sustained, the result would have been that the court would not have confirmed the report, and the proceedings would have

ended without fixing a charge upon the property of plaintiffs. They could have complained that a wrong basis was adopted in estimating damages or benefits; that the estimated cost was too much, or for any misconduct of the commissioners which could affect them, or that the cost exceeded the estimated benefits, and it does not seem to me that the court would have found any difficulty in granting relief." 72 California, 404, 422.

It is contended, however, that the Act was so administered as to result in depriving the plaintiffs of their property without due process of law. This contention is material only so far as it involves the inquiry as to whether the tribunals charged by the statute with the execution of its provisions acquired jurisdiction to proceed in respect to the lots or lands in question and the owners thereof. Jurisdiction was, of course, essential before the plaintiff's property could have been burdened with this assessment. But errors in the mere administration of the statute, not involving jurisdiction of the subject and of the parties, could not justify this court, in its re-examination of the judgment of the State court, upon writ of error, to hold that the State had deprived, or was about to deprive, the plaintiffs of their property without due process of law. Whether it was expedient to widen Dupont Street, or whether the Board of Supervisors should have so declared, or whether the Board of Commissioners properly apportioned the costs of the work or correctly estimated the benefits accruing to the different owners of property affected by the widening of the street, or whether the board's incidental expenses in executing the statute were too great, or whether a larger amount of bonds were issued than should have been, the excess, if any, not being so great as to indicate upon the face of the transaction a palpable and gross departure from the requirements of the statute, or whether upon the facts disclosed the report of the commissioners should have been confirmed, are, none of them, issues presenting Federal questions, and the judgment of the State court, upon them, cannot be reviewed here.

Upon the issue as to whether the Board of Commissioners and the county court acquired jurisdiction to proceed in the execution of the statute, the evidence is full and satisfactory. . . .

It is contended that the notices required by the different sections of the Act to be published for a designated number of days were not so published. This contention rests, principally, upon the ground that the notices, on some of the days, appeared in a "Supplement" of some of the newspapers, and not in the body of the paper where reading matter was usually found. There is no force in this objection, and it does not deserve serious consideration.

Other objections have been urged by the plaintiffs which we do not deem it necessary to consider. For instance, it is said that the mayor of the city of San Francisco, one of the Board of Commissioners, was himself the owner of a lot on Dupont Street, and, for that reason, was incompetent to act as one of the Board of Street Commissioners; that

some of the alterations and modifications of the report of the commissioners made upon the hearing in the county court, of the petitions filed by different parties were so made under private arrangements between the commissioners and those parties, of which other property owners along Dupont Street had no notice, and by which such owners were injuriously affected; that the Board of Commissioners selected experts to "assist" it in estimating the damages for property taken and injured by the proposed improvement and the benefits accruing therefrom, and that the report of those experts was accepted by the commissioners, without themselves making or attempting to make an appraisement of damages or an assessment of benefits under the statute; and that such appraisement and assessment were not in fact correct, fair, or just, but were fraudulent. In respect to all these and like objections, it is sufficient to say that they do not necessarily involve any question of a Federal nature, and, so far as this court is concerned, are concluded by the decision of the Supreme Court of California.

We are of opinion, upon the whole case, that the Supreme Court of California correctly held that the plaintiffs had not been, or were not about to be, deprived of their property, in violation of the Constitution of the United States. *Decree affirmed.*

MR. JUSTICE FIELD. I dissent.

CHICAGO, ETC. RAILWAY COMPANY *v.* MINNESOTA.

SUPREME COURT OF THE UNITED STATES. 1889.

[134 *U. S.* 418.] [1]

THIS was a writ of error to review a judgment of the Supreme Court of the State of Minnesota, awarding a writ of *mandamus* against the Chicago, Milwaukee & St. Paul Railway Company.

The case arose on proceedings taken by the Railroad and Warehouse Commission of the State of Minnesota, under an Act of the Legislature of that State, approved March 7, 1887, General Laws of 1887, c. 10, entitled "An Act to regulate Common Carriers, and creating the Railroad and Warehouse Commission of the State of Minnesota, and defining the Duties of such Commission in Relation to Common Carriers." The Act is set forth in full in the margin [of 134 U. S. Reports at pp. 418–434].

The ninth section of that Act creates a commission to be known as the "Railroad and Warehouse Commission of the State of Minnesota," to consist of three persons to be appointed by the Governor by and with the advice and consent of the Senate.

The first section of the Act declares that its provisions shall apply

[1] The statement of facts is shortened. — ED.

to any common carrier "engaged in the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water, when both are used under a common control, management or arrangement, for a carriage or shipment from one place or station to another, both being within the State of Minnesota."

The second section declares "that all charges made by any common carrier, subject to the provisions of this Act, for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, or for the receiving, delivering, storage or handling of such property, shall be equal and reasonable; and every unequal and unreasonable charge for such service is prohibited and declared to be unlawful."

The eighth section provides that every common carrier subject to the provisions of the Act shall print and keep for public inspection schedules of the charges which it has established for the transportation of property; that it shall make no change therein except after ten days' public notice, plainly stating the changes proposed to be made, and the time when they will go into effect; that it shall be unlawful for it to charge or receive any greater or less compensation than that so established and published, for transporting property; that it shall file copies of its schedules with the commission, and shall notify such commission of all changes proposed to be made; that in case the commission shall find at any time that any part of the tariffs of charges so filed and published is in any respect unequal or unreasonable, it shall have the power, and it is authorized and directed, to compel any common carrier to change the same and adopt such charge as the commission "shall declare to be equal and reasonable," to which end the commission shall, in writing, inform such carrier in what respect such tariff of charges is unequal and unreasonable, and shall recommend what tariff shall be substituted therefor; that in case the carrier shall neglect for ten days after such notice to adopt such tariff of charges as the commission recommends, it shall be the duty of the latter to immediately publish such tariff as it has declared to be equal and reasonable, and cause it to be posted at all the regular stations on the line of such carrier in Minnesota, and it shall be unlawful thereafter for the carrier to charge a higher or lower rate than that so fixed and published by the commission; and that, if any carrier subject to the provisions of the Act shall neglect to publish or file its schedules of charges, or to carry out such recommendation made and published by the commission, it shall be subject to a writ of *mandamus* "to be issued by any judge of the Supreme Court or of any of the district courts" of the State, on application of the commission, to compel compliance with the requirements of section 8 and with the recommendation of the commission, and a failure to comply with the requirements of the *mandamus* shall be punishable as and for contempt, and the commission may apply also to any such judge for an injunction against the carrier from receiving or transporting property or passengers within the State until it shall

have complied with the requirements of section 8 and with the recommendation of the commission, and for any wilful violation or failure to comply with such requirements or such recommendation of the commission, the court may award such costs, including counsel fees, by way of penalty, on the return of said writs and after due deliberation thereon, as may be just.

On the 22d of June, 1887, The Boards-of-Trade Union of Farmington, Northfield, Faribault, and Owatonna, in Minnesota, filed with the commission a petition in writing, complaining that the Chicago, Milwaukee & St. Paul Railway Company, being a common carrier engaged in the transportation of property wholly by railroad, for carriage or shipment from Owatonna, Faribault, Dundas, Northfield, and Farmington, to the cities of St. Paul and Minneapolis, all of those places being within the State of Minnesota, made charges for its services in the transportation of milk from said Owatonna, Faribault, Dundas, Northfield, and Farmington to St. Paul and Minneapolis, which were unequal and unreasonable, in that it charged four cents per gallon for the transportation of milk from Owatonna to St. Paul and Minneapolis, and three cents per gallon from Faribault, Dundas, Northfield, and Farmington to the said cities; and that such charges were unreasonably high, and subjected the traffic in milk between said points to unreasonable prejudice and disadvantage. The prayer of the petition was that such rates be declared unreasonable, and the carrier be compelled to change the same and adopt such rates and charges as the commission should declare to be equal and reasonable.

A statement of the complaint thus made was forwarded by the commission, on the 29th of June, 1887, to the railway company, and it was called upon by the commission, on the 6th of July, 1887, to satisfy the complaint or answer it in writing at the office of the commission in St. Paul, on the 13th of July, 1887. . . . [On a hearing and investigation by the commissioners, the rate of two and a half cents a gallon, in ten-gallon cans, was declared by them to be an equal and reasonable rate for carrying milk from Owatonna and Faribault to St. Paul and Minneapolis, and the existing rate of three cents a gallon was pronounced unequal and unreasonable, and the plaintiff in error was directed to change its rates accordingly. The company neglected to obey, and the commission duly posted the new rates along the company's road, and applied to the Supreme Court of the State for a writ of *mandamus* to compel the company's obedience. An alternative writ was issued. The company answered denying the power of the legislature to delegate to a commission the authority to fix rates for transportation, as was attempted in the Act in question; alleging that the State, in this Act, was undertaking to deprive it of its property without due process of law; and that the old rate was reasonable and the new unreasonable, and the establishing of it a taking of property without due process of law. At the hearing, the company was refused leave to take testimony as to the reasonableness of the new

rate, and the company by a peremptory writ was ordered to change its rates as required by the commission. Costs were given against the company and a reargument was refused. Thereupon the company brought this writ of error.]

Mr. John W. Cary, for plaintiff in error.

Mr. Moses E. Clapp and *Mr. H. W. Childs*, for defendant in error.

Mr. W. C. Goudy, for appellant.

MR. JUSTICE BLATCHFORD, after stating the case as above reported, delivered the opinion of the court.

The opinion of the Supreme Court of Minnesota is reported in 38 Minnesota, 281. In it the court in the first place construed the statute on the question as to whether the court itself had jurisdiction to entertain the proceeding, and held that it had. Of course, we cannot review this decision.

It next proceeded to consider the question as to the nature and extent of the powers granted to the commission by the statute in the matter of fixing the rates of charges. On that subject it said: "It seems to us that, if language means anything, it is perfectly evident that the expressed intention of the legislature is that the rates recommended and published by the commission (assuming that they have proceeded in the manner pointed out by the Act) should be not simply advisory, nor merely *prima facie* equal and reasonable but final and conclusive as to what are lawful or equal and reasonable charges; that, in proceedings to compel compliance with the rates thus published, the law neither contemplates nor allows any issue to be made or inquiry had as to their equality and reasonableness in fact. Under the provisions of the Act, the rates thus published are the only ones that are lawful, and therefore, in contemplation of law, the only ones that are equal and reasonable; and, hence, in proceedings like the present, there is, as said before, no fact to traverse, except the violation of the law in refusing compliance with the recommendations of the commission. Indeed, the language of the Act is so plain on that point that argument can add nothing to its force."

It then proceeded to examine the question of the validity of the Act under the Constitution of Minnesota, as to whether the legislature was authorized to confer upon the commission the powers given to the latter by the statute. It held that, as the legislature had the power itself to regulate charges by railroads, it could delegate to a commission the power of fixing such charges, and could make the judgment or determination of the commission as to what were reasonable charges final and conclusive. . . . [Here follows a history of the plaintiff in error, showing that it succeeded to the franchises of various other railroad companies.]

It is contended for the railway company that the State of Minnesota is bound by the contract made by the Territory in the charter granted to the Minneapolis and Cedar Valley Railroad Company; that a contract existed that the company should have the power of regulating its rates

of toll; that any legislation by the State infringing upon that right impairs the obligation of the contract; that there was no provision in the charter or in any general statute reserving to the Territory or to the State the right to alter or amend the charter; and that no subsequent legislation of the Territory or of the State could deprive the directors of the company of the power to fix its rates of toll, subject only to the general provision of law that such rates should be reasonable.

But we are of opinion that the general language of the ninth section of the charter of the Minneapolis and Cedar Valley Railroad Company cannot be held to constitute an irrepealable contract with that company that it should have the right for all future time to prescribe its rates of toll, free from all control by the legislature of the State. . . .

There is nothing in the mere grant of power, by section 9 of the charter, to the directors of the company, to make needful rules and regulations touching the rates of toll and the manner of collecting the same, which can be properly interpreted as authorizing us to hold that the State parted with its general authority itself to regulate, at any time in the future when it might see fit to do so, the rates of toll to be collected by the company.

In *Stone* v. *Farmers' Loan and Trust Co.*, 116 U. S. 307, 325, the whole subject is fully considered, the authorities are cited, and the conclusion is arrived at, that the right of a State reasonably to limit the amount of charges by a railroad company for the transportation of persons and property within its jurisdiction cannot be granted away by its legislature unless by words of positive grant or words equivalent in law; and that a statute which grants to a railroad company the right "from time to time to fix, regulate and receive the tolls and charges by them to be received for transportation," does not deprive the State of its power, within the limits of its general authority, as controlled by the Constitution of the United States, to act upon the reasonableness of the tolls and charges so fixed and regulated. But, after reaching this conclusion, the court said (p. 331): "From what has thus been said, it is not to be inferred that this power of limitation or regulation is itself without limit. This power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation. Under pretence of regulating fares and freights, the State cannot require a railroad corporation to carry persons or property without reward; neither can it do that which in law amounts to a taking of private property for public use without just compensation, or without due process of law."

There being, therefore, no contract or chartered right in the railroad company which can prevent the legislature from regulating in some form the charges of the company for transportation, the question is whether the form adopted in the present case is valid.

The construction put upon the statute by the Supreme Court of Minnesota must be accepted by this court, for the purposes of the pres-

ent case, as conclusive and not to be re-examined here as to its propriety or accuracy. The Supreme Court authoritatively declares that it is the expressed intention of the Legislature of Minnesota, by the statute, that the rates recommended and published by the commission, if it proceeds in the manner pointed out by the Act, are not simply advisory, nor merely *prima facie* equal and reasonable, but final and conclusive as to what are equal and reasonable charges; that the law neither contemplates nor allows any issue to be made or inquiry to be had as to their equality or reasonableness in fact; that, under the statute, the rates published by the commission are the only ones that are lawful, and, therefore, in contemplation of law the only ones that are equal and reasonable; and that, in a proceeding for a *mandamus* under the statute, there is no fact to traverse except the violation of law in not complying with the recommendations of the commission. In other words, although the railroad company is forbidden to establish rates that are not equal and reasonable, there is no power in the courts to stay the hands of the commission, if it chooses to establish rates that are unequal and unreasonable.

This being the construction of the statute by which we are bound in considering the present case, we are of opinion that, so construed, it conflicts with the Constitution of the United States in the particulars complained of by the railroad company. It deprives the company of its right to a judicial investigation, by due process of law, under the forms and with the machinery provided by the wisdom of successive ages for the investigation judicially of the truth of a matter in controversy, and substitutes therefor, as an absolute finality, the action of a railroad commission which, in view of the powers conceded to it by the State court, cannot be regarded as clothed with judicial functions or possessing the machinery of a court of justice.

Under section 8 of the statute, which the Supreme Court of Minnesota says is the only one which relates to the matter of the fixing by the commission of general schedules of rates, and which section, it says, fully and exclusively provides for that subject, and is complete in itself, all that the commission is required to do is, on the filing with it by a railroad company of copies of its schedules of charges, to "find" that any part thereof is in any respect unequal or unreasonable, and then it is authorized and directed to compel the company to change the same and adopt such charge as the commission "shall declare to be equal and reasonable," and, to that end, it is required to inform the company in writing in what respect its charges are unequal and unreasonable. No hearing is provided for, no summons or notice to the company before the commission has found what it is to find and declared what it is to declare, no opportunity provided for the company to introduce witnesses before the commission, in fact, nothing which has the semblance of due process of law; and although, in the present case, it appears that, prior to the decision of the commission, the company appeared before it by its agent, and the commission investigated the rates charged by the company for transporting milk, yet it does

not appear what the character of the investigation was or how the result was arrived at.

By the second section of the statute in question, it is provided that all charges made by a common carrier for the transportation of passengers or property shall be equal and reasonable. Under this provision, the carrier has a right to make equal and reasonable charges for such transportation. In the present case, the return alleged that the rate of charge fixed by the commission was not equal or reasonable, and the Supreme Court held that the statute deprived the company of the right to show that judicially. The question of the reasonableness of a rate of charge for transportation by a railroad company, involving as it does the element of reasonableness both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring due process of law for its determination. If the company is deprived of the power of charging reasonable rates for the use of its property, and such deprivation takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property, and thus, in substance and effect, of the property itself, without due process of law and in violation of the Constitution of the United States; and in so far as it is thus deprived, while other persons are permitted to receive reasonable profits upon their invested capital, the company is deprived of the equal protection of the laws.

It is provided by section 4 of article 10 of the Constitution of Minnesota of 1857, that "lands may be taken for public way, for the purpose of granting to any corporation the franchise of way for public use," and that "all corporations, being common carriers, enjoying the right of way in pursuance to the provisions of this section, shall be bound to carry the mineral, agricultural and other productions and manufactures on equal and reasonable terms." It is thus perceived that the provision of section 2 of the statute in question is one enacted in conformity with the Constitution of Minnesota.

The issuing of the peremptory writ of *mandamus* in this case was, therefore, unlawful, because in violation of the Constitution of the United States; and it is necessary that the relief administered in favor of the plaintiff in error should be a reversal of the judgment of the Supreme Court awarding that writ, and an instruction for further proceedings by it not inconsistent with the opinion of this court.

In view of the opinion delivered by that court, it may be impossible for any further proceedings to be taken other than to dismiss the proceeding for a *mandamus*, if the court should adhere to its opinion that, under the statute, it cannot investigate judicially the reasonableness of the rates fixed by the commission. Still, the question will be open for review; and

The judgment of this court is, that the judgment of the Supreme Court of Minnesota, entered May 4, 1888, *awarding a peremptory writ of mandamus in this case, be reversed, and the case be remanded to that court, with an instruction for further proceedings not inconsistent with the opinion of this court.*

MR. JUSTICE MILLER concurring.

I concur with some hesitation in the judgment of the court, but wish to make a few suggestions of the principles which I think should govern this class of questions in the courts. Not desiring to make a dissent, nor a prolonged argument in favor of any views I may have, I will state them in the form of propositions.

1. In regard to the business of common carriers limited to points within a single State, that State has the legislative power to establish the rates of compensation for such carriage.

2. The power which the legislature has to do this can be exercised through a commission which it may authorize to act in the matter, such as the one appointed by the Legislature of Minnesota by the Act now under consideration.

3. Neither the legislature nor such commission acting under the authority of the legislature, can establish arbitrarily and without regard to justice and right a tariff of rates for such transportation, which is so unreasonable as to practically destroy the value of property of persons engaged in the carrying business on the one hand, nor so exorbitant and extravagant as to be in utter disregard of the rights of the public for the use of such transportation on the other.

4. In either of these classes of cases there is an ultimate remedy by the parties aggrieved, in the courts, for relief against such oppressive legislation, and especially in the courts of the United States, where the tariff of rates established either by the legislature or by the commission is such as to deprive a party of his property without due process of law.

5. But until the judiciary has been appealed to, to declare the regulations made, whether by the legislature or by the commission, voidable for the reasons mentioned, the tariff of rates so fixed is the law of the land, and must be submitted to both by the carrier and the parties with whom he deals.

6. That the proper, if not the only, mode of judicial relief against the tariff of rates established by the legislature or by its commission, is by a bill in chancery asserting its unreasonable character and its conflict with the Constitution of the United States, and asking a decree of court forbidding the corporation from exacting such fare as excessive, or establishing its right to collect the rates as being within the limits of a just compensation for the service rendered.

7. That until this is done it is not competent for each individual having dealings with the carrying corporation, or for the corporation with regard to each individual who demands its services, to raise a contest in the courts over the questions which ought to be settled in this general and conclusive method.

8. But in the present case, where an application is made to the Supreme Court of the State to compel the common carriers, namely, the railroad companies, to perform the services which their duty requires them to do for the general public, which is equivalent to estab-

lishing by judicial proceeding the reasonableness of the charges fixed by the commission, I think the court has the same right and duty to inquire into the reasonableness of the tariff of rates established by the commission before granting such relief, that it would have if called upon so to do by a bill in chancery.

9. I do not agree that it was necessary to the validity of the action of the commission that previous notice should have been given to all common carriers interested in the rates to be established, nor to any particular one of them, any more than it would have been necessary, which I think it is not, for the legislature to have given such notice if it had established such rates by legislative enactment.

10. But when the question becomes a judicial one, and the validity and justice of these rates are to be established or rejected by the judgment of a court, it is necessary that the railroad corporations interested in the fare to be considered should have notice and have a right to be heard on the question relating to such fare, which I have pointed out as judicial questions. For the refusal of the Supreme Court of Minnesota to receive evidence on this subject, I think the case ought to be reversed on the ground that this is a denial of due process of law in a proceeding which takes the property of the company, and if this be a just construction of the statute of Minnesota it is for that reason void.[1]

[1] MR. JUSTICE BRADLEY (with whom concurred MR. JUSTICE GRAY and MR. JUSTICE LAMAR) dissenting.

I cannot agree to the decision of the court in this case. It practically overrules *Munn* v. *Illinois*, 94 U. S. 113, and the several railroad cases that were decided at the same time. The governing principle of those cases was that the regulation and settlement of the fares of railroads and other public accommodations is a legislative prerogative and not a judicial one. This is a principle which I regard as of great importance. When a railroad company is chartered, it is for the purpose of performing a duty which belongs to the State itself. It is chartered as an agent of the State for furnishing public accommodation. The State might build its railroads if it saw fit. It is its duty and its prerogative to provide means of intercommunication between one part of its territory and another. And this duty is devolved upon the legislative department. If the legislature commissions private parties, whether corporations or individuals, to perform this duty, it is its prerogative to fix the fares and freights which they may charge for their services. When merely a road or a canal is to be constructed, it is for the legislature to fix the tolls to be paid by those who use it; when a company is chartered not only to build a road, but to carry on public transportation upon it, it is for the legislature to fix the charges for such transportation.

But it is said that all charges should be reasonable, and that none but reasonable charges can be exacted; and it is urged that what is a reasonable charge is a judicial question. On the contrary, it is pre-eminently a legislative one, involving considerations of policy as well as of remuneration; and is usually determined by the legislature, by fixing a maximum of charges in the charter of the company, or afterwards, if its hands are not tied by contract. If this maximum is not exceeded, the courts cannot interfere. When the rates are not thus determined, they are left to the discretion of the company, subject to the express or implied condition that they shall be reasonable; express, when so declared by statute; implied, by the common law, when the statute is silent; and the common law has effect by virtue of the legislative will.

Thus, the legislature either fixes the charges at rates which it deems reasonable; or merely declares that they shall be reasonable; and it is only in the latter case,

where what is reasonable is left open, that the courts have jurisdiction of the subject. I repeat: When the legislature declares that the charges shall be reasonable, or, which is the same thing, allows the common-law rule to that effect to prevail, and leaves the matter there; then resort may be had to the courts to inquire judicially whether the charges are reasonable. Then, and not till then, is it a judicial question. But the legislature has the right, and it is its prerogative, if it chooses to exercise it, to declare what is reasonable.

This is just where I differ from the majority of the court. They say in effect, if not in terms, that the final tribunal of arbitrament is the judiciary; I say it is the legislature. I hold that it is a legislative question, not a judicial one, unless the legislature or the law (which is the same thing), has made it judicial, by prescribing the rule that the charges shall be reasonable, and leaving it there.

It is always a delicate thing for the courts to make an issue with the legislative department of the government, and they should never do so if it is possible to avoid it. By the decision now made we declare, in effect, that the judiciary, and not the legislature, is the final arbiter in the regulation of fares and freights of railroads and the charges of other public accommodations. It is an assumption of authority on the part of the judiciary which, it seems to me, with all due deference to the judgment of my brethren, it has no right to make. The assertion of jurisdiction by this court makes it the duty of every court of general jurisdiction, State or Federal, to entertain complaints against the decisions of the boards of commissioners appointed by the States to regulate their railroads; for all courts are bound by the Constitution of the United States, the same as we are. Our jurisdiction is merely appellate.

The incongruity of this position will appear more distinctly by a reference to the nature of the cases under consideration. The question presented before the commission in each case was one relating simply to the reasonableness of the rates charged by the companies, — a question of more or less. In the one case the company charged three cents per gallon for carrying milk between certain points. The commission deemed this to be unreasonable, and reduced the charge to 2½ cents. In the other case the company charged $1.25 per car for handling and switching empty cars over its lines within the city of Minneapolis, and $1.50 for loaded cars; and the commission decided that $1.00 per car was a sufficient charge in all cases.[1] The companies complain that the charges as fixed by the commission are unreasonably low, and that they are deprived of their property without due process of law; that they are entitled to a trial by a court and jury, and are not barred by the decisions of a legislative commission. The State court held that the legislature had the right to establish such a commission, and that its determinations are binding and final, and that the courts cannot review them. This court now reverses that decision, and holds the contrary. In my judgment the State court was right, and the establishment of the commission, and its proceedings, were no violation of the constitutional prohibition against depriving persons of their property without due process of law.

I think it is perfectly clear, and well settled by the decisions of this court, that the legislature might have fixed the rates in question. If it had done so, it would have done it through the aid of committees appointed to investigate the subject, to acquire information, to cite parties, to get all the facts before them, and finally to decide and report. No one could have said that this was not due process of law. And if the legislature itself could do this, acting by its committees, and proceeding according to the usual forms adopted by such bodies, I can see no good reason why it might not delegate the duty to a board of commissioners, charged, as the board in this case was, to regulate and fix the charges so as to be equal and reasonable. Such a board would have at its command all the means of getting at the truth and ascertaining the reasonableness of fares and freights, which a legislative committee has. It might, or it might not, swear witnesses and examine parties. Its duties being of an administrative character, it would have the widest scope for examination and inquiry. All means of knowledge and information would be at its command, —

[1] The report does not give the facts relative to this case. — ED.

just as they would be at the command of the legislature which created it. Such a body, though not a court, is a proper tribunal for the duties imposed upon it.

In the case of *Davidson* v. *City of New Orleans*, 96 U. S. 97, we decided that the appointment of a board of assessors for assessing damages was not only due process of law, but the proper method for making assessments to distribute the burden of a public work amongst those who are benefited by it. No one questions the constitutionality or propriety of boards for assessing property for taxation, or for the improvement of streets, sewers and the like, or of commissions to establish county seats, and for doing many other things appertaining to the administrative management of public affairs. Due process of law does not always require a court. It merely requires such tribunals and proceedings as are proper to the subject in hand. In the *Railroad Commission Cases*, 116 U. S. 307, we held that a board of commissioners is a proper tribunal for determining the proper rates of fare and freight on the railroads of a State. It seems to me, therefore, that the law of Minnesota did not prescribe anything that was not in accordance with due process of law in creating such a board, and investing it with the powers in question.

It is complained that the decisions of the board are final and without appeal. So are the decisions of the courts in matters within their jurisdiction. There must be a final tribunal somewhere for deciding every question in the world. Injustice may take place in all tribunals. All human institutions are imperfect — courts as well as commissions and legislatures. Whatever tribunal has jurisdiction, its decisions are final and conclusive unless an appeal is given therefrom. The important question always is, what is the lawful tribunal for the particular case? In my judgment, in the present case, the proper tribunal was the legislature, or the board of commissioners which it created for the purpose.

If not in terms, yet in effect, the present cases are treated as if the constitutional prohibition was, that no State shall take private property for public use without just compensation, — and as if it was our duty to judge of the compensation. But there is no such clause in the Constitution of the United States. The Fifth Amendment is prohibitory upon the Federal government only, and not upon the State governments. In this matter, — just compensation for property taken for public use, — the States make their own regulations, by constitution, or otherwise. They are only required by the Federal Constitution to provide "due process of law." It was alleged in *Davidson* v. *New Orleans*, 96 U. S. 97, that the property assessed was not benefited by the improvement; but we held that that was a matter with which we would not interfere; the question was, whether there was due process of law. p. 106. If a State court renders an unjust judgment, we cannot remedy it.

I do not mean to say that the legislature, or its constituted board of commissioners, or other legislative agency, may not so act as to deprive parties of their property without due process of law. The Constitution contemplates the possibility of such an invasion of rights. But, acting within their jurisdiction (as in these cases they have done), the invasion should be clear and unmistakable to bring the case within that category. Nothing of the kind exists in the cases before us. The legislature, in establishing the commission, did not exceed its power; and the commission, in acting upon the cases, did not exceed its jurisdiction, and was not chargeable with fraudulent behavior. There was merely a difference of judgment as to amount, between the commission and the companies, without any indication of intent on the part of the former to do injustice. The board may have erred; but if they did, as the matter was within their rightful jurisdiction, their decision was final and conclusive unless their proceedings could be impeached for fraud. Deprivation of property by mere arbitrary power on the part of the legislature, or fraud on the part of the commission, are the only grounds on which judicial relief may be sought against their action. There was, in truth, no deprivation of property in these cases at all. There was merely a regulation as to the enjoyment of property, made by a strictly competent authority, in a matter entirely within its jurisdiction.

It may be that our legislatures are invested with too much power, open, as they are, to influences so dangerous to the interests of individuals, corporations and society. But

such is the constitution of our republican form of government; and we are bound to abide by it until it can be corrected in a legitimate way. If our legislatures become too arbitrary in the exercise of their powers, the people always have a remedy in their hands; they may at any time restrain them by constitutional limitations. But so long as they remain invested with the powers that ordinarily belong to the legislative branch of government, they are entitled to exercise those powers, amongst which, in my judgment, is that of the regulation of railroads and other public means of intercommunication, and the burdens and charges which those who own them are authorized to impose upon the public.

I am authorized to say that Mr. Justice Gray and Mr. Justice Lamar agree with me in this dissenting opinion.[1]

In *Budd* v. *N. Y.*, 143 U. S. 517 (1892), the Supreme Court of the United States, after reaffirming the doctrine of *Munn* v. *Ill.*, 94 U. S. 113 (for which see that case, *infra*, p. 743), BLATCHFORD, J., for the court said: "It is further contended that, under the decision of this court in *Chicago, &c. Railway Co.* v. *Minnesota*, 134 U. S. 418, the fixing of elevator charges is a judicial question, as to whether they are reasonable or not; that the statute must permit and provide for a judicial settlement of the charges; and that, by the statute under consideration, an arbitrary rate is fixed, and all inquiry is precluded as to whether that rate is reasonable or not.

"But this is a misapprehension of the decision of this court in the case referred to. In that case, the Legislature of Minnesota had passed an Act which established a railroad and warehouse commission, and the Supreme Court of that State had interpreted the Act as providing that the rates of charges for the transportation of property by railroads, recommended and published by the commission, should be final and conclusive as to what were equal and reasonable charges, and that there could be no judicial inquiry as to the reasonableness of such rates A railroad company, in answer to an application for a *mandamus*, contended that such rates in regard to it were unreasonable, and, as it was not allowed by the State Court to put in testimony in support of its answer, on the question of the reasonableness of such rates, this court held that the statute was in conflict with the Constitution of the United States, as depriving the company of its property without due process of law, and depriving it of the equal protection of the laws. That was a very different case from one under the statute of New York in question here, for in this instance the rate of charges is fixed directly by the legislature. See *Spencer* v. *Merchant*, 125 U. S. 345, 356. What was said in the opinion of the court in 134 U S. had reference only to the case then before the court, and to charges fixed by a commission appointed under an Act of the Legislature, under a Constitution of the State which provided that all corporations, being common carriers, should be bound to carry 'on equal and reasonable terms,' and under a statute which provided that all charges made by a common carrier for the transportation of passengers or property should be 'equal and reasonable.'

"What was said in the opinion in 134 U. S., as to the question of the reasonableness of the rate of charge being one for judicial investigation, had no reference to a case where the rates are prescribed directly by the legislature. Not only was that the case in the statute of Illinois in *Munn* v. *Illinois*, but the doctrine was laid down by this court in *Wabash, &c. Railway Co.* v. *Illinois*, 118 U. S. 557, 568, that it was the right of a State to establish limitations upon the power of railroad companies to fix the price at which they would carry passengers and freight, and that the question was of the same character as that involved in fixing the charges to be made by persons engaged in the warehousing business. So, too, in *Dow* v. *Beidelman*, 125 U. S. 680, 686, it was said that it was within the power of the legislature to declare what should be a reasonable compensation for the services of persons exercising a public employment, or to fix a maximum beyond which any charge made would be unreasonable.

"But in *Dow* v. *Beidelman*, after citing *Munn* v. *Illinois*, 94 U. S. 113 [and several

[1] Compare *Wellman* v. *Chic. &c. Ry. Co.*, 83 Mich. 592 (1890); *Clyde et al.* v. *Richm. & D. R. R. Co.*, 57 Fed. Rep. 436 (1893, C. C. U. S. So. Ca.).

other cases], as recognizing the doctrine that the legislature may itself fix a maximum beyond which any charge made would be unreasonable, in respect to services rendered in a public employment, or for the use of property in which the public has an interest, subject to the proviso that such power of limitation or regulation is not without limit, and is not a power to destroy, or a power to compel the doing of the services without reward, or to take private property for public use without just compensation or without due process of law, the court said that it had no means, 'if it would under any circumstances have the power,' of determining that the rate fixed by the legislature in that case was unreasonable, and that it did not appear that there had been any such confiscation of property as amounted to a taking of it without due process of law, or that there had been any denial of the equal protection of the laws.

"In the cases before us, the records do not show that the charges fixed by the statute are unreasonable, or that property has been taken without due process of law, or that there has been any denial of the equal protection of the laws; even if under any circumstances we could determine that the maximum rate fixed by the legislature was unreasonable."

Compare *R. R. Co.* v. *Maryland*, 21 Wall. 456, 471 (BRADLEY, J.); *Spencer* v. *Merchant*, *ante*, at p. 647; BRADLEY, J. (dissenting), in *Chicago, &c. Ry. Co.* v. *Minnesota*, *ante*, at p. 660, note; and *Paulsen* v. *Portland*, 149 U. S. 30, 38.

Of that [reasonableness], said the court (WAITE, C. J.), in *Terry* v. *Anderson*, 95 U. S. p. 633 (1877), "the legislature is primarily the judge; and we cannot overrule the decision of that department of the government, unless a palpable error has been committed." See *Pickering Phipps* v. *Lond. & N. W. Ry. Co.*, 66 L. T. Rep. 721.

Compare the function of the court in revising the verdict of a jury: "Not merely must the jury's verdict be conformable to the rules of law, but it must be defensible in point of sense and reason; it must not be absurd or whimsical. This is obviously a different thing from imposing upon the jury the judge's private standard of what is reasonable; as, for example, when the question for the jury itself is one of reasonable conduct. In such a case, the judges do not undertake to set aside the verdict because their own opinion of what is reasonable in the conduct on trial differs from the jury's. The question for the court, it will be observed, is not whether the conduct ultimately in question, *e. g.*, that of a party injured in a railroad accident, was reasonable, but whether the jury's conduct is reasonable in holding it to be so; and the test is whether a reasonable person could, upon the evidence, entertain the jury's opinion. Can the conduct, which the jury are judging, reasonably be thought reasonable? Is that a permissible view?" — *Law and Fact in Jury Trials*, 4 Harv. Law Rev. 167, 168. And so further *Origin and Scope of Am. Doct. Const. Law*, 20–24.

In *State* v. *Vandersluis*, 42 Minn. 129, 131 (1889), the court (GILFILLAN, C. J.) said: "The only limit to the legislative power in prescribing conditions to the right to practise in a profession is that they shall be reasonable. Whether they are reasonable, — that is, whether the legislature has gone beyond the proper limits of its power, — the courts must judge. By the term 'reasonable' we do not mean expedient, nor do we mean that the conditions must be such as the court would impose if it were called on to prescribe what should be the conditions. They are to be deemed reasonable where, although perhaps not the wisest and best that might be adopted, they are fit and appropriate to the end in view, to wit, the protection of the public, and are manifestly adopted in good faith for that purpose. If a condition should be clearly arbitrary and capricious; if no reason with reference to the end in view could be assigned for it; and, especially, if it appeared that it must have been adopted for some other purpose, — such, for instance, as to favor or benefit some persons or class of persons, — it certainly would not be reasonable, and would be beyond the power of the legislature to impose."

It may be doubted that there is any difference between the action of a legislature and that of a legislative commission, as regards the questions involved in such a case as *Chic., &c. Ry. Co.* v. *Minnesota*, when once it is clear that the legislature has really

EILENBECKER *v.* PLYMOUTH COUNTY.

SUPREME COURT OF THE UNITED STATES. 1890.

[134 *U. S.* 31.]

THE case is stated in the opinion.

Mr. William A. McKenney, for plaintiffs in error.

Mr. J. S. Struble, *Mr. S M. Marsh*, and *Mr. A. J. Baker*, Attorney-General of Iowa, for defendant in error.

MR. JUSTICE MILLER delivered the opinion of the court.

This is a writ of error to the Supreme Court of the State of Iowa.

The judgment which we are called upon to review is one affirming the judgment of the District Court of Plymouth County in that State. This judgment imposed a fine of five hundred dollars and costs on each of the six plaintiffs in error in this case, and imprisonment in the jail of Plymouth County for a period of three months, but they were to be

undertaken to confer upon the commission the power in question. If the legislature can exercise it, it would seem that it may confer on the commission a like authority.

Yet, as regards subordinate bodies, there is always the question of construction, as to what authority has, in fact, been conferred on them; and in passing on this, established common-law principles are applicable, which, ordinarily, and in the absence of clear legislative intention to the contrary, enable the courts to control their action much more readily than that of the legislature itself. If a commission or a local board acts unreasonably, the courts may set aside their action as not authorized by the legislature. Similar action by the legislature itself can be condemned only if it be unconstitutional.

In *Leader* v. *Moxon et al.*, 2 W. Bl. 924, where paving commissioners, with general powers "to pave, repair, sink, or alter [a certain street] in such manner as the commissioners shall think fit," proceeded to raise "the footway contiguous to the plaintiff's houses to the height of six feet, but in a regular descent from one end of the street to the other, . . . whereby the doors and windows of the ground-floors of the said houses were totally obstructed," — it was *held*, that "the commissioners had grossly exceeded their powers, which must have a reasonable construction. Their discretion is not arbitrary, but must be limited by reason and law. . . . Had Parliament intended to demolish or render useless some houses for the benefit or ornament of the rest, it would have given express powers for that purpose and given an equivalent for the loss that individuals might have sustained thereby."

In *Sharp* v. *Wakefield* [1891] Appeal Cases, 173, 179, LORD CHANCELLOR HALSBURY, in speaking of the authority of licensing justices in regard to the sale of intoxicating liquors, said: "An extensive power is confided to the justices in their capacity as justices, to be exercised judicially; and 'discretion' means, when it is said that something is to be done within the discretion of the authorities, that something is to be done according to the rules of reason and justice, not according to private opinion, *Rooke's Case*, 5 Rep. 100 *a*; according to law, and not humor. It is to be not arbitrary, vague, and fanciful, but legal and regular. And it must be exercised within the limit to which an honest man competent to the discharge of his office ought to confine himself. *Wilson* v. *Rastall*, 4 T. R. at p. 757."

As to the general question of the legislative power over railroads, see also *Ch., B. & Q. R. R. Co.* v. *Iowa*, 94 U. S. 155 (1876), and *R. R. Com. Cases*, 116 U. S. 307 (1885). — ED.

released from confinement if the fine imposed was paid within thirty days from the date of the judgment.

This sentence was pronounced by the court as a punishment for contempt in refusing to obey a writ of injunction issued by that court, enjoining and restraining each of the defendants from selling, or keeping for sale, any intoxicating liquors, including ale, wine and beer, in Plymouth County, and the sentence was imposed upon a hearing by the court, without a jury, and upon evidence in the form of affidavits.

It appears that on the 11th day of June, 1885, separate petitions in equity were filed in the District Court of Plymouth County against each of these plaintiffs in error, praying that they should be enjoined from selling, or keeping for sale, intoxicating liquors, including ale, wine and beer, in that county. On the 6th of July the court ordered the issue of preliminary injunctions as prayed. On the 7th of July the writs were served on each of the defendants in each proceeding by the sheriff of Plymouth County. On the 24th of October complaints were filed, alleging that these plaintiffs in error had violated this injunction by selling intoxicating liquors contrary to the law and the terms of the injunction served on them, and asking that they be required to show cause why they should not be punished for contempt of court. A rule was granted accordingly, and the court, having no personal knowledge of the facts charged, ordered that a hearing be had at the next term of the court, upon affidavits; and on the 8th day of March, 1886, it being at the regular term of said District Court, separate trials were had upon evidence in the form of affidavits, by the court without a jury, upon which the plaintiffs were found guilty of a violation of the writs of injunction issued in said cause, and a sentence of fine and imprisonment, as already stated, entered against them.

Each plaintiff obtained from the Supreme Court of the State of Iowa, upon petition, a writ of *certiorari*, in which it was alleged that the District Court of Plymouth County had acted without jurisdiction and illegally in rendering this judgment, and by agreement of counsel, and with the consent of the Supreme Court of Iowa, the cases of the six appellants in this court were submitted together and tried on one transcript of record. That court affirmed the judgment of the District Court of Plymouth County, and to that judgment of affirmance this writ of error is prosecuted. . . . [Four assignments of error are here stated.]

The first three of these assignments of error, as we have stated them, being the first and second and fourth of the assignments as numbered in the brief of the plaintiffs in error, are disposed of at once by the principle often decided by this court, that the first eight articles of the amendments to the Constitution have reference to powers exercised by the government of the United States and not to those of the States. *Livingston* v. *Moore*, 7 Pet. 469; *The Justices* v. *Murray*, 9 Wall. 274; *Edwards* v. *Elliott*, 21 Wall. 532; *United States* v. *Cruik-*

shank, 92 U. S. 542; *Walker* v. *Sauvinet*, 92 U. S. 90; *Fox* v. *Ohio*, 5 How. 410; *Holmes* v. *Jennison*, 14 Pet. 540; *Presser* v. *Illinois*, 116 U. S. 252. . . .

This leaves us alone the assignment of error that the Supreme Court of Iowa disregarded the provisions of section 1 of Article XIV. of the amendments to the Constitution of the United States, because it upheld the statute of Iowa,[1] which it is supposed by counsel deprives persons charged with selling intoxicating liquors of the equal protection of the law, abridges their rights and privileges, and denies to them the right of trial by jury, while in all other criminal prosecutions the accused must be presented by indictment, and then have the benefit of trial by a jury of his peers.

The first observation to be made on this subject is, that the plaintiffs in error are seeking to reverse a judgment of the District Court of Plymouth County, Iowa, imposing upon them a fine and imprisonment for violating the injunction of that court, which had been regularly issued and served upon them. Of the intentional violation of this injunction by plaintiffs we are not permitted to entertain any doubt, and, if we did, the record in the case makes it plain. Neither is it doubted that they had a regular and fair trial, after due notice, and opportunity to defend themselves in open court at a regular term thereof.

The contention of these parties is, that they were entitled to a trial by jury on the question as to whether they were guilty or not guilty of the contempt charged upon them, and because they did not have this trial by jury they say that they were deprived of their liberty without due process of law within the meaning of the Fourteenth Amendment to the Constitution of the United States.

If it has ever been understood that proceedings according to the common law for contempt of court have been subject to the right of trial by jury, we have been unable to find any instance of it. It has

[1] Section 1543 of the Code of Iowa, as amended by c. 143 of the Acts of the Twentieth General Assembly, is as follows:

SEC. 1543. In case of violation of the provisions of either of the three preceding sections or of section fifteen hundred and twenty-five of this chapter, the building or erection of whatever kind, or the ground itself in or upon which such unlawful manufacture, or sale, or keeping, with intent to sell, use or give away, of any intoxicating liquors, is carried on or continued or exists, and the furniture, fixture, vessels and contents, is hereby declared a nuisance, and shall be abated as hereinafter provided, and whoever shall erect or establish, or continue, or use any building, erection or place for any of the purposes prohibited in said sections, shall be deemed guilty of a nuisance, and may be prosecuted and punished accordingly, and upon conviction, shall pay a fine of not exceeding one thousand dollars and costs of prosecution, and stand committed until the fine and costs are paid; and the provisions of chapter 47, title 25 of this Code, shall not be applicable to persons committed under this section. Any citizen of the county where such nuisance exists, or is kept or maintained, may maintain an action in equity, to abate and perpetually enjoin the same, and any person violating the terms of any injunction granted in such proceeding shall be punished as for contempt, by fine of not less than five hundred nor more than one thousand dollars or by imprisonment in the county jail not more than six months, or by both such fine and imprisonment in the discretion of the court.

always been one of the attributes — one of the powers necessarily incident to a court of justice — that it should have this power of vindicating its dignity, of enforcing its orders, of protecting itself from insult, without the necessity of calling upon a jury to assist it in the exercise of this power.

In the case in this court of *Ex parte Terry*, 128 U. S. 289, this doctrine is fully asserted and enforced; quoting the language of the court in the case of *Anderson* v. *Dunn*, 6 Wheat. 204, 227, where it was said that "courts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect and decorum in their presence, and submission to their lawful mandates;" citing also with approbation the language of the Supreme Judicial Court of Massachusetts in *Cartwright's Case*, 114 Mass. 230, 238. that "the summary power to commit and punish for contempts tending to obstruct or degrade the administration of justice is inherent in courts of chancery and other superior courts, as essential to the execution of their powers and to the maintenance of their authority, and is part of the law of the land, within the meaning of Magna Charta and of the twelfth article of our Declaration of Rights."

And this court, in Terry's case, held that a summary proceeding of the Circuit Court of the United States without a jury, imposing upon Terry imprisonment for the term of six months, was a valid exercise of the powers of the court, and that the action of the Circuit Court was also without error in refusing to grant him a writ of *habeas corpus*. The case of Terry came into this court upon application for a writ of *habeas corpus*, and presented, as the case now before us does, the question of the authority of the Circuit Court to impose this imprisonment on a summary hearing without those regular proceedings which include a trial by jury — which was affirmed. The still more recent cases of *Ex parte Savin*, 131 U. S. 267, and *Ex parte Cuddy*, 131 U. S. 280, assert very strongly the same principle. In *Ex parte Robinson*, 19 Wall. 505, 510, this court speaks in the following language:

"The power to punish for contempts is inherent in all courts. Its existence is essential to the preservation of order in judicial proceedings. and the enforcement of the judgments, orders and writs of the courts, and consequently to the due administration of justice. The moment the courts of the United States were called into existence and invested with jurisdiction over any subject, they became possessed of this power. But the power has been limited and defined by the Act of Congress of March 2d, 1831. 4 Stat. 487."

The statute, now embodied in § 725 of the Revised Statutes, reads as follows: "The power of the several courts of the United States to issue attachments and inflict summary punishments for contempts of court shall not be construed to extend to any cases except the misbehavior of any person or persons in the presence of the said courts or so near thereto as to obstruct the administration of justice, the mis-

behavior of any of the officers of the said courts in their official transactions, and the disobedience or resistance by any officer of the said courts, party, juror, witness, or any other person or persons to any lawful writ, process, order, rule, decree, or command of the said courts."

It will thus be seen that even in the Act of Congress, intended to limit the power of the courts to punish for contempts of its authority by summary proceedings, there is expressly left the power to punish in this summary manner the disobedience of any party, to any lawful writ, process, order, rule, decree or command of said court. This statute was only designed for the government of the courts of the United States, and the opinions of this court in the cases we have already referred to show conclusively what was the nature and extent of the power inherent in the courts of the States by virtue of their organization, and that the punishments which they were authorized to inflict for a disobedience to their writs and orders were ample and summary, and did not require the interposition of a jury to find the facts or assess the punishment. This, then, is due process of law in regard to contempts of courts; was due process of law at the time the Fourteenth Amendment of the Federal Constitution was adopted; and nothing has ever changed it except such statutes as Congress may have enacted for the courts of the United States, and as each State may have enacted for the government of its own courts.

So far from any statute on this subject limiting the power of the courts of Iowa, the Act of the Legislature of that State, authorizing the injunction which these parties are charged with violating, expressly declares that for violating such injunction a person doing so shall be punished for the contempt by a fine of not less than five hundred or more than a thousand dollars, or by imprisonment in the county jail not more than six months, or by both such fine and imprisonment, in the discretion of the court. So that the proceeding by which the fine and imprisonment imposed upon these parties for contempt in violating the injunction of the court, regularly issued in a suit to which they were parties, is due process of law, and always has been due process of law, and is the process or proceeding by which courts have from time immemorial enforced the execution of their orders and decrees, and cannot be said to deprive the parties of their liberty or property without due process of law.

The counsel for plaintiffs in error seek to evade the force of this reasoning by the proposition that the entire statute under which this injunction was issued is in the nature of a criminal proceeding, and that the contempt of court of which these parties have been found guilty is a crime for the punishment of which they have a right to trial by jury.

We cannot accede to this view of the subject. Whether an attachment for a contempt of court, and the judgment of the court punishing the party for such contempt, is in itself essentially a criminal proceed-

ing or not, we do not find it necessary to decide. We simply hold that, whatever its nature may be, it is an offence against the court and against the administration of justice, for which courts have always had the right to punish the party by summary proceeding and without trial by jury; and that in that sense it is due process of law within the meaning of the Fourteenth Amendment of the Constitution. We do not suppose that that provision of the Constitution was ever intended to interfere with or abolish the powers of the courts in proceedings for contempt, whether this contempt occurred in the course of a criminal proceeding or of a civil suit.

We might rest the case here; but the plaintiffs in error fall back upon the proposition that the statute of the Iowa Legislature concerning the sale of liquors, under which this injunction was issued, is itself void, as depriving the parties of their property and of their liberty without due process of law. We are not prepared to say that this question arises in the present case. The principal suit in which the injunction was issued, for the contempt of which these parties have been sentenced to imprisonment and to pay a fine, has never been tried so far as this record shows. We do not know whether the parties demanded a trial by jury on the question of their guilty violation of that statute. We do not know that they would have been refused a trial by jury if they had demanded it. Until the trial of that case has been had they are not injured by a refusal to grant them a jury trial. It is the well-settled doctrine of this court that a part of a statute may be void and the remainder may be valid. That part of this statute which declares that no person shall own or keep, or be in any way concerned, engaged or employed in owning or keeping any intoxicating liquors with intent to sell the same within this State, and all the prohibitory clauses of the statute, have been held by this court to be within the constitutional powers of the State Legislature, in the cases of *Mugler* v. *Kansas*, 123 U. S. 623, and *Powell* v. *Pennsylvania*, 127 U. S. 678.

If the objection to the statute is that it authorizes a proceeding in the nature of a suit in equity to suppress the manufacture and sale of intoxicating liquors which are by law prohibited, and to abate the nuisance which the statute declares such acts to be, wherever carried on, we respond that, so far as at present advised, it appears to us that all the powers of a court, whether at common law or in chancery, may be called into operation by a legislative body for the purpose of suppressing this objectionable traffic; and we know of no hindrance in the Constitution of the United States to the form of proceedings, or to the court in which this remedy shall be had. Certainly it seems to us to be quite as wise to use the processes of the law and the powers of the court to prevent the evil, as to punish the offence as a crime after it has been committed.

We think it was within the power of the court of Plymouth County to issue the writs of injunction in these cases, and that the disobedience

to them by the plaintiffs in error subjected them to the proceedings for contempt which were had before that court.

The judgment of the Supreme Court of Iowa is

Affirmed.

In *Carleton* v. *Rugg*, 149 Mass. 550 (1889), on a petition in equity, for the abatement of a nuisance, and an injunction restraining the continuance of it, the court (KNOWLTON, J.) said: "The St. of 1887, c. 380, § 1, is as follows: 'The Supreme Judicial Court and Superior Court shall have jurisdiction in equity upon information filed by the district attorney for the district, or upon the petition of not less than ten legal voters of any town or city, setting forth the fact that any building, place, or tenement therein is resorted to for prostitution, lewdness, or illegal gaming, or is used for the illegal keeping or sale of intoxicating liquors, to restrain, enjoin, or abate the same as a common nuisance, and an injunction for such purpose may be issued by any justice of either of said courts.'

"The first question reported for our decision is, whether this statute is constitutional. The respondents contend that it is in conflict with Article XII. of the Declaration of Rights, which provides that 'no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, . . . but by the judgment of his peers, or the law of the land.' . . .

"We do not understand the respondents to contend that the provisions of the Pub. Sts., c. 100, which regulate the sale of intoxicating liquors, or those of the Pub. Sts., c. 101, § 6, which declare that 'all buildings, places, or tenements . . . used for the illegal keeping or sale of intoxicating liquor shall be deemed common nuisances,' are unconstitutional. But the argument is, that, by a process in equity for the abatement of an alleged common nuisance of the kind named in this statute, they are liable to be deprived of their property, immunities, and privileges otherwise than by the judgment of their peers or the law of the land.

"The fallacy of the argument lies in part in disregarding the distinction between a proceeding to abate a nuisance, which looks only to the property that in the use made of it constitutes the nuisance, and a proceeding to punish an offender for the crime of maintaining a nuisance. These two proceedings are entirely unlike. The latter is conducted under the provisions of the criminal law, and deals only with the person who has violated the law. The former is governed by the rules which relate to property, and its only connection with persons is through property in which they may be interested. That which is declared by a valid statute to be a nuisance, is deemed in law to be a nuisance in fact, and should be dealt with as such. The people, speaking through their representatives, have proclaimed it to be offensive and injurious to the public, and the law will not tolerate it. The fact that keeping a nuisance is a crime, does not deprive a court of

equity of the power to abate the nuisance. *Attorney-General* v. *Hunter*, 1 Dev. Eq. 12. *People* v. *St. Louis*, 5 Gilman, 351. *Ewell* v. *Greenwood*, 26 Iowa, 377. *Minke* v. *Hopeman*, 87 Ill. 450. . . .

"It should be borne in mind, that this is not a statute which professes to look to the conduct of persons to prevent the commission of crime. If it were, it would have no legitimate place in our jurisprudence. There is no doubt that in hearings upon applications for preliminary injunctions and orders *pendente lite* in suits in equity, and in proceedings for the punishment of contempt of court, the parties have no constitutional right to a trial by jury. It would be an anomalous proceeding for a court to enjoin a defendant from committing the crime of larceny, or of selling intoxicating liquors, with a view to punish as disobedience of the injunction and contempt of court the same act which was before punishable as a crime. If that could be done, an accused person through a mere change of form in the proceedings might be punished for a crime without a trial by jury, and in violation of both the Federal and State constitutions. There would be strong ground for contending that a statute which should attempt to authorize such a method of preventing or punishing ordinary crimes would be unconstitutional. Indeed, even where a plaintiff seeks the aid of a court of equity to protect him from irreparable injury through the threatened publication of a libel, or the commission of some other like crime, the courts decline to interfere. *Brandreth* v. *Lance*, 8 Paige, 24; *Fleming* v. *Newton*, 1 H. L. Cas. 363, 376; *Boston Diatite Co.* v. *Florence Manuf. Co.*, 114 Mass. 69." . . .

Injunction to issue.[1]

[1] And so *State* v. *Saunders*, 25 Atl. Rep. 588 (N. H. December, 1889).

In *Carleton* v. *Rugg*, FIELD, J., gave a dissenting opinion in the course of which he said: "The phrase 'due process of law,' contained in the Fourteenth Amendment of the Constitution of the United States, has not been construed to mean that parties shall be entitled to a jury trial in civil suits at common law, or that a person shall be tried for a felony or a capital crime only on presentment of a grand jury, and it is doubtful, even, if it would be held that the amendment secures a trial by jury in criminal cases. The clause of that amendment we are considering is a restraint on all the States of the United States, and the Supreme Court of the United States has taken notice that there are considerable diversities in the jurisprudence of the different States. . . . Apparently any mode of procedure duly established by a State, which provides for an impartial trial, and does not violate the fundamental principles of general jurisprudence, would be due process of law within the meaning of that amendment. A different construction has been given by this court to the phrase 'the law of the land,' contained in Article XII. of our Declaration of Rights, and *Kansas* v. *Ziebold* is not an authority upon the meaning of our Constitution. See *Hurtado* v. *People*, 110 U. S. 516; *Jones* v. *Robbins*, and other Massachusetts cases cited *ubi supra*. It will hardly be contended that intoxicating liquors can be destroyed in this Commonwealth because they are kept for sale in violation of law, unless this fact has been found by a jury. *Fisher* v. *McGirr*, 1 Gray, 1; *Brown* v. *Perkins*, 12 Gray, 89. See *Ely* v. *Supervisors*, 36 N. Y. 297; *Gray* v. *Ayres*, 7 Dana, 375; *Welch* v. *Stowell*, 2 Doug. (Mich.) 332; *Rex* v. *Pappineau*, Strange, 686. . . .

"The Massachusetts Statute of 1887, c. 380, was not passed for the abatement of a nuisance by destroying or changing the character or condition of tangible property, or by removing obstructions to the exercise of a public right. Its purpose was, I

IN *In re Converse*, 137 U. S. 624 (1890), in affirming a judgment of a circuit court which denied a petition for the writ of *habeas corpus* on the part of a lawyer who had been sentenced in a State court for embezzlement on his own confession, CHIEF JUSTICE FULLER, after stating the case, delivered the opinion of the court as follows: "The Supreme Court of Michigan held that the information charged the respondent with the crime of embezzlement; that the defendant was

think, to prevent the illegal sale of intoxicating liquors by punishing by fine or imprisonment, or by both, without limit, in the discretion of the court, any person who sells or keeps such liquors for sale after he has been enjoined by the court. The prevention of crime by the punishment of persons found guilty of an offence against a general law is the end aimed at. The keeping or selling of intoxicating liquors without a license was a well-known offence when our Constitution was adopted, and the procedure for punishing it, or for forfeiting the liquors, was also well known. Articles XII. and XV. were inserted in the Declaration of Rights as a protection to every individual in his life, liberty, and property. If a statute had given jurisdiction in equity to hear without a jury an information like this, and had authorized the court, on finding the respondent guilty, to punish him in its discretion, without limit, by fine, or imprisonment, or both, in what substantial respect would such a statute differ from this? The legislature cannot do indirectly what it cannot do directly; it cannot change the nature of things by affixing to them new names. If the legislature, by statute, can authorize a court in a public prosecution to enjoin any person from illegally keeping or selling intoxicating liquors in any specified place within the Commonwealth, why cannot it authorize a court to enjoin any person from illegally keeping or selling intoxicating liquors anywhere within the Commonwealth? and, if this can be done, why can it not authorize a court at the suit of the Commonwealth to enjoin any person from doing any illegal or criminal act anywhere within the Commonwealth, and to try without a jury any person so enjoined, on a charge of having violated the injunction, and to punish him by fine and imprisonment, without limit, if the court find him guilty?

"Except for constitutional limitations, the legislature could deal with all crimes by way of injunctions in equity. Indeed, if this jurisdiction were confined to crimes having some direct relation to a particular building, place, or tenement, the number of such crimes is large, and all crimes have some relation to place, as they must be committed somewhere. The harboring or concealing of criminals; the receiving or concealing of stolen or embezzled property; the making or keeping of instruments intended for criminal use; the violation of the provisions of criminal statutes regulating trade; burglary, arson, and other similar offences, — have a direct relation to a particular building, place, or tenement, and the building, place, or tenement in which these offences are committed may be said to be used for the purpose. In the prosecution of crimes by way of injunctions in equity, the existing Statute of Limitations would not be a defence, and the whole course of criminal procedure would be changed. It was not the intention of the Constitution that persons should be punished for violating general laws by proceedings in equity, or by a court acting without a jury, and subject to no limitations upon its power to fine and imprison except its own discretion. The safeguards of the common law were carefully secured by the Declaration of Rights, both in public prosecutions and in private suits, 'except in cases in which it has heretofore been otherways used and practised.' This is not such a case, and the only thing novel about it is the procedure. Statutes against illegally selling or keeping for sale intoxicating liquors, from the earliest times, have been enforced by criminal complaints or indictments, or by penal actions. Such statutes were never enforced in equity anywhere when the Constitution was adopted. I think that the statute under which the present proceedings were brought is inconsistent with Article XII. of the Declaration of Rights

"MR. JUSTICE DEVENS and MR. JUSTICE WILLIAM ALLEN concur in this dissent."

called upon to plead to this charge when arraigned; that he pleaded guilty of embezzlement, and undoubtedly understood when he made his plea that he was pleading guilty to the felony charged; that this conclusion was fortified by the private examination required by statute to be made by the judge before sentencing upon a plea of guilty, which was shown to have been had in this case; that the fact that the respondent collected the money as an attorney was immaterial; that if the act contained all the elements of embezzlement, he was guilty of the crime and was properly convicted; that an attorney when he collects money for his client acts as the agent of his client as well as his attorney, and if, after making the collection, he appropriates the money to his own use with the intention of depriving the owner of the same, he is guilty of the crime of embezzlement; that the conviction was warranted by the plea; and that the judgment should therefore be affirmed. As remarked by Judge Brown, it is no defence to an indictment under one statute that a defendant might also be punished under another. And as the highest judicial tribunal of the State of Michigan ruled that the word 'agent' in section 9151 of the statutes of that State applied to attorneys-at-law, and as the information charged the defendant with embezzlement under that section, and he pleaded guilty to embezzlement as an attorney-at-law, the affirmance of the conviction necessarily followed. In the view of the statute taken by the court, the plea admitted the truth of the charge.

"It is not our province to inquire whether the conclusion reached and announced by the Supreme Court was or was not correct, for we are not passing upon its judgment as a court of error, nor can we consider the contention that the decision was not in harmony with the State Constitution and laws.

"The single question is whether appellant is held in custody in violation of the Fourteenth Amendment to the Constitution of the United States, in that the State thereby deprives him of liberty without due process of law; for there is no pretence of an abridgment of his privileges and immunities as a citizen of the United States, nor of a denial of the equal protection of the laws. But the State cannot be deemed guilty of a violation of its obligations under the Constitution of the United States because of a decision, even if erroneous, of its highest court, while acting within its jurisdiction. And, conceding that an unconstitutional conviction and punishment under a valid law would be as violative of a person's constitutional rights as a conviction and punishment under an unconstitutional law, we fail to perceive that this conviction and judgment are repugnant to the constitutional provision. Appellant has been subjected, as all persons within the State of Michigan are, to the law in its regular course of administration through courts of justice, and it is impossible to hold that a judgment so arrived at is such an unrestrained and arbitrary exercise of power as to be utterly void.

"We repeat, as has been so often said before, that the Fourteenth

Amendment undoubtedly forbids any arbitrary deprivation of life, liberty, or property, and in the administration of criminal justice requires that no different or higher punishment shall be imposed on one than is imposed on all for like offences, but it was not designed to interfere with the power of the State to protect the lives, liberty, and property of its citizens; nor with the exercise of that power in the adjudications of the courts of a State in administering the process provided by the law of the State. The Supreme Court of Michigan did not exceed its jurisdiction or deliver a judgment abridging appellant's privileges or immunities or depriving him of the law of the land of his domicil. *Arrowsmith* v. *Harmoning*, 118 U. S. 194; *Baldwin* v. *Kansas*, 129 U. S. 52; *In re Kemmler*, 136 U. S. 436." *Judgment affirmed.*

In *Caldwell* v. *Texas*, 137 U. S. 692 (1890), in dismissing a case brought upon error to the Court of Appeals of Texas, Chief Justice Fuller, for the court, said, "By the Fourteenth Amendment the powers of the States in dealing with crime within their borders are not limited, but no State can deprive particular persons or classes of persons of equal and impartial justice under the law. Law, in its regular course of administration through courts of justice, is due process, and when secured by the law of the State, the constitutional requisition is satisfied. 2 Kent Comm. 13. And due process is so secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government, unrestrained by the established principles of private right and distributive justice. *Bank of Columbia* v. *Okely*, 4 Wheat. 235, 244. The power of the State must be exerted within the limits of those principles, and its exertion cannot be sustained when special, partial, and arbitrary. *Hurtado* v. *California*, 110 U. S. 516, 535. No question of repugnancy to the Federal Constitution can be fairly said to arise when the inquiry of the State courts is directed to the sufficiency of an indictment in the ordinary administration of criminal law, and the statutes authorizing the form of indictment pursued are not obviously violative of the fundamental principles above adverted to."

In *Morley* v. *Lake Shore &c. Ry. Co.*, 146 U. S. 162 (1892), on error to the Court of Appeals of New York, where the validity of a State enactment reducing the rate of interest on judgments was in question, as applied to a judgment obtained before its passage, Mr. Justice Shiras, for the court, said: "The further contention of the plaintiff in error, that he has been deprived of his property without due process of law, can be more readily disposed of. If, as we have seen, the plaintiff has actually received on account of his judgment all that he is entitled to receive, he cannot be said to have been deprived of his property; and whether or not a statutory change in the rate of interest thereafter to accrue on the judgment can be regarded as a deprivation of property, the adjudication of the plaintiff's claims by the courts of

his own State must be admitted to be due process of law. Nor are we authorized by the Judiciary Act to review this judgment of the State court, because this judgment refuses to give effect to a valid contract or because such judgment in its effect impairs the obligation of a contract. If we did, every case decided in the State courts could be brought here, when the party setting up a contract alleged that the court took a different view of its obligation from that which he held. *Knox* v. *Exchange Bank*, 12 Wall. 379, 383."[1]

In *Charlotte, &c. Railroad Co.* v. *Gibbes*, 142 U. S. 386 (1892), Mr. Justice Field, after stating the case, delivered the opinion of the court.

Notwithstanding the several objections taken in the complaint to the assessment and tax upon the railroad companies to meet the expenses and salaries of the railroad commissioners, the argument of counsel on the hearing was confined to the supposed conflict of the laws authorizing the tax with the inhibition of the Fourteenth Amendment of the Constitution of the United States. All other objections were deemed to be disposed of by the decision of the Supreme Court of the State, that the laws complained of are not in conflict with its Constitution.

The property of railroad companies in South Carolina is subjected by the general law to the same tax as similar property of individuals, in proportion to its value, and like conditions of uniformity and equality in its assessment are imposed. The further tax laid upon them to meet the expenses and salaries of the railroad commissioners is not in proportion to the value of their property, but according to their gross income, proportioned to the number of miles of their roads in the State. This tax is stated to be beyond any which is levied upon other corporations to meet an expenditure for State officers, and, therefore, it is contended, constitutes an unlawful discrimination against railroad corporations, imposing an unequal burden upon them, in conflict with the constitutional amendment which ordains that no State shall deny to any person the equal protection of the laws. Private corporations are persons within the meaning of the amendment; it has been so held in several cases by this court. *Santa Clara County* v. *Southern Pacific Railroad Co.*, 118 U. S. 394; *Pembina Mining Co.* v. *Pennsylvania*, 125 U. S. 181, 189; *Minneapolis & St Louis Railroad Co.* v. *Beckwith*, 129 U. S. 26.

If the tax were levied to pay for services in no way connected with the railroads, as, for instance, to pay the salary of the executive or judicial officers of the State, whilst railroad corporations were at the same time subjected to taxation upon their property equally with other corporations for such expenses, and other corporations were not taxed for the salaries mentioned, there would be just ground of complaint of un-

[1] See also *In re Kemmler*, 136 U. S. 436, 448; *York* v. *Texas*, 137 U. S. 15; *In re Manning*, 139 U. S. 504. — Ed.

lawful discrimination against the railroad corporations, and of their not receiving the equal protection of the laws. But there is nothing of this nature in the tax in question. The railroad commissioners are charged with a variety of duties in connection with railroads, the performance of which is of great importance in the regulation of those instruments of transportation. . . .

It is evident, from these and many other provisions that might be stated, that the duties of the railroad commissioners, when properly discharged, must be in the highest degree beneficial to the public, securing faithful service on the part of the railroad companies, and safety, convenience, and comfort in the operation of their roads. That the State has the power to prescribe the regulations mentioned there can be no question. Though railroad corporations are private corporations as distinguished from those created for municipal and governmental purposes, their uses are public. They are formed for the convenience of the public in the transportation of persons and merchandise, and are invested for that purpose with special privileges. They are allowed to exercise the State's right of eminent domain that they may appropriate for their uses the necessary property of others upon paying just compensation therefor, a right which can only be exercised for public purposes. And they assume, by the acceptance of their charters, the obligations to transport all persons and merchandise upon like conditions and at reasonable rates; and they are authorized to charge reasonable compensation for the services they thus perform. Being the recipients of special privileges from the State, to be exercised in the interest of the public, and assuming the obligations thus mentioned, their business is deemed affected with a public use, and to the extent of that use is subject to legislative regulation. *Georgia Railroad & Banking Co.* v. *Smith*, 128 U. S. 174, 179. That regulation may extend to all measures deemed essential not merely to secure the safety of passengers and freight, but to promote the convenience of the public in the transaction of business with them, and to prevent abuses by extortionate charges and unjust discrimination. It may embrace a general supervision of the operation of their roads, which may be exercised by direct legislation commanding or forbidding, under severe penalties, the doing or omission of particular acts, or it may be exercised through commissioners specially appointed for that purpose. The mode or manner of regulation is a matter of legislative discretion. When exercised through commissioners, their services are for the benefit of the railroad corporations as well as of the public. Both are served by the required supervision over the roads and means of transportation, and there would seem to be no sound reason why the compensation of the commissioners in such case should not be met by the corporations, the operation of whose roads and the exercise of whose franchises are supervised. In exacting this there is no encroachment upon the Fourteenth Amendment. Requiring that the burden of a service deemed essential to the public, in consequence of the existence of the corporations and the ex-

ercise of privileges obtained at their request, should be borne by the corporations in relation to whom the service is rendered, and to whom it is useful, is neither denying to the corporations the equal protection of the laws or making any unjust discrimination against them. All railroad corporations in the State are treated alike in this respect. The necessity of supervision extends to them all, and for that supervision the like proportional charge is made against all. There is no occasion for similar regulations for the government of other than railroad corporations, and therefore no charge is made against them for the expenses and salaries of the commissioners. The rule of equality is not invaded where all corporations of the same kind are subjected to like charges for similar services, though no charge at all is made against other corporations. There is no charge where there is no service rendered. The legislative and constitutional provision of the State, that taxation of property shall be equal and uniform and in proportion to its value, is not violated by exacting a contribution according to their gross income in proportion to the number of miles of railroad operated in the State to meet the special service required. *Barbier* v. *Connolly*, 113 U. S. 27; *Soon Hing* v. *Crowley*, 113 U. S. 703; *Missouri Pacific Railway*, v. *Humes*, 115 U. S. 512.

There are many instances where parties are compelled to perform certain acts and to bear certain expenses when the public is interested in the acts which are performed as much as the parties themselves. Thus in opening, widening, or improving streets the owners of adjoining property are often compelled to bear the expenses, or at least a portion of them, notwithstanding the work done is chiefly for the benefit of the public. So, also, in the draining of marsh lands, the public is directly interested in removing the causes of malaria, and yet the expense of such labor is usually thrown upon the owners of the property. Quarantine regulations are adopted for the protection of the public against the spread of disease, yet the requirement that the vessel examined shall pay for the examination is a part of all quarantine systems. *Morgan* v. *Louisiana*, 118 U. S. 455, 466. So, the expense of a compulsory examination of a railroad engineer, to ascertain whether he is free from color blindness, has been held to be properly chargeable against the railroad company. *Nashville, Chattanooga & St. Louis Railway* v. *Alabama*, 128 U. S. 96, 101. So, where work is done in a particular county for the benefit of the public, the cost is oftentimes cast upon the county itself instead of upon the whole State. Thus, in *County of Mobile* v. *Kimball*, 102 U. S. 691, it was held that a provision for the issuing of bonds by a county in Alabama could not be declared invalid, although it imposed upon one county the expense of an improvement in which the whole State was interested. In such instances, where the interests of the public and of individuals are blended in any work or service imposed by law, whether the cost shall be thrown entirely upon the individuals, or upon the State, or be apportioned between them, is matter of legislative direction.

We see no error in the ruling of the court below upon the Federal question presented, and the conclusion we have reached renders it unnecessary to consider how far the obligation of the corporation was affected by the alleged amendment made to its charter.

Judgment affirmed.

JUSTICES BRADLEY and GRAY did not sit in this case nor take part in its decision.

NEW YORK, ETC., RAILROAD COMPANY v. BRISTOL ET AL.

SUPREME COURT OF THE UNITED STATES. 1894.

[14 *Sup. Court Rep.* 437.][1]

IN error to the Supreme Court of Errors of the State of Connecticut. In pursuance of an Act of the Legislature of Connecticut approved June 19, 1889, relating to the grade crossings of railroads, the railroad commissioners of that State, on September 2, 1890, made an order reciting that whereas the directors of the New York & New England railroad company had failed to remove, or apply for the removal, during the year ending August 1, 1890, of any grade crossing of a highway which crossed or was crossed by their railroad, and whereas, in their opinion, said directors should have applied for the removal of the grade crossing of their road and the highway known as "Main Street," in the town of Bristol, and directing a hearing upon the matter, with notice to the railroad company, the town, and the owners of land adjoining that portion of the highway. The hearing was had on several days, from September 24, 1890, to February 11, 1891; and the commissioners, being of opinion that the financial condition of the company warranted the order, and that public safety required it, ordered the crossing removed, and determined and directed the alterations, changes, and removals to be made and done, and that they be executed by the railroad company at its sole expense, including damages occasioned thereby. The company appealed from this order to the Superior Court of the County of Hartford, the petition for appeal setting forth various grounds therefor. That court, upon hearing the parties and their evidence, found as facts that the railroad company was financially able to execute the commissioners' order, and that the safety of the public required the removal of the grade crossing; and affirmed the order. The company appealed to the Supreme Court of Errors of Connecticut, which decided that there was no error in the judgment appealed from (62 Conn. 527, 26 Atl. 122); and thereupon a writ of error was allowed to this court, and errors assigned, as follows: —

"(1) The said court erred in holding that the statute under which

[1] The statement of facts is shortened. This case will appear in 151 U. S. 556. — ED.

were had the proceedings as set forth in the order of the railroad commissioners exemplified in the record of the case justified said order, and in affirming the judgment of the Superior Court in and for Hartford County, affirming said order, and in overruling plaintiff's claim that said statute was void as violating the Constitution of the United States, in that it impaired the obligation of the contracts made by said company with the holders of its bonds and preferred stock, by making it impossible for said company to pay the interest on its bonds and dividends on its preferred stock, as agreed between them and said company, and yet maintain and operate its railroad efficiently; and, further, in that it took the property of the company without due process of law, and denied to it the equal protection of the law.

"(2) The said court erred in overruling the claim of the plaintiff in error in the twelfth paragraph of its petition of appeal from the railroad commissioners to the Supreme Court, as set forth in the record, that said statute was void, and was no justification of said order, under the Constitution of the United States and the Fourteenth Amendment thereof."

Chas. E. Perkins, for plaintiff; *John J. Jennings* and *H. C. Robinson*, for defendants.

MR. CHIEF JUSTICE FULLER, after stating the facts in the foregoing language, delivered the opinion of the court. . . .

It must be admitted that the Act of June 19, 1889, is directed to the extinction of grade crossings, as a menace to public safety, and that it is therefore within the exercise of the police power of the State. And, as before stated, the constitutionality of similar prior statutes, as well as of that in question, tested by the provisions of the State and Federal Constitutions, has been repeatedly sustained by the courts of Connecticut. *Woodruff* v. *Catlin*, 54 Conn. 277, 6 Atl. 849; *Westbrook's Appeal*, 57 Conn. 95, 17 Atl. 368; *New York & N. E R. Co.'s Appeal*, 58 Conn. 532, 20 Atl. 670; *Woodruff* v. *Railroad Co.*, 59 Conn. 63, 20 Atl. 17; *State's Attorney* v. *Selectmen of Branford*, 59 Conn. 402, 22 Atl. 336; *New York & N. E. R. Co.* v. *City of Waterbury*, 60 Conn. 1, 22 Atl. 439; *City of Middletown* v. *New York, etc., R. Co.*, 62 Conn. 492, 27 Atl. 119.

In *Woodruff* v. *Catlin*, the court, speaking through Pardee, J., said, in reference to a similar statute: "The Act, in scope and purpose, concerns protection of life. Neither in intent nor fact does it increase or diminish the assets either of the city or of the railroad corporations. It is the exercise of the governmental power and duty to secure a safe highway. The legislature, having determined that the intersection of two railways with a highway in the city of Hartford at grade is a nuisance dangerous to life, in the absence of action on the part either of the city or of the railroads, may compel them, severally, to become the owners of the right to lay out new highways and new railways over such land, and in such manner as will separate the grade of the railways from that of the highway at intersection; may compel them to use the right for the ac-

complishment of the desired end; may determine that the expense shall be paid by either corporation alone, or in part by both; and may enforce obedience to its judgment. That the legislature of this State has the power to do all this, for the specified purpose, and to do it through the instrumentality of a commission, it is now only necessary to state, not to argue."

And as to this Act the court, in 58 Conn. 532, 20 Atl. 670, on this Company's appeal, held that grade crossings were in the nature of nuisances, which it was competent for the legislature to cause to be abated, and that it could, in its discretion, require any party responsible for the creation of the evil, in the discharge of what were in a sense governernmental duties, to pay any part, or all, of the expense of such abatement.

It is likewise thoroughly established in this court that the inhibitions of the Constitution of the United States upon the impairment of the obligation of contracts, or the deprivation of property without due process, or of the equal protection of the laws, by the States, are not violated by the legitimate exercise of legislative power in securing the public safety, health, and morals. The governmental power of self-protection cannot be contracted away, nor can the exercise of rights granted, nor the use of property, be withdrawn from the implied liability to governmental regulation in particulars essential to the preservation of the community from injury. *Beer Co.* v. *Massachusetts*, 97 U. S. 25; *Fertilizing Co.* v. *Hyde Park*, 97 U. S. 659; *Barbier* v. *Connolly*, 113 U. S. 27, 5 Sup. Ct. 357; *New Orleans Gas Co.* v. *Louisiana Light Co.*, 115 U. S. 650, 6 Sup. Ct. 252; *Mugler* v. *Kansas*, 123 U. S. 623, 8 Sup. Ct. 273; *Budd* v. *New York*, 143 U. S. 517, 12 Sup. Ct. 468. And also that "a power reserved to the legislature to alter, amend, or repeal a charter authorizes it to make any alteration or amendment of a charter granted subject to it, which will not defeat or substantially impair the object of the grant, or any rights vested under it, and which the legislature may deem necessary to secure either that object or any public right." *Close* v. *Glenwood Cemetery*, 107 U. S. 466, 476, 2 Sup. Ct. 267; *Waterworks* v. *Schottler*, 110 U. S. 347, 4 Sup. Ct. 48; *Pennsylvania College Cases*, 13 Wall. 190; *Tomlinson* v. *Jessup*, 15 Wall. 454.

The charter of this company was subject to the legislative power over it of amendment, alteration, or repeal, specifically and under general law. 5 Priv. Laws Conn. pp. 543, 547; 7 Sp. Laws Conn. p. 466; 8 Sp. Laws Conn. p. 353; Sp. Laws Conn. 1881, p. 64; Gen. St. 1875, p. 278; Gen. St. 1888, § 1909; *New York, etc., R. Co.* v. *City of Waterbury*, 60 Conn. 1, 22 Atl. 439.

The contention seems to be, however, that the legislature, in discharging the duty of the State to protect its citizens, has authorized by the enactment in question that to be done which is, in certain particulars, so unreasonable, and so obviously unjustified by the necessity invoked, as to bring the Act within constitutional prohibitions.

The argument is that the existing grades of railroad crossings were legally established, in accordance with the then wishes of the people, but, with the increase in population, crossings formerly safe had become no longer so; that the highways were chiefly for the benefit of the local public, and it was the duty of the local municipal corporation to keep them safe; that this law applied to railroad corporations treatment never accorded to other citizens in allowing the imposition of the entire expense of change of grade, both costs and damages, irrespective of benefits, on those companies, and in that respect, and in the exemption of the town from its just share of the burden, denied to them the equal protection of the laws.

And further that the order, and therefore the law which was held to authorize it, amounted to a taking of property without due process, in that it required the removal of tracks many feet from their present location, involving the destruction of much private property, the excavation of the principal highway, and those communicating, and the building of an expensive iron bridge, all at the sole expense, including damages, of the company, without a hearing as to the extent of the several responsibilities of the company and the town, or as to the expense of the removal of this dangerous crossing, as compared with other dangerous crossings, or of the degree of the responsibility of the company for the dangers existing at this particular crossing. The objection is not that hearing was not required and accorded, which it could not well be, in view of the protracted proceedings before the commissioners and the Superior Court and the review in the Supreme Court, but that the scope of inquiry was not as broad as the statute should have allowed, and that the particular crossing to be removed was authorized to be prejudged.

It is further objected that the Supreme Court had so construed the statute that, upon the issue whether the financial condition of the company warranted the order, no question of law could be raised as to the extent of the burdens which a certain amount of financial ability would warrant, and thus, in that aspect, by reason of the large amount of expenditure which might be, and as matter of fact was, in this instance, required, the obligation of the contracts made by the company with the holders of its securities was impaired. Complaint is made in this connection of the striking out by the Superior Court of certain paragraphs of the petition on appeal, held by that court and the Supreme Court to plead mere matters of evidence, and the decision by the Supreme Court that all the material issues were met by the findings. Those issues were stated by the court to be whether or not the company's directors had removed, or applied for the removal of, a grade crossing, as required by the statute; whether or not the grade crossing ordered to be removed by the commissioners was in fact a dangerous one, which the directors ought to have removed, or for the removal of which the directors ought to have applied; and whether or not the company's financial condition was such as to warrant the order.

And upon these premises it is urged, in addition, that the right to

amend the charter of the corporation was not controlling, because that did not include the right to arbitrarily deprive the stockholders of their property, which, though held by them, for purposes of management and control, under a corporate organization created by special law, was nevertheless private property, not by virtue of the charter, but "by force of the most fundamental and general laws of modern society, which, from their nature, necessarily protect alike and fully all legitimate acquisitions of the members of the community, no matter whether held by them as individuals or partnerships or associations or corporations."

The Supreme Court of Connecticut held that the statute operated as an amendment to the charters of the railroad corporations affected by it; that, as grade crossings are in the nature of nuisances, the legislature had a right to cause them to be abated, and to require either party to pay the whole or any portion of the expense; that the statute was not unconstitutional, in authorizing the commissioners to determine their own jurisdiction, and that, besides, the right of appeal saved the railroad companies from any harm from their findings; that it was the settled policy of the State to abolish grade crossings as rapidly as could be reasonably done; and that all general laws and police regulations affecting corporations were binding upon them without their assent.

We are asked, upon the grounds above indicated, to adjudge that the highest tribunal of the State in which these proceedings were had, committed, in reaching these conclusions, errors so gross as to amount in law to a denial by the State of rights secured to the company by the Constitution of the United States, or that the statute itself is void by reason of infraction of the provisions of that instrument.

But this court cannot proceed upon general ideas of the requirements of natural justice, apart from the provisions of the Constitution supposed to be involved, and in respect of them we are of opinion that our interposition cannot be successfully invoked.

As observed by Mr. Justice Miller in *Davidson* v. *New Orleans*, 96 U. S. 97, 104, the Fourteenth Amendment cannot be availed of "as a means of bringing to the test of the decision of this court the abstract opinions of every unsuccessful litigant in the State court of the justice of the decision against him, and of the merits of the legislation on which such a decision may be founded." To use the language of Mr. Justice Field in *Railway Co.* v. *Humes*, 115 U. S. 512, 520, 6 Sup. Ct. 110, "it is hardly necessary to say that the hardship, impolicy, or injustice of State laws is not necessarily an objection to their constitutional validity, and that the remedy for evils of that character is to be sought from State legislatures."

The conclusions of this court have been repeatedly announced, to the effect that though railroad corporations are private corporations, as distinguished from those created for municipal and governmental purposes, their uses are public, and they are invested with the right of eminent domain, only to be exercised for public purposes; that therefore they are subject to legislative control in all respects necessary to protect the

public against danger, injustice, and oppression; that the State has power to exercise this control through boards of commissioners; that there is no unjust discrimination, and no denial of the equal protection of the laws, in regulations applicable to all railroad corporations alike; nor is there necessarily such denial, nor an infringement of the obligation of contracts, in the imposition upon them, in particular instances, of the entire expense of the performance of acts required in the public interest, in the exercise of legislative discretion; nor are they thereby deprived of property without due process of law, by statutes under which the result is ascertained in a mode suited to the nature of the case, and not merely arbitrary and capricious; and that the adjudication of the highest court of a State that, in such particulars, a law enacted in the exercise of the police power of the State is valid, will not be reversed by this court on the ground of an infraction of the Constitution of the United States. *Railway Co.* v. *Alabama*, 128 U. S. 96, 9 Sup. Ct. 28; *Banking Co.* v. *Smith*, 128 U. S. 174, 9 Sup. Ct. 47; *Railway Co.* v. *Beckwith*, 129 U. S. 26, 9 Sup. Ct. 207; *Dent* v. *West Virginia*, 129 U. S. 114, 9 Sup. Ct. 231; *Railroad Co.* v. *Gibbes*, 142 U. S. 386, 12 Sup. Ct. 255; *Railroad Co.* v. *Emmons*, 149 U. S. 364, 13 Sup. Ct. 870. *Judgment affirmed.*

NOTE.

The subjects treated in this chapter are intimately connected with those of the next, and are further illustrated there. — ED.

CHAPTER V.

UNCLASSIFIED LEGISLATIVE POWER. THE SO-CALLED POLICE POWER.[1]

COMMONWEALTH *v.* ALGER.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1853.

[7 *Cush.* 53.]

THIS was an indictment against the defendant for an alleged breach of the statutes of this Commonwealth establishing the commissioners' lines, so-called, in the harbor of Boston, by erecting, building, and maintaining a wharf over and beyond those lines into said harbor.

The indictment was found and returned into the Municipal Court of the city of Boston at June Term, 1849. It set forth the following statutes for fixing and limiting the lines of the harbor of Boston: "An Act to preserve the Harbor of Boston, and to prevent Encroachments therein," passed April 19, 1837. St. 1837, c. 229, 7 Special Laws, 808. . . .

The first and second sections of the Act of 1837, c. 229, established a line by local objects designated from the lower South Boston Free Bridge, around the easterly and northerly sides of the city, to the abutment on the Boston side of Warren Bridge, above Charles River Bridge. The third, fourth, fifth, and sixth sections of this Act were as follows. [These are given in a note below.[2] The case also recites the substance

[1] Discussions of what is called the "police power" are often uninstructive, from a lack of discrimination. It is common to recognize that the subject is hardly susceptible of definition, but very often, indeed, it is not perceived that the real question in hand is that grave, difficult, and fundamental matter, — what are the limits of legislative power in general? In talking of the "police power," sometimes the question relates to the limits of a power admitted and fairly well-known, as that of taxation or eminent domain; sometimes to the line between the local legislative power of the States and the Federal legislative power; sometimes to legislation as settling the details of municipal affairs, and local arrangements for the promotion of good order, health, comfort, and convenience; sometimes to that special form of legislative action which applies the maxim of *Sic utere tuo ut alienum non lædas*, adjusts and accommodates interests that may conflict, and fixes specific limits for each. But often, the discussion turns upon the true limits and scope of legislative power in general, — in whatever way it may seek to promote the general welfare. — ED.

[2] "SECTION 3. No wharf, pier, or building, or encumbrance of any kind, shall ever hereafter be extended beyond the said line into or over the tide-water in said harbor.

"SECTION 4. No person shall enlarge or extend any wharf or pier, which is now

of Acts of 1840, 1841, and 1847, altering the former lines or establishing others.] . . .

The indictment then averred that all the parts of the harbor of Boston, outside of and beyond the commissioners' lines, and between those lines and the high sea, were, and from the time whereof the memory of man was not to the contrary, an ancient, navigable harbor, and an ancient and common highway for all citizens of the Commonwealth. . . . [Here follow the formal charges of unlawful building beyond the lines.]

At the trial in the Municipal Court before WELLS, C. J., at September Term, 1849, the attorney for the Commonwealth put in evidence a statement agreed to and signed by himself and the defendant, exhibiting the following facts: The defendant is, and for more than thirty years past has been, seised of an estate on Fourth Street in South Boston, consisting of upland and of flats belonging thereto, just above the old South Boston Bridge, and bounding on that arm of the sea, lying between Boston proper and South Boston, in and through which the sea ebbs and flows to and from a bay above, called South Bay. In 1843, he began to build a wharf on his said flats, and constructed the northerly wall thereof from his upland nearly to the channel, and then filled in and constructed said wharf, but did not complete it until the commissioners' line of 1847 had been established, after which he built the triangular piece set forth in the indictment, which forms a part of the wharf as originally commenced by him. This triangular piece is beyond said line, but is built on the defendant's own flats; it is not one hundred rods from the upland, is not below low water-mark, is no injury to navigation, and is not so far beyond the commissioners' line or so near the channel as the northerly wall of the wharf was built in 1843.

No other evidence was offered.

The defendant contended and requested the judge to rule and instruct the jury that the evidence offered did not sustain the indictment, and that the defendant, upon these facts, was entitled to a verdict. But the judge refused so to rule, and instructed the jury that on the evidence introduced, if believed, the government were entitled to a verdict. Whereupon the jury returned a verdict of guilty; and the

erected on the inner side of said line, further towards the said line than such wharf or pier now stands, or than the same might have been lawfully enlarged or extended before the passing of this Act, without leave first obtained from the legislature.

"SECTION 5. No person shall in any other part of the said harbor of Boston, belonging to the Commonwealth, erect or cause to be erected any wharf or pier, or begin to erect any wharf or pier therein, or place any stones, wood, or other materials in said harbor, or dig down or remove any of the land covered with water at low tide, in said harbor, with intent to erect any wharf or pier therein, or to enlarge or extend any wharf or pier now erected: *provided, however*, that nothing herein contained shall be construed to restrain or control the lawful rights of the owners of any lands or flats in said harbor."

[Section 6 imposes penalties, and declares the forbidden obstructions to be nuisances.]

presiding judge, being of opinion that the questions of law arising in the case were so doubtful and important as to require the decision of this court, with the consent of the defendant, reported the case for the purpose of presenting those questions.

The case was argued at March Term, 1850.

S. D. Parker, County Attorney, for the Commonwealth.

B. R. Curtis and *C. A. Welch*, for the defendant.

The opinion was delivered at March Term, 1853.

SHAW, C. J. In proceeding to give judgment in the present case, the court are deeply impressed with the importance of the principles which it involves, and the magnitude and extent of the great public interests, and the importance and value of the private rights, directly or indirectly to be affected by it. It affects the relative rights of the public and of individual proprietors, in the soil lying on tide-waters, between high and low water-mark, over which the sea ebbs and flows, in the ordinary action of the tides. . . .

The uncontested facts in the present case are, that the defendant was owner of land, bounded on a cove or arm of the sea, in which the tide ebbed and flowed, that he built the wharf complained of, on the flats before his said land, between high and low water-mark, and within one hundred rods of his upland, but below the commissioners' line as fixed by one of these statutes; although it was so built as not to obstruct or impede navigation. This certainly presents the case most favorably for the defendant.

We may, perhaps, better embrace the several subjects involved in the inquiry, by considering,

First, What are the rights of owners of land, bounding on salt water, whom it is convenient to designate as riparian proprietors, to the flats over which the tide ebbs and flows, as such rights are settled and established by the laws of Massachusetts; and,

Second, What are the just powers of the legislature to limit, control, or regulate the exercise and enjoyment of these rights.

I. By the common law of England, as it stood long before the emigration of our ancestors to this country and the settlement of the colony of Massachusetts, the title to the land or property in the soil, under the sea, and over which the tide-waters ebbed and flowed, including flats, or the sea-shore, lying between high and low water-mark, was in the king, as the representative of the sovereign power of the country. But it was held by a rule equally well settled, that this right of property was held by the king in trust, for public uses, established by ancient custom or regulated by law, the principal of which were for fishing and navigation. These uses were held to be public, not only for all the king's subjects, but for foreigners, being subjects of States at peace with England, and coming to the ports and havens of England, with their ships and vessels, for the purposes of trade and commerce. . . .

Assuming that by the common law of England, as above stated, the right of riparian proprietors, bounding upon tide-waters, extended to

high water-mark only, and assuming that the first settlers of Massachusetts regarded the law of England as their law, and governed themselves by it, it follows that the earliest grants of land bounding on tide-waters would be to the high water-line and not below it, and would have so remained but for the colony ordinance, now to be considered.

This is commonly denominated the ordinance of 1641; but this date is probably a mistake. It is found in the Ancient Charters, 148, in connection with another on free fishing and fowling, and marked 1641, 47. That on free fishing, etc., is taken in terms from the "Body of Liberties," adopted and passed in 1641, leaving the date 1647 to apply to the other subject respecting ownership in coves, etc., about salt water. See an interesting work, "Remarks on the Early Laws of Massachusetts Bay," by Francis C. Gray. 8 Mass. Hist. Soc. Coll. (3d series), 191, 215. This work contains, probably for the first time in print, a full copy of the "Body of Liberties," which, there is evidence to believe, were adopted and sanctioned by the colonial government in 1641, but were never printed entire with the colony laws, although many of them were embodied in terms in particular ordinances. But the date is quite immaterial, and the only purpose of making this explanation is to show why these two subjects, separate in their origin, were so connected together in the publication of the colony laws, that it seems necessary now to consider them together as one act.

The whole article, as it stands in the Ancient Charters and in the edition of the colony laws of 1660, is as follows: —

"Sect. 2. Every inhabitant who is an householder shall have free fishing and fowling in any great ponds, bays, coves, and rivers, so far as the sea ebbs and flows within the precincts of the town where they dwell, unless the freemen of the same town, or the General Court, have otherwise appropriated them: provided, that no town shall appropriate to any particular person or persons, any great pond, containing more than ten acres of land, and that no man shall come upon another's propriety without their leave, otherwise than as hereafter expressed.

"The which clearly to determine; Sect. 3. It is declared, that in all creeks, coves, and other places about and upon salt water, where the sea ebbs and flows, the proprietor, or the land adjoining shall have propriety to the low water-mark, where the sea doth not ebb above a hundred rods, and not more wheresoever it ebbs further: provided, that such proprietor shall not by this liberty have power to stop or hinder the passage of boats or other vessels, in or through any sea, creeks, or coves, to other men's houses or lands.

"Sect. 4. And for great ponds lying in common, though within the bounds of some town, it shall be free for any man to fish and fowl there, and may pass and repass on foot through any man's propriety for that end, so they trespass not upon any man's corn or meadow. [1641, 47.]" . . .

We have thought it proper to examine, with some care, the foundation, on which the right of property in land, situated between high and

low water-mark in Massachusetts, rests, though it has not been much contested in reference to these harbor lines, except indirectly, and in vague and general terms. And we think it is entirely clear that, since the adoption of the colony ordinance, every grant of land, bounding upon the sea, or any creek, cove, or arm of the sea, and either in terms including flats to low water-mark, or bounding the land granted on the sea or salt water, with no terms limiting or restraining the operation of the grant, and where the land and flats have not been severed by any intervening conveyance, has had the legal effect to pass an estate in fee to the grantee, subject to a limited right of way for boats and vessels. We have seen that the entire right of property in the soil was granted by the charter to the colonists, with a full power of disposal, and that the colonial government was clothed with so much of the royal prerogative and power, as was necessary to maintain and regulate all public rights and immunities in the same. If land so situated had, previously to the ordinance, been conveyed by the government, to companies of proprietors or individuals, the Act was in the nature of a grant of the flats to such prior grantees. It is said that it was not of itself a grant, but a general law affecting the character of property. Be it so. It was an authoritative declaration of owners, having a full right of property and power of disposal, annexing additional land to that previously granted, to hold in fee, subject to a reserved easement; and, if not strictly a grant, it partook of most of the characteristics of a grant, and could not be revoked by the power that gave it. In regard to all grants made by the government after the ordinance, the terms of the grant, bounding the lands granted upon the sea, or arm of the sea, or places where the tide ebbed and flowed, would, *ex vi termini*, carry a fee to low water-mark, or one hundred rods; so that in one or the other alternative, this ordinance must govern and control the shore rights of riparian proprietors in every part of the Commonwealth.

II. Assuming, then, that the defendant was owner in fee of the soil and flats upon which the wharf in question was built, it becomes necessary to inquire whether it was competent for the legislature to pass the Acts establishing the harbor lines, and what is the legal validity and effect of those Acts. . . .

The manifest object of these statutes is to prevent injurious obstructions in the harbor of Boston, and to secure the free, common, and unobstructed use thereof, for the citizens of the Commonwealth, and all other persons, for navigation with ships, boats, and vessels of all kinds, as a common and public right. If this can be done, without an unwarrantable encroachment on the rights of private property, it is an object of great importance, and one in which the holders of riparian rights, as well as all other holders of real estate, and the whole community, have a deep and abiding interest.

We think it is a settled principle, growing out of the nature of well-ordered civil society, that every holder of property, however absolute

and unqualified may be his title, holds it under the implied liability that his use of it may be so regulated, that it shall not be injurious to the equal enjoyment of others, having an equal right to the enjoyment of their property, nor injurious to the rights of the community. All property in this Commonwealth, as well that in the interior as that bordering on tide-waters, is derived directly or indirectly from the government, and held subject to those general regulations which are necessary to the common good and general welfare. Rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment, as shall prevent them from being injurious, and to such reasonable restraints and regulations established by law, as the legislature, under the governing and controlling power vested in them by the Constitution, may think necessary and expedient.

This is very different from the right of eminent domain, the right of a government to take and appropriate private property to public use, whenever the public exigency requires it; which can be done only on condition of providing a reasonable compensation therefor. The power we allude to is rather the police power, the power vested in the legislature by the Constitution, to make, ordain, and establish all manner of wholesome and reasonable laws, statutes, and ordinances, either with penalties or without, not repugnant to the Constitution, as they shall judge to be for the good and welfare of the Commonwealth and of the subjects of the same.

It is much easier to perceive and realize the existence and sources of this power, than to mark its boundaries, or prescribe limits to its exercise. There are many cases in which such a power is exercised by all well-ordered governments, and where its fitness is so obvious, that all well-regulated minds will regard it as reasonable. Such are the laws to prohibit the use of warehouses for the storage of gunpowder near habitations or highways; to restrain the height to which wooden buildings may be erected in populous neighborhoods, and require them to be covered with slate or other incombustible material; to prohibit buildings from being used for hospitals for contagious diseases, or for the carrying on of noxious or offensive trades; to prohibit the raising of a dam, and causing stagnant water to spread over meadows, near inhabited villages, thereby raising noxious exhalations, injurious to health and dangerous to life.

Nor does the prohibition of such noxious use of property, a prohibition imposed because such use would be injurious to the public, although it may diminish the profits of the owner, make it an appropriation to a public use, so as to entitle the owner to compensation. If the owner of a vacant lot in the midst of a city could erect thereon a great wooden building, and cover it with shingles, he might obtain a larger profit of his land, than if obliged to build of stone or brick, with a slated roof. If the owner of a warehouse in a cluster of other buildings could store quantities of gunpowder in it for himself and others, he might be saved the great expense of transportation. If a landlord could let his building

for a small-pox hospital, or a slaughter-house, he might obtain an increased rent. But he is restrained; not because the public have occasion to make the like use, or to make any use of the property, or to take any benefit or profit to themselves from it; but because it would be a noxious use, contrary to the maxim, *Sic utere tuo, ut alienum non lædas*. It is not an appropriation of the property to a public use, but the restraint of an injurious private use by the owner, and is therefore not within the principle of property taken under the right of eminent domain. The distinction, we think, is manifest in principle, although the facts and circumstances of different cases are so various, that it is often difficult to decide whether a particular exercise of legislation is properly attributable to the one or the other of these two acknowledged powers.

These principles were somewhat discussed, and similar views were substantially adopted, in the case of *Commonwealth* v. *Tewksbury*,[1] 11 Met. 55. Perhaps the facts in that case were imperfectly stated, or some of the positions and illustrations were expressed in too broad and unqualified a manner; but we are of opinion that the principle on which that judgment proceeded was correct. It assumes that all real estate, inland or on the sea-shore, derived immediately or remotely from the government of the State, is taken and held under the tacit understanding that the owner shall so deal with it as not to cause injury to others; that when land is so situated, or such is its conformation, that it forms a natural barrier to rivers or tidal watercourses, the owner cannot justifiably remove it, to such an extent as to permit the waters to desert their natural channels, and overflow, and perhaps inundate fields and villages, render rivers, ports, and harbors shallow, and consequently desolate, and thereby destroy the valuable rights of other proprietors, both in the navigation of the stream, and in the contiguous lands. It expresses nearly the same legal truth, which is expressed in the familiar maxim, that no owner, through whose land a natural watercourse runs, can lawfully divert it to the damage of others. But what is the diversion of a watercourse? Ordinarily, and when no such circumstances exist, the owner of land has a perfect right to use and remove the earth, gravel, and clay of which the soil is composed, as his own interest or convenience may require. But can he do this when the same materials form the natural embankment of a watercourse? He may say, perhaps, that he merely intends to make use of materials which are his own, and to which he has a right, and for which he has other uses. But we think the law will admit of no such excuse; he knows that, when these materials are removed, the water, by the law of gravitation, will rush out,

[1] In this case it was held, in 1846, that a statute of Massachusetts of 1845, imposing a penalty for removing stones, gravel, or sand from any beach in the town of Chelsea, was passed for the purpose of protecting the harbor of Boston, that it applied to the owner of the beach as well as others, and that it was not a taking of property for public use, within the meaning of the Constitution, but a legitimate exercise of legislative power. — Ed.

and all the mischievous consequences of diverting the watercourse will follow. He must be presumed to have intended all the necessary and natural consequences of his own acts; of course, that he intended, by those acts, to divert the watercourse; and the law holds him responsible for them accordingly. Principles are tested by taking extreme cases. Take the case of the river Mississippi, where large tracts of country, with cities and villages, depend for their protection upon the natural river-bank, which is private property. Perhaps, under such circumstances, it might not be too much to say, not only that the owner cannot do any positive act towards removing the embankment, but that he may properly be held responsible for the permissive waste of it, by negligence and inattention. And the other cases hereinbefore stated, though very different in their facts, are similar in principle, all being cases in which the specific use prohibited, is so prohibited because it would be noxious, and cause or threaten damage to the lives, health, comfort, or property of other members of the community, equally entitled to protection. We think, therefore, that that case was rightly decided.

Supposing the principle itself to be well established, the great question then is, whether the Act in question, fixing certain harbor lines, was within it; and we are of opinion that it is, although it may in some cases seem to trench somewhat largely on the profitable use of individual property. This opinion is founded on several considerations.

We have already alluded to the point, that a particular use of land, as well inland as on the sea-shore, which, in one situation, would be greatly injurious to common and public rights, in another position would be wholly harmless. A man having a hill of gravel on his farm, not constituting the embankment of a stream, may remove the earth at his pleasure, because such use can injure no one; when under other circumstances, it would be greatly injurious. Whether any restraint upon the use of land is necessary to the preservation of common rights and the public security, must depend upon circumstances, to be judged of by those to whom all legislative power is intrusted by the sovereign authority of the State, so to declare and regulate as to secure and preserve all public rights.

We think it is a consideration entitled to some weight, that the colony ordinance itself, which changed the tenure and extended the title of riparian proprietors to low water-mark, so as to include the shore, was not absolute and unqualified. It contained a reservation, to the effect that riparian proprietors should not, by this extension of their territorial limits, have power to stop or hinder the passage of boats and vessels, in or through any sea, creeks, or coves, to other men's houses or lands. From these very general words, it is certainly difficult to prescribe exact limits to this reservation. That it was designed to impose some restriction in favor of the right of navigation is quite clear. To say, as it has sometimes been contended, that the reservation was intended to prohibit any restraint upon the pre-existing right of navigation, and

that all persons should have the same right of passing over it, with boats and vessels, as they had before, would seem to restrain any building thereon, and to render the Act nugatory and of no practical effect. Besides, if the purpose was, as it has often been declared to be, to enable proprietors bounding on the shore to erect and build quays, wharves, and warehouses thereon, for purposes incident to the great interests of commerce and navigation, such a construction of the Act would defeat the purposes for which it was designed.

Again, the construction which has been put upon this Act, in all the judicial decisions which have been made upon it, many of which are cited in the former part of this opinion, has been, that, notwithstanding the Act vests a fee in the soil in the riparian proprietor, analogous to the *jus privatum*, or right of property, which at the common law the Crown could grant to a subject, yet that the land between high water and low water, until it was enclosed, built upon, or so occupied by the riparian proprietor, so far partook of its original character, that whilst covered by the tide-water the public and all persons might lawfully use it, might sail over it, anchor upon it, fish upon it, and by so doing no person should be held to commit a trespass, or disseise the owner, or take adverse possession. The public used only a common right, by so using these lands when covered with tide-water.

In putting a construction upon any statute, every part shall be regarded, and it shall be so expounded, if practicable, as to give some effect to every part of it. Looking at the terms of this law, and the purposes for which it was intended, the object seems to have been, to secure to riparian proprietors in general, without special grant, a property in the land, with full power to erect such wharves, embankments, and warehouses thereon, as would be usually required for purposes of commerce, subordinate only to a reasonable use of the same, by other individual riparian proprietors and the public, for the purposes of navigation, through any sea, creeks, or coves, with their boats and vessels. . . .

But the use which we think may be justly made of these principles, and of these views of the law of England, as it had existed long anterior to the emigration of our ancestors to America, is this: They had been accustomed to regard the use of the sea-shores, for navigation and fishing, as *publici juris*, to be held and regulated for the common and general benefit; and this, although in many cases the right of soil was vested by private grant in an individual. They had long been familiar with the practice of the Crown to make grants of the *jus privatum*, or right of property in the soil, in the sea-shore over which the tide ebbed and flowed, which would warrant the grantee of the Crown in erecting thereon wharves, quays, and warehouses, for facilitating navigation and commerce, provided such erections did not hinder or obstruct navigation, or become a nuisance. If such a wharf or other erection were such as to interfere essentially with the common right of navigation, it would be held by the common law to be a common nuisance, and could

not be justified, even by the king's grant, unless sanctioned by an Act of Parliament. These rules and practices were familiar to the minds of our English ancestors at their emigration, and we may presume that the colonial government had them in view when, by a general Act, it annexed the sea-shore to the upland, and made it the private property of the riparian proprietor. It must have well understood that all estate granted by the government to individuals is subject, by reasonable implication, to such restraints in its use, as shall make the enjoyment of it by the grantee consistent with the equal enjoyment by others, of their several and common rights. When therefore the government did, by such general Act, grant a right of separate property in the soil of the sea-shore, to enable the riparian proprietor to erect quays and wharves for a better access to the sea, and by the same Act reserved some right to individuals and the public of passing and repassing with vessels, but without defining it, it seems just and reasonable to construe such reservation much more liberally in favor of the right reserved, than it otherwise would be under other circumstances.

And so in the exercise of the more general power of government, so to restrain the injurious use of property, it seems to apply more significantly and more directly to real estate thus situated on the sea-shore, separating the upland from the sea, to which the public have a common and acknowledged right, so that such estate should be held subject to somewhat more restrictive regulations in its use, than interior and upland estate remote from places in which the public have a common right. The circumstances are different. In respect to land lying in the interior, and used for agricultural purposes, there is little occasion to impose any restraint upon the absolute dominion of the owner, because such restraint is not necessary to prevent it from being injurious. But the circumstances are entirely different in regard to the sea-shore, which lies between the sea, admitted to be common to all, and the use of which is of vast importance to the public, and ports and places, without access to which, the use of the sea for navigation would be of little value.

Considering, therefore, that all real estate derived from the government is subject to some restraint for the general good, whether such restraint be regarded as a police regulation or of any other character; considering that sea-shore estate, though held in fee by the riparian proprietor, both on account of the qualified reservation under which the grant was made, and the peculiar nature and character, position, and relations of the estate, and the great public interests associated with it, is more especially subject to some reasonable restraints, in order that the exercise of full dominion over it, by the proprietor, may not be noxious to others, and injurious to the public, the court are of opinion that the legislature has power, by a general law affecting all riparian proprietors on the same line of shore equally and alike, to make reasonable regulations, declaring the public right, and providing for its preservation by reasonable restraints, and to enforce these restraints by suitable penalties.

Wherever there is a general right on the part of the public, and a general duty on the part of a land-owner, or any other person, to respect such right, we think it is competent, for the legislature, by a specific enactment, to prescribe a precise, practical rule for declaring, establishing, and securing such right, and enforcing respect for it. It may be said in general terms, independently of any positive enactment, that it is the right of society, in the midst of a populous settlement, to be exempt from the proximity of dangerous and noxious trades; and that it is the duty of the owner of real estate, in the midst of many habitations, to abstain from erecting buildings thereon, or otherwise using it, for carrying on a trade dangerous to the lives, health, or comfort of the inhabitants of such dwellings; although a trade in itself useful and beneficial to the public. But such general duty and obligation not being fixed by a rule precise enough for practical purposes, we think it is competent for the legislature to interpose, and by a specific enactment to declare what shall be deemed a dangerous or noxious trade, under what circumstances and within what distance of habitations it may or shall not be set up, how the use of it shall be regulated, and to prohibit any other than such regulated use, by specific penalties.

This principle of legislation is of great importance and extensive use, and lies at the foundation of most enactments of positive law, which define and punish *mala prohibita*. Things done may or may not be wrong in themselves, or necessarily injurious and punishable as such at common law; but laws are passed declaring them offences, and making them punishable, because they tend to injurious consequences; but more especially for the sake of having a definite, known, and authoritative rule which all can understand and obey. In the case already put, of erecting a powder magazine or slaughter-house, it would be indictable at common law, and punishable as a nuisance, if in fact erected so near an inhabited village as to be actually dangerous or noxious to life or health. Without a positive law, everybody might agree that two hundred feet would be too near, and that two thousand feet would not be too near; but within this wide margin, who shall say, who can know, what distance shall be too near or otherwise? An authoritative rule, carrying with it the character of certainty and precision, is needed. The tradesman needs to know, before incurring expense, how near he may build his works without violating the law or committing a nuisance; builders of houses need to know, to what distance they must keep from the obnoxious works already erected, in order to be sure of the protection of the law for their habitations. This requisite certainty and precision can only be obtained by a positive enactment, fixing the distance, within which the use shall be prohibited as noxious, and beyond which it will be allowed, and enforcing the rule thus fixed, by penalties.

Many cases will suggest themselves, where the legislature interposes by statute to declare, protect, and regulate public rights, although those rights are public easements only, over lands of which the fee of the soil

is in private proprietors. Such are laws regulating the construction and repairs of roads, highways, and bridges; declaring how they shall be graded, what barriers shall be erected to guard travellers against dangerous places, and what obstructions shall be removed. . . .

But in reference to the present case, and to the Act of the Legislature, establishing lines in the harbor, beyond which private proprietors are prohibited from building wharves, it is urged that such a restraint upon the estate of an individual, debarring him to some extent from the most beneficial use of it, is in effect taking his estate. If such restraint were in fact imposed upon the estate of one proprietor only, out of several estates on the same line of shore, the objection would be much more formidable. But we are to consider the subject-matter, to which such restraint applies. The value of this species of estate, that of shore and flats, consists mainly in the means it affords of building wharves from the upland towards deep water, to place merchandise and build wharves upon, and principally to afford access, to vessels requiring considerable depth of water, from the sea to suitable landings. Now, if along a shore where there are flats of considerable extent, one were restrained to a certain length, whilst others were allowed to extend further, the damage might be great. So if one were allowed to extend, and the coterminous proprietors adjacent were restrained, it would be obviously more injurious. The one extended would stop or check the current along the others, cause mud to accumulate near them, and thus render the water shoal at those wharves. But where all are permitted to extend alike, and all are restrained alike, by a line judiciously adapted to the course of the current, so that all have the benefit of access to their wharves, with the same depth of water, and the same strength of current at their heads, the damage must be comparatively less.

But of this the legislature must judge. Having once come to the conclusion that a case exists, in which it is competent for the legislature to make a law on the subject, it is for them, under a high sense of duty to the public and to individuals, with a sacred regard to the rights of property and all other private rights, to make such reasonable regulations as they may judge necessary to protect public and private rights, and to impose no larger restraints upon the use and enjoyment of private property, than are in their judgment strictly necessary to preserve and protect the rights of others.

In regard to the case of Mr. Alger, the report states that a certain piece of wharf, called a triangular piece, was erected and placed in its position beyond the line, after the law fixing the line had been passed; but that some other portions, though actually beyond the line, were erected, and the obstructions complained of actually placed in their position, before the law was passed; and also that the wharf complained of does not obstruct the navigation of boats and vessels.

In regard to the first suggestion, it may be necessary to examine the facts more minutely before any final judgment is entered. If any portion of this erection, described in the indictment, had been actually made

and placed in its position before the Act was passed, the court are all of opinion that the owner is not liable to its penalties. These laws were future and prospective in their terms and in their operation. They proceed on the assumption, that before they were passed, every man had a right to build on his own flats, if the erection did not in fact operate to impede navigation, and render him indictable as at common law; and that the common law, in thus lending its aid in the prosecution of actual injuries to navigation, to be proved in each case as nuisances, would be sufficient to secure the public against encroachments without legislation. But, for the reasons hereinbefore given, it seems to us highly important to have a more precise and definite law made and promulgated, by which all persons may more certainly know their own and the public rights, and govern themselves accordingly.

If, indeed, before the passing of these laws, any one had so built into navigable water as to cause a public nuisance, he may be liable to indictment and punishment, but not by these laws, fixing harbor lines. It follows, therefore, that all persons who built on their own soil before these laws, in a manner not amounting to a public nuisance, independently of them, had exercised only their just and lawful right; and any laws, made to punish acts lawful at the time they were done, would be *ex post facto*, contrary to the Constitution and to the plainest principles of justice, and of course inoperative and void.

In regard to the other suggestion, that it is found by the case that the particular wharf of Mr. Alger did not obstruct or impede navigation, it is proper to say, that if we are right in principle, we are bound to hold that this circumstance can afford no defence. A consideration of this fact illustrates the principles we have been discussing. The reason why it is necessary to have a certain and authoritative law, is shown by the difficulty, not to say impracticability, of inquiring and deciding as a fact, in each particular case, whether a certain erection in tide-water is a nuisance at common law or not; and when ascertained and adjudged, it affords no rule for any other case, and can have little effect in maintaining and protecting the acknowledged public right. It is this consideration (the expediency and necessity of defining and securing the rights of the public), which creates the exigency, and furnishes the legislature with the authority to make a general and precise law; but when made, because it was just and expedient, and because it is law, it becomes the duty of every person to obey it and comply with it. The question under the statute therefore is, not whether any wharf, built after the statute was made and promulgated, was an actual obstruction to navigation, but whether it was within the prohibited limit.

On the whole, the court are of opinion that the Act fixing a line within the harbor of Boston, beyond which no riparian proprietor should erect a wharf or other permanent structure, although to some extent it prohibited him from building such structure on flats of which he owned the fee, was a constitutional law, and one which it was com-

petent for the legislature to make; that it was binding on the defendant, and rendered him obnoxious to its penalties, if he violated its provisions.[1]

THORPE *v.* RUTLAND AND BURLINGTON RAILROAD COMPANY.

SUPREME COURT OF VERMONT. 1855.

[27 *Vt.* 140.]

D. A. Smalley, for the defendants.

J. Mueck, for the plaintiff.

[For the statement of facts and the beginning of the opinion, see *ante*, p. 157. The statute in question is given in the note.[2] The opinion continues as follows:]

REDFIELD, CH. J. . . . II. It being assumed then, that the legislature may control the action, prescribe the functions and duties of corporations, and impose restraints upon them to the same extent as upon natural persons, that is, in all matters coming within the general range of legislative authority, subject to the limitation of not impairing the obligation of contracts, provided the essential franchise is not taken without compensation, it becomes of primary importance to determine the extent to which the charter of a corporation may fairly be regarded as a contract within the meaning of the United States Constitution. . . . [Here the reasoning in the case of *Dartmouth College* v. *Woodward*, 4 Wheat. 518, is stated.]

But it has sometimes been supposed that corporations possess a kind of immunity and exemption from legislative control, extending to everything materially affecting their interest, and where there is no express reservation in their charters. It was upon this ground that a perpetual exemption from taxation was claimed in *Providence Bank* v. *Billings*, 4 Peters, 514, their charter being general, and no power of taxation reserved to the State. The argument was, that the right to tax either their property or their stock was not only an abridgment of the beneficial use of the franchise, but if it existed, was capable of being so exercised as virtually to destroy it. This was certainly plausible, and the court do not deny the liability to so exercise the power of taxation as to absorb the entire profits of the institution. But still they deny the exemption claimed. CHIEF JUSTICE MARSHALL there says:

[1] Compare *Grand Rapids* v. *Powers*, 89 Mich. 94; *Summerville* v. *Pressley*, 33 So. Ca. 56 (1890); *St. Louis* v. *Hill*, 22 S. W. Rep. 861 (1893). — ED.

[2] The statute is as follows: "Each railroad corporation shall erect and maintain fences on the lines of their road, . . . and also construct and maintain cattle-guards at all farm and road crossings, suitable and sufficient to prevent cattle and animals from getting on to the railroad. Until such fences and cattle-guards shall be duly made, the corporation and its agents shall be liable for all damages which shall be done by their agents or engines to cattle, horses, or other animals thereon, if occasioned by want of such fences and cattle-guards." — Comp. Stat. 200, § 41.

"The great object of an incorporation is, to bestow the character and properties of individuality on a collected and changing body of men. Any privileges which may exempt it from the burdens common to individuals, do not flow necessarily from the charter, but must be expressed in it, or they do not exist."

This is sufficiently explicit, and upon examination will be found, I think, to have placed the matter upon its true basis. In reason, it would seem that no fault could be found with the rule here laid down by the great expounder of American constitutional law. As to the general liability to legislative control, it places natural persons and corporations precisely upon the same ground. And it is the true ground, and the only one upon which equal rights and just liabilities and duties can be fairly based.

To apply this rule to the present case, it must be conceded that all which goes to the constitution of the corporation and its beneficial operation is granted by the legislature, and cannot be revoked, either directly or indirectly, without a violation of the grant, which is regarded as impairing the contract, and so prohibited by the United States Constitution. And if we suppose the legislature to have made the same grant to a natural person which they did to defendants, which they may undoubtedly do (*Moor* v. *Veazie*, 32 Maine, 343; s. c. in error in the Sup. Ct. U. S., 4 Peters, 565), it would scarcely be supposed that they thereby parted with any general legislative control over such person, or the business secured to him. Such a supposition, when applied to a single natural person, sounds almost absurd. But it must, in fact, be the same thing when applied to a corporation, however extensive. In either case, the privilege of running the road, and taking tolls, or fare and freight, is the essential franchise conferred. Any act essentially paralyzing this franchise, or destroying the profits therefrom arising, would no doubt be void. But beyond that, the entire power of the legislative control resides in the legislature, unless such power is expressly limited in the grant to the corporation, as by exempting their property from taxation, in consideration of a share of the profits, or a bonus, or the public duties assumed. And it has been questioned how far one legislature could, in this manner, abridge the general power of every sovereignty to impose taxes to defray the expense of public functions. *Brewster* v. *Hough*, 10 New Hamp. 138; *Mechanics' and Traders' Bank* v. *Debolt*, 1 Ohio St. 591; *Toledo Bank* v. *Bond*, Ibid., 622. It seems to me there is some ground to question the right of the legislature to extinguish, by one act, this essential right of sovereignty. I would not be surprised to find it brought into general doubt. But at present it seems to be pretty generally acquiesced in. *State of New Jersey* v. *Wilson*, 7 Cranch, 164; reaffirmed in *Gordon* v. *Appeal Tax Court*, 3 Howard, 133. But all the decisions in the United States Supreme Court, allowing the legislature to grant irrevocably any essential prerogative of sovereignty, require it to be upon consideration, and in the case of corporations, contemporaneous with the creation of the fran-

chise. *Richmond R. Co.* v. *The Louisa R. Co.*, 13 Howard, 71. Similar decisions in regard to the right of the legislature to grant perpetual exemption from taxation to corporations and property, the title to which is derived from the State, have been made by this court (*Herrick* v. *Randolph*, 13 Vt. 525); and in some of the other States (*Landon* v. *Litchfield*, 11 Conn. 251, and cases cited, *O'Donnell* v. *Bailey*, 24 Miss. 386). But these cases do not affect to justify even this express exemption from taxation being held inviolable, except upon the ground that it formed a part of the value of the grant, for which the State received or stipulated for a consideration.

But in the present case the question arises upon the statute of 1850, requiring all railways in the State to make and maintain cattle-guards at farm-crossings, and until they do so, making them liable for damage done to cattle by their engines, by reason of defect of fences or cattle-guards. The defendant's charter required them to fence their road, but no express provision is made in regard to cattle-guards. There is no pretence of any express exemption in the charter upon this subject, or that such an implied exemption can fairly be said to form a condition of the Act of Incorporation, unless everything is implied by grant, which is not expressly inhibited, whereas the true rule of construction in regard to the powers of corporations is, that they are to take nothing by intendment, but what is necessary to the enjoyment of that which is expressly granted. . . .

But upon the principle contended for in *Providence Bank* v. *Billings*, *supra*, and sometimes attempted to be maintained in favor of other corporations, most of the railways in this State would be quite beyond the control of the legislature, as well as to their own police, as that of the State generally. For in very few of their charters are these matters defined, or the control of them reserved to the legislature. Many of the charters do not require the roads to be fenced. But in *Quimby* v. *The Vermont Cent. R. Co.*, 23 Vt. 387, it was considered that the corporation were bound, as part of the compensation to land-owners, either to build fences or pay for them. The same was also held in *Morss* v. *Boston and Maine R.*, 2 Cush. 536. Any other construction will enable railroad corporations to take land without adequate compensation, which is in violation of the State Constitution, and would make the charter void to that extent. So, too, in regard to farm-crossings, the charters of many roads are silent. And it has been held that the provision for restoring private ways does not apply to farm-crossings. But the railways, without exception, built farm-crossings, regarding them as an economical mode of reducing land damages, and they are now bound to maintain them, however the case might have been if none had been stipulated for, and the damages assessed accordingly. *Manning* v. *Eastern Counties Railway Co.*, 12 M. & W. 237. So, too, many of the charters are silent as to cattle-guards at road-crossings, but the roads generally acquiesced in their necessity, both for the security of property and persons upon the railroad and of cattle in the

highway. For it has been held that this provision is for the protection of all cattle in the highway. *Fawcett* v. *The York and North Midland R. Co.*, 2 Law & Eq. 289; *Trow* v. *Vermont Cent. R. Co.*, 24 Vt. 487. Thus making a distinction in regard to the extent of the liability of railways for damages arising through defect of fences, and farm-crossings, and cattle-guards, at those points, and those which arise from defect of fences, and cattle-guards at road-crossings, the former being only for the protection of cattle, rightfully in the adjoining fields, as was held in *Jackson* v. *Rutland & B. R. Co.*, 25 Vt. 150, and the other for the protection of all cattle in the highway, unless, perhaps, in some excepted cases, amounting to gross negligence in the owners. And there can be no doubt of the perfect right of the legislature to make the same distinction in regard to the extent of the liability of railways in the Act of 1850, if such was their purpose, which thus becomes a matter of construction.

But the present case resolves itself into the narrow question of the right of the legislature, by general statute to require all railways, whether now in operation, or hereafter to be chartered, or built, to fence their roads upon both sides, and provide sufficient cattle-guards at all farm and road crossings, under penalty of paying all damage caused by their neglect to comply with such requirements. It might be contended that cattle-guards are a necessary part of the fence at all crossings, but that has been questioned, and we think the matter should be decided upon the general ground. It was supposed that the question was settled by this court, in *Nelson* v. *V. & C. R. Co.*, 26 Vt. 717. The general views of the court are there stated as clearly as it could now be done, but as the general question is of vast importance, both to the roads and the public, and has again been urged upon our consideration, we have examined it very much in detail.

We think the power of the legislature to control existing railways in this respect, may be found in the general control over the police of the country, which resides in the law-making power in all free States, and which is, by the fifth article of the bill of rights of this State, expressly declared to reside perpetually and inalienably in the legislature, which is, perhaps, no more than the enunciation of a general principle applicable to all free States, and which cannot, therefore, be violated so as to deprive the legislature of the power, even by express grant to any mere public or private corporation. And when the regulation of the police of a city or town, by general ordinances, is given to such towns and cities, and the regulation of their own internal police is given to railroads to be carried into effect by their by-laws and other regulations, it is, of course always, in all such cases, subject to the superior control of the legislature. That is a responsibility which legislatures cannot divest themselves of, if they would.

This police power of the State extends to the protection of the lives, limbs, health, comfort, and quiet of all persons, and the protection of all property within the State. According to the maxim, *Sic utere tuo ut*

alienum non lædas, which being of universal application, it must, of course, be within the range of legislative action to define the mode and manner in which every one may so use his own as not to injure others. So far as railroads are concerned, this police power which resides primarily and ultimately in the legislature is twofold: 1. The police of the roads, which, in the absence of legislative control, the corporations themselves exercise over their operatives, and to some extent over all who do business with them, or come upon their grounds, through their general statutes, and by their officers. We apprehend there can be no manner of doubt that the legislature may, if they deem the public good requires it, of which they are to judge, and in all doubtful cases their judgment is final, require the several railroads in the State to establish and maintain the same kind of police which is now observed upon some of the more important roads in the country for their own security, or even such a police as is found upon the English railways, and those upon the continent of Europe. No one ever questioned the right of the Connecticut Legislature to require trains upon all their railroads to come to a stand before passing draws in bridges; or of the Massachusetts Legislature to require the same thing before passing another railroad. And by parity of reason may all railways be required so to conduct themselves, as to other persons, natural or corporate, as not unreasonably to injure them or their property. And if the business of railways is specially dangerous, they may be required to bear the expense of erecting such safeguards as will render it ordinarily safe to others, as is often required of natural persons under such circumstances.

There would be no end of illustrations upon this subject, which, in the detail, are more familiar to others than to us. It may be extended to the supervision of the track, tending switches, running upon the time of other trains, running a road with a single track, using improper rails, not using proper precaution by way of safety beams in case of the breaking of axle-trees, the number of brakemen upon a train with reference to the number of cars, employing intemperate or incompetent engineers and servants, running beyond a given rate of speed, and a thousand similar things, most of which have been made the subject of legislation or judicial determination, and all of which may be. *Hegeman* v. *Western R. Corp.*, 16 Barbour, 353.

2. There is also the general police power of the State, by which persons and property are subjected to all kinds of restraints and burdens, in order to secure the general comfort, health, and prosperity of the State, of the perfect right in the legislature to do which no question ever was, or, upon acknowledged general principles, ever can be made, so far as natural persons are concerned. And it is certainly calculated to excite surprise and alarm, that the right to do the same in regard to railways should be made a serious question. This objection is made generally upon two grounds: 1. That it subjects corporations to virtual destruction by the legislature; and 2. That it is an attempt to control the obligation of one person to another, in matters of merely private concern.

The first point has already been somewhat labored. It is admitted that the essential franchise of a private corporation is recognized by the best authority as private property, and cannot be taken without compensation, even for public use. *Armington* v. *Barnet*, 15 Vt. 745; *West River Bridge Co.* v. *Dix*, 16 Vt. 446, s. c. in error in the United States Sup. Ct.; 6 Howard, 507; 1 Shelford (Bennett's ed.), 441, and cases cited.

All the cases agree that the indispensable franchises of a corporation cannot be destroyed or essentially modified. This is the very point upon which the leading case of *Dartmouth College* v. *Woodward* was decided, and which every well-considered case in this country maintains. But when it is attempted upon this basis to deny the power of regulating the internal police of the railroads, and their mode of transacting their general business, so far as it tends unreasonably to infringe the rights or interests of others, it is putting the whole subject of railway control quite above the legislation of the country. Many analogous subjects may be adduced to show the right of legislative control over matters chiefly of private concern. It was held, that a statute making the stockholders of existing banks liable for the debts of the bank was a valid law as to debts thereafter contracted, and binding to that extent upon all stockholders, subsequent to the passage of the law. *Stanley* v. *Stanley*, 26 Maine, 191. But where a bank was chartered with power to receive money on deposit, and pay away the same, and to discount bills of exchange, and make loans, and a statute of the State subsequently made it unlawful for any bank in the State to transfer by indorsement or otherwise, any bill or note, etc., it was held that the Act was void, as a violation of the contract of the State with the bank in granting its charter. *Planters' Bank* v. *Sharp*, and *Baldwin* v. *Payne*, 6 Howard, 301, 326, 327, 332; *Jamison* v. *Planters' and Merchants' Bank*, 23 Alabama, 168. It is true that any statute destroying the business or profits of a bank, and equally of a railroad, is void. Hence a statute prohibiting banks from taking interest, or discounting bills or notes, would be void, as striking at the very foundation of the general objects and beneficial purposes of the charter. But a general statute reducing the rate of interest, or punishing usury, or prohibiting speculations in exchange or in depreciated paper, or the issuing of bills of a given denomination, or creating other banks in the same vicinity, have always been regarded as valid. And while it is conceded the legislature could not prohibit existing railways from carrying freight or passengers, it is believed that beyond all question, it may so regulate these matters as to impose new obligations and restrictions upon these roads materially affecting their profits, as by not allowing them to run in an unsafe condition, as was held as to turnpikes. *State* v. *Bosworth*, 13 Vt. 402. But a law allowing certain classes of persons to go toll free is void. *Pingrey* v. *Washburn*, 1 Aiken, 268. So, too, chartering a railroad along the same route of a turnpike is no violation of its rights (*White River Turnpike Co.* v. *Vermont Cent. R.*

Co., 21 Vt. 590; *Turnpike Co.* v. *Railway Co.*, 10 Gill & Johnson, 392); or chartering another railway along the same route of a former one, to whom no exclusive rights are granted in terms. *Matter of Hamilton Avenue*, 14 Barbour, 405; or the establishment of a free way by the side of a toll bridge (*Charles River Bridge* v. *Warren Bridge*, 11 Peters, 420).

The legislature, may no doubt, prohibit railroads from carrying freight which is regarded as detrimental to the public health or morals, or the public safety generally, or they might probably be made liable as insurers of the lives and limbs of passengers as they virtually are of freight. The late statute giving relatives the right to recover damages where a person is killed, has wrought a very important change in the liability of railways, ten times as much, probably, as the one now under consideration ever could do. And I never knew the right of the legislature to impose the liability to be brought in question.

But the argument that these cattle-guards at farm-crossings are of so private a character as not to come within the general range of legislative cognizance, seems to me to rest altogether upon a misapprehension. It makes no difference how few or how many persons a statute will be likely to affect. If it professes to regulate a matter of public concern, and is in its terms general, applying equally to all persons or property coming within its provisions, it makes no difference in regard to its character or validity, whether it will be likely to reach one case or ten thousand. A statute requiring powder-mills to be built remote from the villages or highways, or to be separated from the adjoining lands by any such muniment as may be requisite to afford security to others' property or business, would probably be a valid law if there were but one powder-mill in the State, or none at all, and notwithstanding the whole expense of the protection should be imposed upon the proprietor of the dangerous business. And even where the State legislature have created a corporation for manufacturing powder at a given point, at the time, remote from inhabitants, if in process of time dwellings approach the locality, so as to render the further pursuit of the business at that point destructive to the interests of others, it may be required to be suspended or removed, or secured from doing harm, at the sole expense of such corporation. This very point is, in effect, decided in regard to Trinity churchyard, which is a royal grant for interment, securing fees to the proprietors, in the case of *Coates* v. *The City of New York*, 7 Cowen, 585; and in regard to *The Presbyterian Church*, in their case v. *The City of New York*, 5 Cowen, 538.

So, too, a statute requiring division fences between adjoining land proprietors, to be built of a given height or quality, although differing from the former law, would bind natural persons and equally corporations. But a statute requiring land-owners to build all their fences of a given quality or height, would no doubt be invalid, as an unwarrantable interference with matters of exclusively private concern. But the farm-crossings upon a railway are by no means of this character. They

are division fences between adjoining occupants, to all intents. In addition to this, they are the safeguards which one person, in the exercise of a dangerous business, is required to maintain in order to prevent the liability to injure his neighbor. This is a control by legislative action coming within the obligation of the maxim, *Sic utere tuo*, and which has always been exercised in this manner in all free States, in regard to those whose business is dangerous and destructive to other persons' property or business. Slaughter-houses, powder-mills, or houses for keeping powder, unhealthy manufactories, the keeping of wild animals, and even domestic animals, dangerous to persons or property, have always been regarded as under the control of the legislature. It seems incredible how any doubt should have arisen upon the point now before the court. And it would seem it could not, except from some undefined apprehension, which seems to have prevailed to a considerable extent, that a corporation did possess some more exclusive powers and privileges upon the subject of its business, than a natural person in the same business, with equal power to pursue and to accomplish it, which, I trust, has been sufficiently denied.

I do not now perceive any just ground to question the right of the legislature to make railways liable for all cattle killed by their trains. It might be unjust or unreasonable, but none the less competent. *Girtman* v. *Central Railroad*, 1 Kelly (Georgia), 173, is sometimes quoted as having held a different doctrine, but no such point is to be found in the case. The British Parliament for centuries, and most of the American legislatures, have made the protection of the lives of domestic animals, the subject of penal enactment. It would be wonderful if they could not do the same as to railways or if they could not punish the killing, by requiring them to compensate the owner, or, as in the present case, to do it until they used certain precautions in running their trains, to wit, maintained cattle-guards at roads and farm-crossings.

There are some few cases in the American courts bearing more directly upon the very point before us. In *Suydam* v. *Moore*, 8 Barbour, 358, the very same point is decided against the railway; Willard, J., compares the requirement to the law of the road, the passing of canal-boats, and keeping lights at a given elevation in steamboats. and says it comes clearly within the maxim *Sic utere tuo;* and in *Waldron* v. *The Rensselaer & Saratoga R. Co.*, Ibid. 390, the same point is decided, and the same judge says the requirements of the new Act, which is identical with our statute of 1850, as applied to existing railways, "are not inconsistent with their charter, and are. in our judgment, such as the legislature had the right to make." They were designed for the public safety, as well as the protection of property. In *Milliman* v. *The Oswego & Syracuse R.*, 10 Barbour, 87, the ground is assumed that the new law was not intended to apply to existing roads. And no doubt is here intimated of the right of the legislature to impose similar regulations upon existing railways. The N. Y. Revised Statutes subject all corporate charters to the control of the legislature, but it has

been there considered, that this reservation does not extend to matters of this kind, but that the right depends upon general legislative authority, The case of *The Galena and Chicago Union R. Co.* v. *Loomis*, 13 Illinois, 548, decides the point that the legislature may pass a law, requiring all railways to ring the bell or blow the whistle of their engines immediately before passing highways at grade. The court say, "The legislature has the power, by general laws, from time to time as the public exigencies may require, to regulate corporations in their franchises, so as to provide for the public safety. The provision in question is a mere police regulation, enacted for the protection and safety of the public, and in no manner interferes with, or impairs the powers conferred on the defendants in their Act of Incorporation."

All farm-crossings in England are required to be above or below grade, so as not to endanger passengers upon the road, and so of all road-crossings there, unless protected by gates. I could entertain no doubt of the right of the legislature to require the same here as to all railways, or even to subject their operations to the control of a board of commissioners, as has been done in some States. In *Benson* v. *New York City*, 10 Barbour, 223, it was held, that a ferry, the grant to which was held, not under the authority of the State, but from the city of New York, and which was a private corporation, as to the stock might be required by the legislature to conform to such regulations, restrictions, and precautions as were deemed necessary for the public benefit and security. The opinion of Woodbury, Justice, in *East Hartford* v. *Hartford Bridge Co.*, 10 Howard, 511, assumes similar grounds, although that case was somewhat different. The case of *Swan* v. *Williams*, 2 Michigan, 427, denies that railways are private corporations. But that proposition is scarcely maintainable so far as the pecuniary interest is concerned. If the stock is owned by private persons, the corporation is private so far as the right of legislative control is concerned, however public the functions devolved upon it may be. The language of Marshall, Chief Justice, in *Dartmouth College* v. *Woodward*, 4 Wheaton, 518, 629, seems pertinent to the general question of what laws are prohibited on the ground of impairing the obligation of contracts: "That the framers of the Constitution did not intend to restrain the States in the regulation of their civil institutions, adopted for internal government, and that the instrument they have given us is not to be so construed, may be admitted." And equally pertinent is the commentary of Parsons on Contracts, 2 vol. 511, upon the provision of the United States Constitution in relation to the obligation of contracts. "We may say that it is not intended to apply to public property, to the discharge of public duties, to the possession or exercise of public rights, nor to any changes or qualifications in any of these, which the legislature of a State may at any time deem expedient."

We conclude then, that the authority of the legislature to make the requirement of existing railways may be vindicated, because it comes fairly within the police of the State; 2. Because it regards the division

fence between adjoining proprietors; 3. Because it properly concerns the safe mode of exercising a dangerous occupation or business; and 4. Because it is but a reasonable provision for the protection of domestic animals, all of which interests fall legitimately within the range of legislative control, both in regard to natural and artificial persons.

Judgment affirmed.[1]

BENNETT, J., dissenting.

WYNEHAMER *v.* THE PEOPLE.
THE PEOPLE *v.* TOYNBEE.

NEW YORK COURT OF APPEALS. 1856.

[13 *N. Y.* 378.]

WYNEHAMER, the defendant in the court below in the case first above entitled, was, in July, 1855, indicted at a court of general sessions, held in and for the county of Erie, for selling intoxicating liquors, contrary to the provisions of the statute entitled "An Act for the Prevention of Intemperance, Pauperism, and Crime."[2] The indictment

[1] There are some analogous subjects where legislative control has been sustained by the courts which may properly be here alluded to. The expense of sidewalks and curbstones in cities and towns has been imposed upon adjacent lots, chiefly for general comfort and convenience. *Parson* v. *Sweet*, 1 Green, 196; *City of Lowell* v. *Hadley*, 8 Metcalf, 180. Unlicensed persons not allowed to remove house-dirt and offal from the streets. *Vandine's Case*, 6 Pick. 187. Prohibiting persons selling produce not raised upon their own farms, from occupying certain stands in the market. *Nightingale's Case*, 11 Pick. 168. See also *Buffalo* v. *Webster*, 10 Wendell, 99; *Bush* v. *Seabury*, 8 Johns. 327. Prohibiting the driving or riding horses faster than a walk in certain streets. *Commonwealth* v. *Worcester*, 3 Pick. 462. Prohibiting bowling-alleys. *Tanner* v. *The Trustees of the City of Albion*, 5 Hill, 121, or the exhibition of stud horses or stallions in public places. *Nolan* v. *Mayor of Franklin*, 4 Yerger, 163. The same may be said of all statutes regulating the mode of driving upon the highway or upon bridges, the validity of which have long been acquiesced in.

The destruction of private property in cities and towns, to prevent the spread of conflagrations, is an extreme application of the rule, compelling the subserviency of private rights to public security, in cases of imperious necessity. But even this has been fully sustained after the severest scrutiny. *Hale* v. *Lawrence*, and other cases upon the same subject; 1 Zabriskie, 714, 3 Zabriskie, 590, and cases there referred to from the New York Reports. There is, in short, no end to these illustrations, when we look critically into the police of the large cities. One in any degree familiar with this subject would never question the right depending upon invincible necessity, in order to the maintenance of any show of administrative authority among the class of persons with which the city police have to do. To such men any doubt of the right to subject persons and property to such regulations as the public security and health may require, regardless of merely private convenience, looks like mere badinage. They can scarcely regard the objector as altogether serious. And generally, these doubts in regard to the extent of governmental authority come from those who have had small experience. [This appears to be the Chief Justice's note. See also *Minneapolis, &c. Ry. Co.* v. *Emmons*, 149 U. S. 364 (1893). — ED.]

[2] The reporter does not give the terms of the statute. The following summary of it is taken from the opinion of A. S. JOHNSON, J., at pp. 406–409: "The sections which

contained several counts, each of which charged in substance that the defendant, on a day subsequent to the 4th of July, 1855, at the city of

particularly relate to it are substantially these, omitting such parts as do not bear upon this case: 'It shall be the duty of every sheriff, under sheriff, deputy sheriff, constable, marshal, or policeman, to arrest any person whom he shall see actually engaged in the commission of any offence in violation of the 1st section of this Act, and to seize all liquor kept in violation of said section, at the time and place of the commission of such offence, together with the vessels in which the same is contained, and forthwith to convey such person before any magistrate of the same city or town, to be dealt with according to law, and to store the liquor and vessels so seized in some convenient place, to be disposed of as hereinafter provided. It shall be the duty of every officer by whom any arrest and seizure shall be made, under this section, to make complaint on oath against the person arrested, and to prosecute such complaint to judgment and execution.' — Laws of 1855, p. 340, § 12. 'All liquors and vessels in which they are contained, which shall have been found and seized in the possession of any person who shall have been arrested for violating any provision of the 1st section and not claimed by any other person, shall, upon conviction of such person of such offence, be adjudged forfeited.' § 13. When any liquor seized under any provision of the Act shall be adjudged forfeited, as provided in any section of the Act, it shall be the duty of the magistrate (after the determination is become final) forthwith to issue a warrant commanding that the liquor be destroyed. The officer to whom the warrant shall be delivered is to destroy it and make a return of the destruction, and then an execution is to be issued to sell the vessels which contained the liquor § 10. Every justice of the peace, police justice, county judge, city judge (certain other officers in New York), and in all cities where there is a recorder's court, the recorder, has power to issue process, to hear and determine charges, and punish for all offences under the Act, and to hold courts of special sessions for the trial of such offences. The section proceeds: 'Such court of special sessions shall not be required to take the examination of any person brought before it upon charge of an offence under the Act, but shall proceed to trial as soon thereafter as the complainant can be notified' Power to adjourn, for good cause, is given for not exceeding twenty days. At the time of joining issue, and not after, either party may demand trial by jury, in which case the magistrate is to cause a jury to be summoned and empanelled, as in other criminal cases in courts of special sessions. § 5. No person who shall have been convicted of any offence against any provision of the Act, or who shall be engaged in the sale or keeping of intoxicating liquors, contrary to the Act, shall be competent to act as a juror upon any trial under any provision of the Act. § 16. Upon the trial of any complaint under the Act, proof of the sale of liquor shall be sufficient to sustain an averment of an unlawful sale, and proof of delivery shall be *prima facie* evidence of sale. § 17. A violation of any provision of the 1st section is made a misdemeanor. The guilty party is to forfeit all liquors kept by him in violation of the section, and is to be further punished by a fine of $50 for the first offence; for the second, by a fine of $100 and thirty days' imprisonment; for the third and every subsequent offence, by a fine not less than $100, nor more than $250, and by imprisonment for not less than three, nor more than six months. The defendant is likewise to pay all costs and fees provided in the Act; and in default of payment of any such fine, costs, and fees, or any part thereof, the defendant is to be committed until the same are paid 'not less than one day per dollar of the amount unpaid.' § 4. . . .

"The prohibitory clause itself, upon which these proceedings are founded, constitutes the 1st section. Omitting certain exceptions from the prohibition, which will be afterwards noticed, it provides that intoxicating liquor shall not be sold, or kept for sale, or kept with intent to be sold, by any person, in any place whatsoever; that it shall not be given away, nor be kept with intent to be given away, in any place whatsoever, except in a dwelling-house, in no part of which any tavern, store, grocery, shop, boarding-house or victualling-house, or room for gambling, dancing, or other public amusement or recreation of any kind is kept; that it shall not be kept or deposited in

Buffalo, wilfully and unlawfully and contrary to the form of the statute, sold to persons unauthorized by law to sell intoxicating liquor to the jury unknown, intoxicating liquor, to wit, a gill each of rum, brandy, gin, wine, whiskey, and strong beer, without having filed in the office of the clerk of the county of Erie any undertaking approved by the county judge of that county, according to the provisions of the 2d section of the Act. It was further alleged in each count of the indictment that the liquor so sold was not alcohol manufactured by the defendant, or pure wine manufactured by him from grapes grown by himself; and that the sale of the liquor was not authorized, nor was any right to sell the same given by any law or treaty of the United States. The defendant pleaded not guilty; and the issues were tried in the court of general sessions by a common-law jury duly empanelled. On the trial the counsel for the people gave evidence tending to prove that after the 4th day of July, 1855, and before the finding of the bill of indictment, the defendant on several occasions had sold and delivered to different persons at his bar, in Buffalo, brandy, in quantities less than a pint, which was drank on his premises. When the people rested, the counsel for the defendant requested the court to discharge the defendant, or to direct the jury to render a verdict of not

any place whatsoever, except in such a dwelling-house as is above described, or for sacramental purposes in a church or place of worship; or in a place where either some chemical, or mechanical, or medicinal art, requiring the use of liquor, is carried on as a regular branch of business, or while in actual transportation from one place to another, or stored in a warehouse prior to its reaching the place of its destination. By an exception in this same section, liquor may be given away as a medicine by physicians pursuing the practice of medicine as a business, or for sacramental purposes. The section concludes with a provision that it shall not apply to liquor, the right to sell which in this State is given by any law or treaty of the United States.

"By §§ 2 and 3, persons answering the description, doing the acts, and taking the oaths prescribed therein, may be licensed to keep for sale, and sell intoxicating liquor and alcohol for mechanical, chemical, or medicinal purposes, and wine for sacramental use. By § 22, the Act is not to be construed to prevent the sale of cider in quantities not less than ten gallons; nor to prevent the manufacturer of alcohol, or of pure wine from grapes grown by him, from keeping or from selling such alcohol or wine, nor the importer of foreign liquor from keeping or selling the same in the original packages to any person authorized by the Act to sell such liquors; nor to prohibit the manufacture or keeping for sale, nor the selling burning fluids of any kind, perfumery, essences, drugs, varnishes, nor any other article which may be composed in part of alcohol or other spirituous liquors, if not adapted to use as a beverage, or in evasion of this Act.

"The foregoing clauses contain, in substance, the prohibition of the Act, with the exceptions which qualify its effect.

"Two other provisions are necessary to be quoted, as they bear upon the rights which the owner of liquor has in it, and the modes in which he may assert those rights. The first is at the close of § 16, and declares 'that no person shall maintain an action to recover the value or possession of any intoxicating liquor sold or kept by him, which shall be purchased, taken, detained, or injured by any other person, unless he shall prove that such liquor was sold according to the provisions of the Act, or was lawfully kept and owned by him.' The other clause is at the end of § 25, and provides that 'all liquor kept in violation of any provision of the Act shall be deemed and is hereby declared to be a public nuisance.'" — ED.

guilty, on the following grounds, *viz.*: 1. That it was not shown that any offence had been committed by the defendant; 2. That it did not appear but that the liquor alleged to have been sold was liquor, the right to sell which was given by laws or treaties of the United States, nor but that it was imported by defendant from foreign countries in pursuance of the United States laws; 3. That the 1st and 4th sections of the aforesaid Act were respectively in violation of the constitutions of the United States and of this State, and void; 4. That the said Act was unauthorized by and in conflict with the laws and treaties of the United States and the Constitution of this State, and therefore void; 5. That it was not shown but that the liquor alleged to have been sold by the defendant was authorized to be sold by the Act of the Legislature above referred to. The court overruled each of the objections, and decided that the case must be submitted to the jury, and the counsel for the defendant excepted. Thereupon the counsel for the defendant offered to prove that the liquor alleged to have been sold was imported into this State from a foreign country, under and in pursuance of the revenue laws of the United States, and that the legal duties thereon were paid; that the defendant purchased such liquor from the importers in the package in which it was imported; and that it was drawn from such package and sold to the persons and at the times proved by the witnesses for the prosecution. The counsel for the people admitted the truth of the facts so offered to be proved, but objected to their admissibility as evidence, on the ground that they were irrelevant and immaterial. The court so held and excluded the evidence, and the defendant's counsel excepted. The counsel for the defendant also offered to prove that the liquor sold by the defendant was owned and possessed by him previous to and on the 3d of July, 1855; the counsel for the people admitted the fact to be so, but objected to it as evidence on the ground that it was immaterial. The objection was sustained, and the evidence excluded, and the defendant's counsel excepted. At the close of the evidence the counsel for the defendant requested the court to direct the jury to acquit the defendant, on the grounds stated at the close of the evidence for the prosecution. The court declined and the defendant's counsel excepted. The counsel for the defendant also requested the court to charge the jury that the people must prove that the liquor sold by the defendant was intoxicating; the court as to this request charged, that if it was proved that the defendant sold brandy, this was intoxicating liquor within the meaning of the Act; and the defendant's counsel again excepted. The jury found the defendant guilty; and the court sentenced him to pay a fine of fifty dollars, and to be committed until the same was paid. The judgment was affirmed by the Supreme Court sitting in the eighth district. See 20 Barbour, 567. The defendant sued out a writ of error.

Toynbee, the defendant in the case secondly above entitled, was, on the 17th of July, 1855, arrested by Mathews, a police officer of the city of Brooklyn, and brought before a police justice of that city, with

out any precept for his arrest having been issued. When he brought him before the justice, Mathews made a complaint in writing, verified by his oath, which stated that on the day of the arrest the complainant saw the defendant at a place which was specified, in Brooklyn, sell and keep for sale, and have in his possession, with intent to sell, intoxicating liquors, to wit, brandy and champagne; that the complainant saw the defendant engaged in selling liquor, to wit, brandy, in violation of the Act for the prevention of intemperance, pauperism, and crime; that the offence consisted in selling one glass of brandy and one bottle of champagne; that the complainant had arrested the defendant and brought him before the justice to answer the charge, and to be dealt with according to law; and that at the time and place of the offence, he, the complainant, seized the said brandy and champagne, with the bottles in which they were contained, and had stored them in a convenient place, to be disposed of as provided by the aforesaid Act. The defendant asked to be discharged, on the ground that the Act was unconstitutional, and on the further ground that the complaint did not set forth facts sufficient to constitute an offence by the defendant. His application was denied. He then objected to being tried by a court of special sessions, and offered to give bail for his appearance at the next court having criminal jurisdiction. The justice overruled the objection, refused to take bail, and required the defendant to plead to the charge. The defendant pleaded not guilty, and thereupon the complainant was sworn and testified that the defendant kept a hotel in Brooklyn, in the basement of which he kept a bar-room; that on the 17th of July, he, the witness, saw the defendant sell a glass of brandy and a bottle of champagne, which were intoxicating liquors, and that the defendant kept for sale in his bar-room such liquors. He further testified that the champagne was imported liquor; and that he, the witness, on the occasion aforesaid, seized and took into his possession the bottle of brandy from which the defendant sold, and the bottle of champagne which he had sold and was in the act of delivering. The foregoing is the substance of all the evidence. The court found the defendant guilty of selling and having in his possession with intent to sell, intoxicating liquors, as charged in the complaint, adjudged him guilty of a misdemeanor, and sentenced him to pay a fine of $50, and $5.87 costs of the proceedings, and that he be imprisoned until the same were paid, not exceeding fifty-six days. The court further adjudged that the liquor seized be forfeited, and that a warrant for its destruction be issued. On appeal by the defendant, the judgment was reversed by the Supreme Court at a general term in the second district. See 20 Barb. 168. The people appealed to this court. . . .

A. J. Parker, for the plaintiff in error, in the case first entitled.

A. Sawin, for the people.

J. M. Van Cott, for the people, in the case secondly entitled.

John A. Lott, for the defendant. . . .

HUBBARD, J. The first ground assumed by the appellant's [Toyn-

bee's] counsel on the argument was, that the sale of imported liquor in a less quantity than the package of importation was contrary to the provisions of the Act under which the defendant was convicted. This is clearly a tenable position. In the view which I take of the law in this case, it is not very essential that this proposition be considered at much length. . . .

The Act in question, by the exception alluded to, expressly refrains from all interference with the operation of the laws of Congress or with the right of sale of the importer as above stated, and hence is not obnoxious to the objection I am considering.[1]

The next question to be considered relates to the prohibitory character of the law, and its vindicatory provisions as it respects existing rights of property in liquor at the time the Act took effect. This is purely a question of legislative power, under the fundamental law. It is needless to say that the courts have no concern with the wisdom or expediency of the enactment to accomplish the beneficent ends indicated by the title. The policy of this government, from its foundation, certainly vindicates the political necessity and economy of stringent laws circumscribing the sale of spirituous liquors. I entertain no doubt of the constitutional competency of the legislature to prohibit entirely the commerce, within the State, in liquor as a beverage, by laws prospective in their operation. If, in the judgment of the legislature, the public welfare required it, the future production, manufacture, or acquisition of liquor might be prohibited. The sovereign power of the State in all matters pertaining to the public good, the health, good order, and morals of the people, is omnipotent. Laws intended to promote the welfare of society are within legislative discretion, and cannot be the just subject of judicial animadversion, except when it is seen that the constitutional guarantees of private property have been invaded. The police power is, of necessity, despotic in its character, commensurate with the sovereignty of the State; and individual rights of property, beyond the express constitutional limits, must yield to its exercise. And in emergencies, it may be exercised to the destruction of property, without compensation to the owner, and even without the formality of a legal investigation. It is upon this principle that health and quarantine laws are established; that a building is blown up to arrest a conflagration in a populous town; that the public market is purged of infectious articles; that merchandise on ship-board, infested with pestilence, is cast into the deep, and public nuisances are abated. It is the public exigency which demands the summary destruction, upon the maxim that the safety of society is the paramount law. It is the application of the personal right or principle of self-preservation to the body politic. I know of no limits to the exercise of the police power vested in the legislature, except the restrictions contained in the written constitution. Under our system of government, with co-or-

[1] See *Brown* v. *Md.*, 12 Wheat. 419. — ED.

dinate branches, each independent within its sphere, and all deriving their powers from a common source, the fundamental law, one cannot exercise a supremacy over the other, except as it finds its warrant for it in that law. The judiciary possesses no legitimate authority over Acts of the Legislature, aside from the constitutional grant; and even this authority is exercised in an indirect manner, when its powers are appealed to, to carry a statutory law into effect; and then only as it respects the individual rights of property or person.

It is said that this idea of the omnipotency of the legislature, aside from the express constitutional restrictions, is a fallacy. It is conceded that all power emanates from the people, and that the written Constitution clothes the legislature with all the power it possesses. But the grant of power in that instrument is general, of all the legislative power of the State; what this is precisely, is not and cannot well be defined. Aside from the express limitations, it is believed to embrace all the common-law power which the legislature would have possessed had the fundamental law remained, as in England, a part of the unwritten law of the State. This is by no means an alarming proposition. The Declaration of Rights, forming the guarantee of personal liberty and property in the first article of the Constitution, when construed according to its full spirit and intent, is quite ample to protect the citizen against the unauthorized encroachments of the legislature; to protect against all sumptuary laws and laws of kindred character, which have not the public good for their object. I am opposed to the judiciary attempting to set bounds to legislative authority, or declaring a statute invalid upon any fanciful theory of higher law or first principles of natural right outside the Constitution. If the courts may imply limitation, there is no bound to implication except judicial discretion, which must place the courts above the legislature and also the Constitution itself. This is hostile to the theory of the government. The Constitution is the only standard for the courts to determine the question of statutory validity.

There is no constitutional restriction upon the power of the legislature in the regulation of the sale or traffic in intoxicating drinks, whether affecting existing rights of property in liquor or not. As a scheme of regulation, the degree of the limitation of the sale or traffic is a matter of legislative discretion. The fault of the present law is, that it does not profess to be a scheme of regulation. There is no attempted discrimination between liquor owned at the time the law took effect and that acquired afterwards. I have reflected with much attention to see whether the courts could not make the discrimination, for instance, as a question of fact, to be ascertained in a given case, but I have encountered the insurmountable difficulty, that the legislature plainly intended that there should be no such distinction. No defence on a trial could be admitted on such ground, for the reason that it would be against the manifest policy of the Act. It is the intent of the statute alone which the courts are authorized to execute.

The prohibitory feature of the law must, therefore, be regarded as extending to all liquor in the State at the time the Act took effect. In this aspect I will, in a few words, give my views of its unconstitutionality as it respects vested rights of property in liquor, under the organic law, which forbids the citizen being deprived of his property without due process of law. That liquor is recognized by the law as property, that the Constitution knows no distinction in its guarantees of the rights of property of all kinds, that the constitutionality of the law is to be tested the same as though it related to some other and perhaps better species of property, is not questioned. The Constitution surrounds liquor, as property, with the same inviolability as any other species of property. There can be no room, I think, for difference of opinion as to the meaning of the phrase, "due process of law," as used in the Constitution. It means an ordinary judicial proceeding. In a criminal case, an arraignment, formal complaint, confronting of witnesses, a trial, and regular conviction and judgment. When a forfeiture of property is made a part of the punishment, as in this case, the judgment embracing it would, in its effect, deprive the offender of his property in the constitutional method. I think it competent for the legislature to declare a forfeiture of liquor, which an offender may have in possession, as a mode of punishment; and if the law in question was in other respects constitutional, I should uphold the judgment of forfeiture in this case as entirely proper. But the portion of the law which authorizes the seizure and destruction of liquor, where the prosecution or conviction of the owner is not contemplated, I should not hesitate to pronounce void, as property is thus destroyed or the citizen deprived of it without process of law. It is not pretended, nor can it be, that property which is not *per se* a nuisance can be annihilated by force of a statute alone, or by proceeding *in rem* for the punishment of a personal offence. Liquor is not a nuisance *per se*, nor can it be made so by a simple legislative declaration. It does not stand in the category of common nuisances which of themselves endanger the welfare or safety of society. It is its use and abuse as a beverage which gives it its offensive character. Otherwise it is entirely inoffensive. In my judgment, therefore, it cannot be confiscated to prevent its misuse, except through a prosecution against the owner *in personam*.

But it is said that this law does not assume to deprive any one of his property in liquor; that the owner is allowed to retain the unmolested custody and personal use of it, according to his pleasure. It is true that the owner may not be molested in this enjoyment, provided he keeps it in his dwelling-house, if fortunate enough to possess a domicil. I apprehend that by a fair construction of the law he is forbidden, under a severe penalty, from keeping it elsewhere, except for mechanical and other specified uses, although innocent of any intent to sell. I have examined the 1st section of the law with care, to see if it could not be construed in such manner as to make the keeping in any place except a dwelling-house, criminal only when accompanied

with an intent to sell. But the section cannot be so construed. The language is too clear to admit of a doubt as to the intention of the legislature. The keeping or deposit in any place, except in a dwelling-house, or place where some trade or business is carried on requiring its use, is prohibited, and by the 4th section of the Act such keeping or deposit is a crime. This, certainly, is a most extraordinary provision, which must have the effect to render a person a criminal who was so unfortunate as to have a quantity of liquor on hand in a forbidden place at the time the law took effect, although he had no intent to violate the law by selling. A person thus circumstanced would have but one of two alternatives to avoid criminality, either just before the law took effect to remove the liquor to a dwelling-house, or to a shop for mechanical and other prescribed uses, or destroy it with his own hand. I can scarcely credit that the legislature designed the law to have this effect; but no other construction can be put upon the language of the 1st section of the law, and we are bound to suppose, judicially, that the legislature intended what their words import.

The law does not even countenance the exportation of the liquor after it took effect. The plain design of the law seems to have been to cut off the liquor itself, to insure its destruction, by circumscribing the keeping of it, and authorizing its seizure, if kept in a forbidden place, or with a criminal intent to sell. The entire right of sale, within the State at least, is prohibited, and in this, in my judgment, consists the error of the law as it respects liquor owned when the law went into operation. If there had been any right of sale within the State preserved, for instance, to a licensed vendor, although of minor importance, it would have been sufficient, perhaps, to have impressed the law with a character of regulation, and saved its validity.

But the abolition of all right of sale in the State is equivalent to and is a substantial deprivation of the owner of his property. The right of sale is of the very essence of property in any article of merchandise; it is its chief characteristic; take away its vendible quality and the article is practically destroyed. As applied to merchandise of any description, this effect can be judicially seen. Even if the law allowed exportation, that would be of such minor importance as not to save the law from the charge of effectually depriving the owner of his property in the liquor. It is but of trifling value after the entire domestic market is closed against it.

I am unable, therefore, to avoid the conclusion that the prohibition in the 1st section of the law is invalid, inasmuch as it makes no discrimination, nor allows the courts to make any, but extends to all liquor, irrespective of the time of its acquisition; and that, by closing the domestic or State market, it in effect substantially deprives the owner of liquor, acquired before the law took effect, of his vested right of property therein, without due process of law.

At the trial before the police justice, the defendant offered bail for his appearance before a higher court having criminal jurisdiction. It was an error for the court to refuse to receive it. I am well satisfied

that the defendant had a constitutional right to be tried by a common-law jury of twelve men, and that to this end he should have been allowed to give bail to appear before a tribunal where such a jury could be obtained. . . .

I am of the opinion, therefore, that the judgment of the Supreme Court ought to be affirmed. . . .

[Other opinions are reported, by COMSTOCK, A. S. JOHNSON, SELDEN, MITCHELL, and T. A. JOHNSON, JJ., and a brief summary of an opinion by DENIO, C. J. The reporter then adds the following statement:]

On deciding these cases, the court passed upon and affirmed the following propositions:

1. That the prohibitory Act, in its operation upon property in intoxicating liquors existing in the hands of any person within this State when the Act took effect, is a violation of the provision in the Constitution of this State which declares that no person shall be "deprived of life, liberty, or property, without due process of law." That the various provisions, prohibitions, and penalties contained in the Act do substantially destroy the property in such liquors in violation of the terms and spirit of the constitutional provision.

2. That inasmuch as the Act does not discriminate between such liquors existing when it took effect as a law, and such as might thereafter be acquired by importation or manufacture, and does not countenance or warrant any defence based upon the distinction referred to, it cannot be sustained in respect to any such liquor, whether existing at the time the Act took effect or acquired subsequently; although all the judges were of opinion that it would be competent for the legislature to pass such an Act as the one under consideration (except as to some of the forms of proceeding to enforce it), provided such Act should be plainly and distinctly prospective as to the property on which it should operate.

3. That the criminal proceeding in a court of special sessions authorized by the said Act is unconstitutional and void because the accused is thereby deprived of the right of trial by jury, guaranteed by the Constitution.

DENIO, C. J., A. S. JOHNSON, COMSTOCK, SELDEN, and HUBBARD, Js., concurred in the foregoing propositions.

MITCHELL, J., dissented from the first and second, and concurred in the third.

T. A. JOHNSON and WRIGHT, Js., dissented from all of them.

All the judges, except T. A. JOHNSON, WRIGHT, and MITCHELL, were in favor of reversing the judgment of the Supreme Court, and of the court of general sessions in the case of Wynehamer.

All the judges, except T. A. JOHNSON and WRIGHT, were in favor of affirming the judgment of the Supreme Court, which reversed that of the court of special sessions in the case of Toynbee.

Judgments accordingly.[1]

[1] Compare *State* v. *Gilman*, 33 W. Va. 146 (1889). — ED.

BERTHOLF *v.* O'REILLY.

NEW YORK COURT OF APPEALS. 1878.

[74 *N. Y.* 509.]

APPEAL from judgment of the General Term of the Supreme Court, in the second judicial department, affirming a judgment in favor of plaintiff, entered upon a verdict. (Reported below, 8 Hun, 16.)

The nature of the action and the facts are set forth sufficiently in the opinion.

Lewis E. Carr, for appellant.

W. J. Groo, for respondent.

ANDREWS, J. . . . This action is brought by the plaintiff against the defendant, as the landlord of hotel premises, let with knowledge that intoxicating liquors were to be sold therein by the lessee, to recover the value of a horse owned by the plaintiff, which died in consequence of having been overdriven by the plaintiff's son while in a state of intoxication, produced in part by liquor sold him by the lessee at his bar on the leased premises. . . .

All the elements of the landlord's liability under the Act [the Civil Damage Act of April 29, 1873] exist in this case, *viz.:* the leasing of premises with knowledge that intoxicating liquors were to be sold thereon; the sale by the tenant, producing intoxication; and the act of the intoxicated person, causing injury to the property of the plaintiff.

The question we are now to determine is whether the legislature has the power to create a cause of action for damages, in favor of a person injured in person or property by the act of an intoxicated person, against the owner of real property, whose only connection with the injury is that he leased the premises where the liquor causing the intoxication was sold or given away, with knowledge that intoxicating liquors were to be sold thereon.

To realize the full force of this inquiry it is to be observed that the leasing of premises to be used as a place for the sale of liquors is a lawful act, not prohibited by this or any other statute. The liability of the landlord is not made to depend upon the nature of the act of the tenant, but exists irrespective of the fact whether the sale or giving away of the liquor was lawful or unlawful, that is, whether it was authorized by the license law of the State, or was made in violation of that law. Nor does the liability depend upon any question of negligence of the landlord in the selection of the tenant, or of the tenant in selling the liquor. Although the person to whom liquor is sold is at the time apparently a man of sober habits and, so far as the vendor knows, one whose appetite for strong drink is habitually controlled by his reason and judgment, yet if it turns out that the liquor sold causes or contributes to the intoxication of the person to whom the sale or gift is made, under the influence of which he commits an injury to person or property, the seller and his

landlord are by the Act made jointly and severally responsible. The element of care or diligence on the part of the seller or landlord does not enter into the question of liability. The statute imposes upon the dealer and the landlord the risk of any injury which may be caused by the traffic. It cannot be denied that the liability sought to be imposed by the Act is of a very sweeping character and may, in many cases, entail severe pecuniary liability, and its language may include cases not within the real purpose of the enactment. The owner of a building who lets it to be occupied for the sale of general merchandise, including wines and liquors, may, under the Act, be made liable for the acts of an intoxicated person, where his only fault is that he leased the premises for a general business, including the sale of intoxicating liquors, in the same way as other merchandise. The liability is not restricted to the results of intoxication from liquors sold or given away to be drank on the premises of the seller. There is no way by which the owner of real property can escape possible liability for the results of intoxication where he leases or permits the occupation of his premises, with the knowledge that the business of the sale of liquors is to be carried on on the premises, whether alone or in connection with other merchandise, or whether they are to be sold to be drank on the premises or to be carried away and used elsewhere. His only absolute protection against the liability imposed by the Act is to be found in not using or permitting the premises to be used for the sale of intoxicating liquors.

The question whether the Act under consideration is a valid exercise of legislative power is to be determined solely by reference to constitutional restraints and prohibitions. The legislative power has no other limitation. . . .

There are two general grounds upon which the Act in question is claimed to be unconstitutional; *first*, that it operates to restrain the lawful use of real property by the owner, inasmuch as it attaches to the particular use a liability, which substantially amounts to a prohibition of such use, and, as to the seller, imposes a pecuniary responsibility, which interferes with the traffic in intoxicating liquors, although the business is authorized by law; and *second*, that it creates a right of action unknown to the common law, and subjects the property of one person to be taken in satisfaction of injuries sustained by another remotely resulting from an act of the person charged, which act may be neither negligent or wrongful, but may be, in all respects, in conformity with law. The Act, it is said, in effect authorizes the taking of private property without "due process of law," contrary to article 1, section 6, of the Constitution, and is also a violation of the first section of the same article, which declares that "no member of this State shall be disfranchised, or deprived of any of the rights or privileges secured to any of the citizens thereof, unless by the law of the land or the judgment of his peers." If the Act is "due process of law," within the sixth section of the first article, it is manifest that it is valid within the other section to which reference is made.

The right of the State to regulate the traffic in intoxicating liquors, within its limits, has been exercised from the foundation of the government, and is not open to question. The State may prescribe the persons by whom and the conditions under which the traffic may be carried on. It may impose upon those who act under its license such liabilities and penalties as in its judgment are proper to secure society against the dangers of the traffic and individuals against injuries committed by intoxicated persons under the influence of or resulting from their intoxication.

The licensee, by accepting a license and acquiring thereby a privilege from the State to engage in the traffic, a privilege confined to those who are licensees and withheld from all other citizens, takes it subject to such conditions as the legislature may attach to its exercise. He consents to be bound by the conditions when he accepts the license, and the State is the sole judge of the reasonableness of the conditions imposed. And the power of the legislature, as a part of the excise system, to impose the liabilities, imposed by the Act in question, upon licensed dealers, as a condition of granting the license, cannot, we think, be questioned. . . .

The Act of 1873 cannot, however, be sustained in all its aspects upon the theory that the liability imposed by the Act is a condition of a privilege granted by the State. This cannot be affirmed in respect of the liability of the landlord, whose right to lease his property belongs to him, as an incident to ownership. The responsibility imposed is not confined to cases of unlawful sales of liquors or to sales made by licensed vendors. Any person selling or giving away liquor, which causes intoxication and consequent injury, is made liable under the Act.

The broad question is presented, whether the Act transcends the limits of legislative power, in subjecting a landlord to liability, under the circumstances mentioned in the Act. Does the Act, in effect, deprive him of his property without "due process of law," in the sense of the Constitution. If the Act can be sustained as to the landlord, it is clearly valid as to all other persons; and its validity as to the landlord is the question directly presented in this case.

We need not enter into any elaborate discussion of the meaning of the words "due process of law." This has been done in numerous judicial decisions. They are held, under the liberal interpretation given to them, to protect the life, liberty and property of the citizens against acts of mere arbitrary persons, in any department of the government. Denio, J., in *Westervelt* v. *Gregg*, 12 N. Y. 212. These are the fundamental civil rights, for the security of which society is organized, and all acts of legislation which contravene them are within the prohibition of the constitutional guarantee. In judicial proceedings, due process of law requires notice, hearing and judgment; in legislative proceedings, conformity to the settled maxims of free governments, observance of constitutional restraints and requirements, and an omission to exercise powers appertaining to the judicial or executive departments. It is as

difficult, as it would be unwise to attempt an exact definition of their scope. Their application, in a particular case, must be determined when the question arises, and, in the absence of exact precedents, courts must determine the question, upon a consideration of the general scope of legislative power, the practice of governments, and in view of the conceded principle that individual rights may be curtailed and limited to secure the public welfare and the equal rights of all. . . .

If the legislature was impotent to deal with the traffic in intoxicating liquors or powerless to restrain or regulate it in the interest of the community at large, because legislation on the subject might, to some extent, interfere with the use of property or the prosecution of private business, the legislature would be shorn of one of its most usual and important functions. But, as we have said, the right of the legislature to regulate the traffic is shown by the uniform practice of the government. It may not only regulate, but it may prohibit it. This was declared after solemn argument and mature deliberation, in one of the propositions adopted by this court in *Wynehamer* v. *The People*, subject only to the qualification that the prohibition shall not interfere with vested rights of property. The same principle was declared in the case of *Metropolitan Board of Excise* v. *Barrie*, 34 N. Y. 657; and that the legislative power extends to the entire prohibition of the traffic has been recently recognized by the Supreme Court of the United States.

It is quite evident that the Act of 1873 may seriously interfere with the profitable use of real property by the owner. This is especially true with respect to a building erected to be occupied as an inn or hotel, and specially adapted to that use, where the rental value may largely depend upon the right of the tenant to sell intoxicating liquors. The owner of such a building may well hesitate to lease his property, when, by so doing, he subjects himself to the onerous liability imposed by the Act. The Act, in this way, indirectly operates to restrain the absolute freedom of the owner in the use of his property, and may justly be said to impair its value. But this is not a taking of his property, within the meaning of the Constitution. He is not deprived either of the title or the possession. The use of his property for any other lawful purpose is unrestricted, and he may let or use it as a place for the sale of liquors, subject to the liability which the Act imposes. The objection we are now considering would apply with greater force to a statute prohibiting, under any circumstances, the traffic in intoxicating liquors, and as such a statute must be conceded to be within the legislative power, and would not interfere with any vested rights of the owner of real property, although absolutely preventing the particular use, *a fortiori* the Act in question does not operate as an unlawful restraint upon the use of property.

That a statute impairs the value of property does not make it unconstitutional. All property is held subject to the power of the State to regulate or control its use, to secure the general safety and the public

welfare. . . . [Here follow quotations from *Com.* v. *Alger*, 7 Cush. 84, and *Thorpe* v. *B. & R. R. R. Co.*, 27 Vt. 140, and statements of *The Slaughter-House Cases*, 16 Wall. 36, and *Munn* v. *Ill.*, 94 U. S. 113.]

The right of the legislature to control the use and traffic in intoxicating liquors being established, its authority to impose liabilities upon those who exercise the traffic, or who sell or give away intoxicating drinks, for consequential injuries to third persons, follows as a necessary incident. And the Act of 1873 is not invalid because it creates a right of action and imposes a liability not known to the common law. There is no such limit to legislative power. The legislature may alter or repeal the common law. It may create new offences, enlarge the scope of civil remedies, and fasten responsibility for injuries upon persons against whom the common law gives no remedy. We do not mean that the legislature may impose upon one man liability for an injury suffered by another, with which he had no connection. But it may change the rule of the common law, which looks only to the proximate cause of the mischief, in attaching legal responsibility, and allow a recovery to be had against those whose acts contributed, although remotely, to produce it. This is what the legislature has done in the Act of 1873. That there is or may be a relation, in the nature of cause and effect, between the act of selling or giving away intoxicating liquors, and the injuries for which a remedy is given, is apparent, and upon this relation the legislature has proceeded in enacting the law in question. It is an extension, by the legislature, of the principle expressed in the maxim, *Sic utere tuo ut alienum non lædas*, to cases to which it had not before been applied, and the propriety of such an application is a legislative and not a judicial question.

It is said that the statute imposes a liability for the consequences of a lawful act. But the legislature, having control of the subject of the traffic in and use of intoxicating liquors, may make such regulations to prevent the public evils and private injuries resulting from intoxication as in its judgment are calculated to accomplish this end. It may prohibit the selling or giving away of liquors, or it may, while not interfering with the liberty of sale or use, guard against the dangers of an indiscriminate traffic, and induce caution, on the part of those who engage in the business, by subjecting them to liabilities for consequential injuries.

The Act of 1873 does not deprive the seller, who is made liable under the Act, of his property, without due process of law. It authorizes it to be appropriated, in the due course of judicial proceedings, for the satisfaction of injuries resulting from intoxication caused by his act. The legislature has said that the seller may be treated as the author of the injuries, and we think this was within the legislative power.

The liability imposed upon the landlord for the acts of the tenant is not a new principle in legislation. His liability only arises when he has consented that the premises may be used as a place for the sale of liquors. He selects the tenant, and he may, without violating any con-

stitutional provision, be made responsible for the tenant's acts connected with the use of the leased property. In *Dobbins* v. *The United States*, recently decided by the United States Supreme Court, a distillery, with the real and personal property used in connection therewith, had been seized and condemned to be forfeited, for the violation, by a lessee, of certain provisions of the Act of Congress, regulating the business of distilling. No fraud was imputed to the owner of the premises, and he was not charged with any complicity with the tenant in violating the law. The owner objected that his property could not be forfeited for the acts of the tenant, committed without his knowledge or consent. But the court affirmed the decree of condemnation; and, in his opinion, Clifford, J., says: "The legal conclusion must be that the unlawful acts of the distiller bind the owner of the property, in respect to the management of the same, as much as if they were committed by the owner himself. Power to that effect the law vests in him by virtue of his lease; and, if he abuses his trust, it is a matter to be settled between him and his lessor; but the acts of violation as to the penal consequences to the property are to be considered just the same as if they were the acts of the owner."

Our conclusion is that the Act of 1873 is a constitutional enactment. It is doubtless an extreme exercise of legislative power, but we cannot say that it violates any express or implied prohibition of the Constitution.

There are some subordinate questions presented, as grounds for the reversal of the judgment. They were considered by the General Term, and we concur in its conclusions in respect to them.

The judgment must be affirmed, with costs.

All concur. *Judgment affirmed.*[1]

In *Gibbons* v. *Ogden*, 9 Wheat. 1, 209 (1824), MARSHALL, C. J., for the court, said: "Since, however, in exercising the power of regulating their own purely internal affairs, whether of trading or police, the States may sometimes enact laws, the validity of which depends on their interfering with, and being contrary to, an Act of Congress passed in pursuance of the Constitution, the court will enter upon the inquiry, whether the laws of New York, as expounded by the highest tribunal of that State, have, in their application to this case, come into collision with an Act of Congress, and deprived a citizen of a right to which that Act entitles him. Should this collision exist, it will be immaterial whether those laws were passed in virtue of a concurrent power 'to regulate commerce with foreign nations and among the several States,' or, in virtue of a power to regulate their domestic trade and police. In one case and the other, the acts of New York must yield to the law of Congress; and the decision sustaining the privilege they confer, against a right given by a law of the Union, must be erroneous.

"This opinion has been frequently expressed in this court, and is

[1] Compare *Howes* v. *Maxwell*, 157 Mass. 333 — ED.

founded as well on the nature of the government as on the words of the Constitution. In argument, however, it has been contended that, if a law passed by a State, in the exercise of its acknowledged sovereignty, comes into conflict with a law passed by Congress in pursuance of the Constitution, they affect the subject, and each other, like equal opposing powers.

"But the framers of our Constitution foresaw this state of things, and provided for it by declaring the supremacy not only of itself, but of the laws made in pursuance of it. The nullity of any Act, inconsistent with the Constitution, is produced by the declaration that the Constitution is the supreme law. The appropriate application of that part of the clause which confers the same supremacy on laws and treaties, is to such acts of the State legislatures as do not transcend their powers, but, though enacted in the execution of acknowledged State powers, interfere with, or are contrary to the laws of Congress, made in pursuance of the Constitution, or some treaty made under the authority of the United States. In every such case the Act of Congress, or the treaty, is supreme; and the law of the State, though enacted in the exercise of powers not controverted, must yield to it."

IN *U. S.* v. *Holliday*, 3 Wall. 407, 416 (1865), it was a question whether an Act of Congress of 1862, forbidding the sale of intoxicating liquor to an Indian under the charge of an agent, anywhere in the United States, was valid. MILLER, J., for the court, in sustaining the enactment, said: "We are not furnished with any argument by either of the defendants on this branch of the subject, and may not therefore be able to state with entire accuracy the position assumed. But we understand it to be substantially this: that so far as the Act is intended to operate as a police regulation to enforce good morals within the limits of a State of the Union, that power belongs exclusively to the State, and there is no warrant in the Constitution for its exercise by Congress. If it is an attempt to regulate commerce, then the commerce here regulated is a commerce wholly within the State, among its own inhabitants or citizens, and is not within the powers conferred on Congress by the commercial clause.

"The Act in question, although it may partake of some of the qualities of those acts passed by State legislatures, which have been referred to the police powers of the States, is, we think, still more clearly entitled to be called a regulation of commerce. 'Commerce,' says Chief Justice Marshall, in the opinion in *Gibbons* v. *Ogden*, to which we so often turn with profit when this clause of the Constitution is under consideration, 'commerce undoubtedly is traffic, but it is something more: it is intercourse.' The law before us professes to regulate traffic and intercourse with the Indian tribes. It manifestly does both. It relates to buying and selling and exchanging commodities, which is the essence of all commerce, and it regulates the intercourse between the citizens of the United States and those tribes, which is another branch of commerce, and a very important one.

"If the Act under consideration is a regulation of commerce, as it undoubtedly is, does it regulate that kind of commerce which is placed within the control of Congress by the Constitution? The words of that instrument are: 'Congress shall have power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes.' Commerce with foreign nations, without doubt, means commerce between citizens of the United States and citizens or subjects of foreign governments, as individuals. And so commerce with the Indian tribes, means commerce with the individuals composing those tribes. The Act before us describes this precise kind of traffic or commerce, and, therefore, comes within the terms of the constitutional provision.

"Is there anything in the fact that this power is to be exercised within the limits of a State, which renders the Act regulating it unconstitutional?

"In the same opinion to which we have just before referred, Judge Marshall, in speaking of the power to regulate commerce with foreign States, says, 'The power does not stop at the jurisdictional limits of the several States. It would be a very useless power if it could not pass those lines.' 'If Congress has power to regulate it, that power must be exercised wherever the subject exists.' It follows from these propositions, which seem to be incontrovertible, that if commerce, or traffic, or intercourse, is carried on with an Indian tribe, or with a member of such tribe, it is subject to be regulated by Congress, although within the limits of a State. The locality of the traffic can have nothing to do with the power. The right to exercise it in reference to any Indian tribe, or any person who is a member of such tribe, is absolute, without reference to the locality of the traffic, or the locality of the tribe, or of the member of the tribe with whom it is carried on. It is not, however, intended by these remarks to imply that this clause of the Constitution authorizes Congress to regulate any other commerce, originated and ended within the limits of a single State, than commerce with the Indian tribes."

IN RE RAPIER, PETITIONER. IN RE DUPRÉ, PETITIONER.

SUPREME COURT OF THE UNITED STATES. 1892.

[143 *U. S.* 110.]

THESE were three applications to this court for leave to file petitions for writs of *habeas corpus*. Leave was granted, March 9, 1891, and the petitions were made returnable on the third Monday of the next April. They were duly returned, and were, on the 27th of April, assigned for argument at the present term. The prayer in each case was for a discharge from arrest for an alleged violation of the provisions of section 3894 of the Revised Statutes, as amended by the Act of September 19, 1890, 26 Stat. 465, c. 908, generally known as

the Anti-lottery Act, which is printed in the margin. [It is omitted here.]

Rapier was arrested under an information in the District Court for the Southern District of Alabama.

Dupré was arrested under two indictments in the Circuit Court for the Eastern District of Louisiana.

The charge against Rapier, and against Dupré in one indictment, was the mailing of a newspaper containing an advertisement of the Louisiana Lottery; and in the other indictment against Dupré was for the mailing of a letter concerning it.

As a cause for the issue of the writ Rapier said, in his application: "Your petitioner avers that he is now in the custody of said marshal under or by color of the authority of the United States and in violation of the Constitution of the United States. Your petitioner is advised that the pretended statute under which he is being prosecuted and held is in violation of the Constitution of the United States, and that the said District Court is without jurisdiction in the premises."

Dupré in No. 8 averred that he was "deprived of his liberty under and by color of the authority of the United States and of said court and in violation of the Constitution of the United States and of his rights as a citizen thereof, because he says that he is advised and therefore avers that the statute of the United States under which he is held and being prosecuted upon said indictment is unconstitutional, null and void, and particularly obnoxious to and in violation of the First Amendment to said Constitution, which forbids Congress passing any law abridging the freedom of the press, and that therefore said Circuit Court is and was without jurisdiction in the premises, and he is deprived of his liberty without authority of law."

His petition in No. 9 contained substantially the same averment.

Mr. Hannis Taylor, for Rapier. *Mr. James C. Carter* and *Mr. Thomas Semmes*, for Dupré. *Mr. Attorney-General* and *Mr. Assistant Attorney-General Maury*, for the United States.

MR. CHIEF JUSTICE FULLER delivered the opinion of the court.

We are constrained by the circumstances in which we find ourselves placed by the illness and death of Mr. Justice Bradley, to whom the preparation of the opinion in these cases was committed, to waive any elaboration of our views, and confine ourselves to the expression of the general grounds on which our decision proceeds.

These are applications for discharge by writ of *habeas corpus* from arrest for alleged violations of an Act of Congress, approved September 19, 1890, entitled "An Act to amend Certain Sections of the Revised Statutes relating to Lotteries, and for other Purposes." 26 Stat. 465, c. 908.

The question for determination relates to the constitutionality of section 3894 of the Revised Statutes as amended by that Act. In *Ex parte Jackson*, 96 U. S. 727, it was held that the power vested

in Congress to establish post-offices and post-roads embraced the regulation of the entire postal system of the country, and that under it Congress may designate what may be carried in the mail and what excluded; that in excluding various articles from the mails the object of Congress is not to interfere with the freedom of the press or with any other rights of the people, but to refuse the facilities for the distribution of matter deemed injurious by Congress to the public morals; and that the transportation in any other way of matters excluded from the mails would not be forbidden. Unless we are prepared to overrule that decision, it is decisive of the question before us.

It is argued that in Jackson's case it was not urged that Congress had no power to exclude lottery matter from the mails; but it is conceded that the point of want of power was passed upon in the opinion. This was necessarily so, for the real question was the existence of the power and not the defective exercise of it. And it is a mistake to suppose that the conclusion there expressed was not arrived at without deliberate consideration. It is insisted that the express powers of Congress are limited in their exercise to the objects for which they were intrusted, and that in order to justify Congress in exercising any incidental or implied powers to carry into effect its express authority, it must appear that there is some relation between the means employed and the legitimate end. This is true, but while the legitimate end of the exercise of the power in question is to furnish mail facilities for the people of the United States, it is also true that mail facilities are not required to be furnished for every purpose.

The States before the Union was formed could establish post-offices and post-roads, and in doing so could bring into play the police power in the protection of their citizens from the use of the means so provided for purposes supposed to exert a demoralizing influence upon the people. When the power to establish post-offices and post-roads was surrendered to the Congress it was as a complete power, and the grant carried with it the right to exercise all the powers which made that power effective. It is not necessary that Congress should have the power to deal with crime or immorality within the States in order to maintain that it possesses the power to forbid the use of the mails in aid of the perpetration of crime or immorality.

The argument that there is a distinction between *mala prohibita* and *mala in se*, and that Congress might forbid the use of the mails in promotion of such acts as are universally regarded as *mala in se*, including all such crimes as murder, arson, burglary, etc., and the offence of circulating obscene books and papers, but cannot do so in respect of other matters which it might regard as criminal or immoral, but which it has no power itself to prohibit, involves a concession which is fatal to the contention of petitioners, since it would be for Congress to determine what are within and what without the rule; but we think there is no room for such a distinction here, and that it must be left to Congress in the exercise of a sound discretion to

determine in what manner it will exercise the power it undoubtedly possesses.

We cannot regard the right to operate a lottery as a fundamental right infringed by the legislation in question; nor are we able to see that Congress can be held, in its enactment, to have abridged the freedom of the press. The circulation of newspapers is not prohibited, but the government declines itself to become an agent in the circulation of printed matter which it regards as injurious to the people. The freedom of communication is not abridged within the intent and meaning of the constitutional provision unless Congress is absolutely destitute of any discretion as to what shall or shall not be carried in the mails, and compelled arbitrarily to assist in the dissemination of matters condemned by its judgment, through the governmental agencies which it controls. That power may be abused furnishes no ground for a denial of its existence, if government is to be maintained at all.

In short, we do not find sufficient grounds in the arguments of counsel, able and exhaustive as they have been, to induce us to change the views already expressed in the case to which we have referred. We adhere to the conclusion therein announced.

The writs of habeas corpus prayed for will therefore be denied, and the rules hereinbefore entered discharged.

UNITED STATES *v.* DEWITT.

SUPREME COURT OF THE UNITED STATES. 1869.

[9 *Wall.* 41.]

ON certificate of division in opinion between the judges of the Circuit Court for the Eastern District of Michigan; the case being this:

Section 29 of the Act of March 2d, 1867 (14 Stat. at Large, 484), declares,

"That no person shall mix for sale naphtha and illuminating oils, or shall knowingly sell or keep for sale, or offer for sale such mixture, or shall sell or offer for sale oil made from petroleum for illuminating purposes, inflammable at less temperature or fire-test than 110 degrees Fahrenheit; and any person so doing, shall be held to be guilty of a misdemeanor, and on conviction thereof by indictment or presentment in any court of the United States having competent jurisdiction, shall be punished by fine, &c., and imprisonment," &c.

Under this section one Dewitt was indicted, the offence charged being the offering for sale, at Detroit, in Michigan, oil made of petroleum of the description specified. There was no allegation that the sale was in violation or evasion of any tax imposed on the property sold. It was alleged only that the sale was made contrary to law.

To this indictment there was a demurrer; and thereupon arose two questions, on which the judges were opposed in opinion.

(1) Whether the facts charged in the indictment constituted any offence under any valid and constitutional law of the United States?

(2) Whether the aforesaid section 29 of the Act of March 2d, 1867, was a valid and constitutional law of the United States?

Mr. Field, Assistant Attorney-General, for the United States.

Mr. Wills, *contra*.

The CHIEF JUSTICE delivered the opinion of the court.

The questions certified resolve themselves into this: Has Congress power, under the Constitution, to prohibit trade within the limits of a State?

That Congress has power to regulate commerce with foreign nations and among the several States, and with the Indian tribes, the Constitution expressly declares. But this express grant of power to regulate commerce among the States has always been understood as limited by its terms; and as a virtual denial of any power to interfere with the internal trade and business of the separate States; except, indeed, as a necessary and proper means for carrying into execution some other power expressly granted or vested.

It has been urged in argument that the provision under which this indictment was framed is within this exception; that the prohibition of the sale of the illuminating oil described in the indictment was in aid and support of the internal revenue tax imposed on other illuminating oils. And we have been referred to provisions, supposed to be analogous, regulating the business of distilling liquors, and the mode of packing various manufactured articles; but the analogy appears to fail at the essential point, for the regulations referred to are restricted to the very articles which are the subject of taxation, and are plainly adapted to secure the collection of the tax imposed; while, in the case before us, no tax is imposed on the oils the sale of which is prohibited. If the prohibition, therefore, has any relation to taxation at all, it is merely that of increasing the production and sale of other oils, and, consequently, the revenue derived from them, by excluding from the market the particular kind described.

This consequence is too remote and too uncertain to warrant us in saying that the prohibition is an appropriate and plainly adapted means for carrying into execution the power of laying and collecting taxes.

There is, indeed, no reason for saying that it was regarded by Congress as such a means, except that it is found in an act imposing internal duties. Standing by itself, it is plainly a regulation of police; and that it was so considered, if not by the Congress which enacted it, certainly by the succeeding Congress, may be inferred from the circumstance, that while all special taxes on illuminating oils were repealed by the Act of July 20th, 1868, which subjected distillers and refiners to the tax on sales as manufacturers, this prohibition was left unrepealed.

As a police regulation, relating exclusively to the internal trade of the States, it can only have effect where the legislative authority of Congress excludes, territorially, all State legislation, as for example, in the District of Columbia. Within State limits, it can have no constitutional operation. This has been so frequently declared by this court, results so obviously from the terms of the Constitution, and has been so fully explained and supported on former occasions, that we think it unnecessary to enter again upon the discussion.

The first question certified must, therefore, be answered in the negative.

The second question must also be answered in the negative, except so far as the section named operates within the United States, but without the limits of any State.[1]

[1] In the *License Tax Cases*, 5 Wall. 462, 470 (1866), CHASE, C. J., for the court, said: "This series of propositions, and the conclusion in which it terminates, depends on the postulate that a license necessarily confers an authority to carry on the licensed business. But do the licenses required by the Acts of Congress for selling liquor and lottery tickets confer any authority whatever?

"It is not doubted that where Congress possesses constitutional power to regulate trade or intercourse, it may regulate by means of licenses as well as in other modes; and, in case of such regulation, a license will give to the licensee authority to do whatever is authorized by its terms. . . . But very different considerations apply to the internal commerce, or domestic trade of the States. Over this commerce and trade Congress has no power of regulation nor any direct control. This power belongs exclusively to the States. No interference by Congress with the business of citizens transacted within a State is warranted by the Constitution, except such as is strictly incidental to the exercise of powers clearly granted to the legislature. The power to authorize a business within a State is plainly repugnant to the exclusive power of the State over the same subject. . . . If, therefore, the licenses under consideration must be regarded as giving authority to carry on the branches of business which they license, it might be difficult, if not impossible, to reconcile the granting of them with the Constitution. . . .

"But it is not necessary to regard these laws as giving such authority. So far as they relate to trade within State limits, they give none, and can give none. They simply express the purpose of the government not to interfere by penal proceedings with the trade nominally licensed, if the required taxes are paid. The power to tax is not questioned, nor the power to impose penalties for non-payment of taxes. The granting of a license, therefore, must be regarded as nothing more than a mere form of imposing a tax, and of implying nothing except that the license shall be subject to no penalties under national law, if he pays it."

In *Patterson* v. *Ky.*, 97 U. S. 501 (1878), HARLAN, J., for the court said: "Whether the final judgment of the Court of Appeals of Kentucky denies to plaintiff in error any right secured to her by the Constitution and laws of the United States, is the sole question presented in this case for our determination.

"That court affirmed the judgment of an inferior State court in which, upon indictment and trial, a fine of $250 was imposed upon plaintiff in error for a violation of certain provisions of a Kentucky statute, approved Feb. 21, 1874, regulating the inspection and ganging of oils and fluids, the product of coal, petroleum, or other bituminous substances. . . .

"The specific offence charged in the indictment was that the plaintiff in error had sold, within the State, to one Davis, an oil known as the Aurora oil, the casks containing which had been previously branded by an authorized inspector with the words 'unsafe for illuminating purposes.' That particular oil is the same for which, in

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1867, letters-patent were granted to Henry C. Dewitt, of whom the plaintiff in error is the assignee, by assignment duly recorded as required by the laws of the United States. Upon the trial of the case it was agreed that the Aurora oil could not, by any chemical combination described in the patent, be made to conform to the standard or test required by the Kentucky statute as a prerequisite to the right, within that State, to sell, or to offer for sale, illuminating oils of the kind designated.

"The plaintiff in error, as assignee of the patentee, in asserting the right to sell the Aurora oil in any part of the United States, claims that no State could, consistently with the Federal Constitution and the laws of Congress, prevent or obstruct the exercise of that right, either by express words of prohibition, or by regulations which prescribed tests to which the patented article could not be made to conform.

"The Court of Appeals of Kentucky held this construction of the Constitution and the laws of the United States to be inadmissible, and in that opinion we concur.

"Congress is given power to promote the progress of science and the useful arts. To that end it may, by all necessary and proper laws, secure to inventors, for limited times, the exclusive right to their inventions. That power has been exerted in the various statutes prescribing the terms and conditions upon which letters-patent may be obtained. It is true that letters-patent, pursuing the words of the statute, do, in terms, grant to the inventor, his heirs and assigns, the exclusive right to make, use, and vend to others his invention or discovery, throughout the United States and the Territories thereof. But, obviously, this right is not granted or secured, without reference to the general powers which the several States of the Union unquestionably possess over their purely domestic affairs, whether of internal commerce or of police. . . . The Kentucky statute under examination manifestly belongs to that class of legislation. It is, in the best sense, a mere police regulation, deemed essential for the protection of the lives and property of citizens. It expresses in the most solemn form the deliberate judgment of the State that burning fluids which ignite or permanently burn at less than a prescribed temperature are unsafe for illuminating purposes. Whether the policy thus pursued by the State is wise or unwise, it is not the province of the national authorities to determine. That belongs to each State, under its own sense of duty, and in view of the provisions of its own Constitution. Its action, in those respects, is beyond the corrective power of this court. That the statute of 1874 is a police regulation within the meaning of the authorities is clear from our decision in *United States* v. *Dewitt*, 9 Wall. 41. . .

"The Kentucky statute being, then, an ordinary police regulation for the government of those engaged in the internal commerce of that State, the only remaining question is, whether, under the operation of the Federal Constitution and the laws of Congress, it is without effect in cases where the oil, although condemned by the State as unsafe for illuminating purposes, has been made and prepared for sale in accordance with a discovery for which letters-patent had been granted. We are of opinion that the right conferred upon the patentee and his assigns to use and vend the corporeal thing or article, brought into existence by the application of the patented discovery, must be exercised in subordination to the police regulations which the State established by the statute of 1874. It is not to be supposed that Congress intended to authorize or regulate the sale, within a State, of tangible personal property which that State declares to be unfit and unsafe for use, and by statute has prohibited from being sold or offered for sale within her limits."

Compare *Trade Mark Cases*, 100 U. S. 82. — ED.

was an Act passed February 11, 1824, consisting of several sections. The first section, the only one passed upon by the court, required the master of every ship or vessel arriving in the port of New York from any country out of the United States, or from any other State of the United States, to make report in writing, and on oath, within twenty-four hours after his arrival, to the mayor of the city, of the name, place of birth, last legal settlement, age, and occupation of every person brought as a passenger from any country out of the United States, or from any of the United States into the port of New York, or into any of the United States, and of all persons landed from the ship, or put on board, or suffered to go on board, any other vessel during the voyage, with intent of proceeding to the city of New York. A penalty was prescribed of seventy-five dollars for each passenger not so reported, and for every person whose name, place of birth, last legal settlement, age, and occupation should be falsely reported.

"The other sections required him to give bond, on the demand of the mayor, to save harmless the city from all expense of support and maintenance of such passenger, or to return any passenger, deemed liable to become a charge, to his last place of settlement; and required each passenger, not a citizen of the United States, to make report of himself to the mayor, stating his age, occupation, the name of the vessel in which he arrived, the place where he landed, and name of the commander of the vessel. We gather from the report of the case that the defendant, Miln, was sued for the penalties claimed for refusing to make the report required in the first section. A division of opinion was certified by the judges of the Circuit Court on the question, whether the Act assumes to regulate commerce between the port of New York and foreign ports, and is unconstitutional and void.

"This court, expressly limiting its decision to the first section of the Act, held that it fell within the police powers of the States, and was not in conflict with the Federal Constitution.

"From this decision Mr. Justice Story dissented, and in his opinion stated that Chief Justice Marshall, who had died between the first and the second argument of the case, fully concurred with him in the view that the statute of New York was void, because it was a regulation of commerce forbidden to the States.

"In the *Passenger Cases*, reported in 7 How. 283, the branch of the statute not passed upon in the preceding case came under consideration in this court. It was not the same statute, but was a law relating to the marine hospital on Staten Island. It authorized the health commissioner to demand, and, if not paid, to sue for and recover, from the master of every vessel arriving in the port of New York from a foreign port, one dollar and fifty cents for each cabin passenger, and one dollar for each steerage passenger, mate, sailor, or mariner, and from the master of each coasting vessel twenty-five cents for each person on board. These moneys were to be appropriated to the use of the hospital.

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fusing to pay for 295 steerage passengers on board the British ship 'Henry Bliss,' of which he was master, demurred to the declaration on the ground that the Act was contrary to the Constitution of the United States, and void. From a judgment against him, affirmed in the Court of Errors of the State of New York, he sued out a writ of error, on which the question was brought to this court.

"It was here held, at the January Term, 1849, that the statute was 'repugnant to the Constitution and laws of the United States, and therefore void.' 7 How. 572.

"Immediately after this decision, the State of New York modified her statute on that subject, with a view, no doubt, to avoid the constitutional objection; and amendments and alterations have continued to be made up to the present time.

"As the law now stands, the master or owner of every vessel landing passengers from a foreign port is bound to make a report similar to the one recited in the statute held to be valid in the case of *New York* v. *Miln*; and on this report the mayor is to indorse a demand upon the master or owner that he give a bond for every passenger landed in the city, in the penal sum of $300, conditioned to indemnify the commissioners of emigration, and every county, city, and town in the State, against any expense for the relief or support of the person named in the bond for four years thereafter; but the owner or consignee may commute for such bond, and be released from giving it, by paying, within twenty-four hours after the landing of the passengers, the sum of one dollar and fifty cents for each one of them. If neither the bond be given nor the sum paid within the twenty-four hours, a penalty of $500 for each pauper is incurred, which is made a lien on the vessel, collectible by attachment at the suit of the Commissioner of Emigration.

"Conceding the authority of the *Passenger Cases*, which will be more fully considered hereafter, it is argued that the change in the statute now relied upon requiring primarily a bond for each passenger landed, as an indemnity against his becoming a future charge to the State or county, leaving it optional with the ship-owner to avoid this by paying a fixed sum for each passenger, takes it out of the principle of the case of *Smith* v. *Turner*, — the *Passenger Case* from New York. It is said that the statute in that case was a direct tax on the passenger, since the Act authorized the shipmaster to collect it of him, and that on that ground alone was it held void; while in the present case the requirement of the bond is but a suitable regulation under the power of the State to protect its cities and towns from the expense of supporting persons who are paupers or diseased, or helpless women and children, coming from foreign countries.

"In whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect; and if it is apparent that the object of this statute, as judged by that criterion, is to compel the owners of vessels to pay a sum of money for every passenger brought by them from a foreign shore, and landed at the port of

New York, it is as much a tax on passengers if collected from them, or a tax on the vessel or owners for the exercise of the right of landing their passengers in that city, as was the statute held void in the *Passenger Cases*.

"To require a heavy and almost impossible condition to the exercise of this right, with the alternative of payment of a small sum of money, is, in effect, to demand payment of that sum. To suppose that a vessel, which once a month lands from three hundred to one thousand passengers, or from three thousand to twelve thousand per annum, will give that many bonds of $300 with good sureties, with a covenant for four years, against accident, disease, or poverty of the passenger named in such bond, is absurd, when this can be avoided by the payment of one dollar and fifty cents collected of the passenger before he embarks on the vessel.

"Such bonds would amount in many instances, for every voyage, to more than the value of the vessel. The liability on the bond would be, through a long lapse of time, contingent on circumstances which the bondsman could neither foresee nor control. The cost of preparing the bond and approving sureties, with the trouble incident to it in each case, is greater than the sum required to be paid as commutation. It is inevitable, under such a law, that the money would be paid for each passenger, or the statute resisted or evaded. It is a law in its purpose and effect imposing a tax on the owner of the vessel for the privilege of landing in New York passengers transported from foreign countries.

"It is said that the purpose of the Act is to protect the State against the consequences of the flood of pauperism immigrating from Europe, and first landing in that city.

"But it is a strange mode of doing this to tax every passenger alike who comes from abroad.

"The man who brings with him important additions to the wealth of the country, and the man who is perfectly free from disease, and brings to aid the industry of the country a stout heart and a strong arm, are as much the subject of the tax as the diseased pauper who may become the object of the charity of the city the day after he lands from the vessel.

"No just rule can make the citizen of France landing from an English vessel on our shore liable for the support of an English or Irish pauper who lands at the same time from the same vessel. . . .

"The accuracy of these definitions is scarcely denied by the advocates of the State statutes. But assuming that, in the formation of our government, certain powers necessary to the administration of their internal affairs are reserved to the States, and that among these powers are those for the preservation of good order, of the health and comfort of the citizens, and their protection against pauperism and against contagious and infectious diseases, and other matters of legislation of like character, they insist that the power here exercised falls within this class, and belongs rightfully to the States.

"This power, frequently referred to in the decisions of this court, has been, in general terms, somewhat loosely called the police power. It is not necessary for the course of this discussion to attempt to define it more accurately than it has been defined already. It is not necessary, because whatever may be the nature and extent of that power, where not otherwise restricted, no definition of it, and no urgency for its use, can authorize a State to exercise it in regard to a subject-matter which has been confided exclusively to the discretion of Congress by the Constitution.

"Nothing is gained in the argument by calling it the police power. Very many statutes, when the authority on which their enactments rest is examined, may be referred to different sources of power, and supported equally well under any of them. A statute may at the same time be an exercise of the taxing power and of the power of eminent domain. A statute punishing counterfeiting may be for the protection of the private citizen against fraud, and a measure for the protection of the currency and for the safety of the government which issues it. It must occur very often that the shading which marks the line between one class of legislation and another is very nice, and not easily distinguishable.

"But, however difficult this may be, it is clear, from the nature of our complex form of government, that, whenever the statute of a State invades the domain of legislation which belongs exclusively to the Congress of the United States, it is void, no matter under what class of powers it may fall, or how closely allied to powers conceded to belong to the States." [1]

[1] Compare *Chy Lung* v. *Freeman et al.*, 92 U. S. 275.

The vague and ill-considered notions that are widely entertained as to what is meant by the "police power," may be observed in certain misleading observations that have a considerable currency; *e. g.*, that the Federal government has no police power in the States; that the Fourteenth Amendment has no relation to the police power of the States; that the States have never parted with the police power. But in truth, the partition of the total powers of government which took place when our Federal Constitution was adopted, did not, either in name or in fact, proceed upon such lines as are here indicated. How thoroughly the powers of the Federal government are interlaced with those of the States as regards matters of local police, may be seen, for example, in the discussions relating to the regulation of foreign and interstate commerce, and commerce with the Indian tribes. As regards the Fourteenth Amendment, it had for its main purpose that of cutting down the local legislative power of the States, their "police power," and conferring on the general government the right to restrain them in exercising it. Under this amendment, indeed, its action is but negative. As regards the affirmative power of the general government, when it is remembered that certain entire topics are committed to it, for example, those of foreign relations, the taxing of imports, the post-office, the currency, bankruptcy, the regulation of external and interstate commerce, it is easy to see that much of what is understood by the "police power," is wrapped up in these things; in determining, for example, on the admission or exclusion of foreigners, in settling what may pass through the mails, or what goods shall come in free and what shall pay duty. — ED.

MUNN *v.* ILLINOIS.

SUPREME COURT OF THE UNITED STATES. 1876.

[94 *U. S.* 113.]

ERROR to the Supreme Court of the State of Illinois. . . . [The Constitution of Illinois of 1870, art. xiii. s. 1, declared all elevators, where grain or other property is stored for a compensation, to be public warehouses; s. 2, required in places of not less than one hundred thousand inhabitants, the making under oath and public posting and filing of certain statements as to the amount and kind of grain or other property stored, and warehouse receipts issued and outstanding, and the daily noting of changes in the quantity and grade of grain; and forbade the mixing of different grades without the owners' consent; s. 3, secured the owner of stored property liberty to examine it, and the warehouse books and records relating to it; s. 4, bound common carriers to weigh or measure grain where shipped, and to receipt for it; and made them responsible for delivering it all; s. 5, required railroad companies to deliver grain directly to the consignee, if he could be reached by any track which they could use, and required them to allow connections with their tracks, for such purposes; ss. 6 and 7 made it the duty of the legislature to pass all necessary laws to prevent the issue of fraudulent warehouse receipts, and to give effect to this article of the Constitution, and for the inspection of grain and the protection of the producers, shippers, and receivers of grain and produce. A statute of Illinois, approved April 25, 1871, divided warehouses into classes A, B, and C; and required the keepers of warehouses of class A, to qualify by taking out a license, which should be revocable by the court granting it upon a summary proceeding, on complaint and satisfactory proof. The licensee was required to file a bond for the performance of his duty, with a surety in the sum of $10,000. A penalty of $100 a day was imposed for carrying on the business without a license. Warehousemen of class A were required yearly, during the first week in January, to publish the rates for the storage of grain for the coming year, and these were not to be increased during the year, — with certain exceptions. A maximum charge was fixed for storing and handling grain of 2 cents a bushel, for the first thirty days; and for each fifteen days or less afterwards, one half of one per cent a bushel; with certain variations.]

On the twenty-ninth day of June, 1872, an information was filed in the Criminal Court of Cook County, Ill., against Munn & Scott, alleging that they were, on the twenty-eighth day of June, 1872, in the city of Chicago, in said county, the managers and lessees of a public warehouse, known as the "North-western Elevator," in which they then and there stored grain in bulk, and mixed the grain of different owners together

in said warehouse; that the warehouse was located in the city of Chicago, which contained more than one hundred thousand inhabitants; that they unlawfully transacted the business of public warehousemen, as aforesaid, without procuring a license from the Circuit Court of said county, permitting them to transact business as public warehousemen, under the laws of the State.

To this information a plea of not guilty was interposed.

From an agreed statement of facts, made a part of the record, it appears that Munn & Scott leased of the owner, in 1862, the ground occupied by the "North-western Elevator," and erected thereon the grain warehouse or elevator in that year, with their own capital and means; that they ever since carried on, in said elevator, the business of storing and handling grain for hire, for which they charged and received, as a compensation, the rates of storage which had been, from year to year, agreed upon and established by the different elevators and warehouses in the city of Chicago, and published in one or more newspapers printed in said city, in the month of January in each year, as the established rates for the year then next ensuing such publication. On the twenty-eighth day of June, 1872, Munn & Scott were the managers and proprietors of the grain warehouse known as "The North-western Elevator," in Chicago, Ill., wherein grain of different owners was stored in bulk and mixed together; and they then and there carried on the business of receiving, storing, and delivering grain for hire, without having taken a license from the Circuit Court of Cook County, permitting them, as managers, to transact business as public warehousemen, and without having filed with the clerk of the Circuit Court a bond to the people of the State of Illinois, as required by sects. 3 and 4 of the Act of April 25, 1871. The city of Chicago, then, and for more than two years before, had more than one hundred thousand inhabitants. Munn & Scott had stored and mixed grain of different owners together, only by and with the express consent and permission of such owners, or of the consignee of such grain, they having agreed that the compensation should be the published rates of storage.

Munn & Scott had complied in all respects with said Act, except in two particulars: first, they had not taken out a license, nor given a bond, as required by sects. 3 and 4; and, second, they had charged for storage and handling grain the rates established and published in January, 1872, which were higher than those fixed by sect. 15.

The defendants were found guilty, and fined $100.

The judgment of the Criminal Court of Cook County having been affirmed by the Supreme Court of the State, Munn & Scott sued out this writ, and assign for error: —

1. Sects. 3, 4, 5, and 15 of the statute are unconstitutional and void.

2. Said sections are repugnant to the third clause of sect. 8 of art. 1, and the sixth clause of sect. 9, art. 1, of the Constitution of the United States, and to the Fifth and Fourteenth Amendments.

Mr. W. C. Goudy, with whom was *Mr. John N. Jewett*, for the plaintiffs in error.

Mr. James K. Edsall, Attorney-General of Illinois, *contra*.

Mr. Chief Justice Waite delivered the opinion of the court.

The question to be determined in this case is whether the General Assembly of Illinois can, under the limitations upon the legislative power of the States imposed by the Constitution of the United States, fix by law the maximum of charges for the storage of grain in warehouses at Chicago and other places in the State having not less than one hundred thousand inhabitants, "in which grain is stored in bulk, and in which the grain of different owners is mixed together, or in which grain is stored in such a manner that the identity of different lots or parcels cannot be accurately preserved."

It is claimed that such a law is repugnant —

1. To that part of sect. 8, art. 1, of the Constitution of the United States which confers upon Congress the power "to regulate commerce with foreign nations and among the several States;"

2. To that part of sect. 9 of the same article which provides that "no preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another;" and

3. To that part of amendment 14 which ordains that no State shall "deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

We will consider the last of these objections first.

Every statute is presumed to be constitutional. The courts ought not to declare one to be unconstitutional, unless it is clearly so. If there is doubt, the expressed will of the legislature should be sustained.

The Constitution contains no definition of the word "deprive," as used in the Fourteenth Amendment. To determine its signification, therefore, it is necessary to ascertain the effect which usage has given it, when employed in the same or a like connection.

While this provision of the amendment is new in the Constitution of the United States, as a limitation upon the powers of the States, it is old as a principle of civilized government. It is found in Magna Charta, and, in substance if not in form, in nearly or quite all the constitutions that have been from time to time adopted by the several States of the Union. By the Fifth Amendment, it was introduced into the Constitution of the United States as a limitation upon the powers of the national government, and by the Fourteenth, as a guarantee against any encroachment upon an acknowledged right of citizenship by the legislatures of the States.

When the people of the United Colonies separated from Great Britain, they changed the form, but not the substance, of their government. They retained for the purposes of government all the powers of the British Parliament, and through their State constitutions, or other forms of social compact, undertook to give practical effect to such as

they deemed necessary for the common good and the security of life and property. All the powers which they retained they committed to their respective States, unless in express terms or by implication reserved to themselves. Subsequently, when it was found necessary to establish a national government for national purposes, a part of the powers of the States and of the people of the States was granted to the United States and the people of the United States. This grant operated as a further limitation upon the powers of the States, so that now the governments of the States possess all the powers of the Parliament of England, except such as have been delegated to the United States or reserved by the people. The reservations by the people are shown in the prohibitions of the constitutions.

When one becomes a member of society, he necessarily parts with some rights or privileges which, as an individual not affected by his relations to others, he might retain. "A body politic," as aptly defined in the preamble of the Constitution of Massachusetts, "is a social compact by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good." This does not confer power upon the whole people to control rights which are purely and exclusively private (*Thorpe* v. *R. & V. Railroad Co.*, 27 Vt. 143); but it does authorize the establishment of laws requiring each citizen to so conduct himself, and so use his own property, as not unnecessarily to injure another. This is the very essence of government, and has found expression in the maxim *Sic utere tuo ut alienum non lædas*. From this source come the police powers, which, as was said by Mr. Chief Justice Taney in the *License Cases*, 5 How. 583, "are nothing more or less than the powers of government inherent in every sovereignty, . . . that is to say, . . . the power to govern men and things." Under these powers the government regulates the conduct of its citizens one towards another, and the manner in which each shall use his own property, when such regulation becomes necessary for the public good. In their exercise it has been customary in England from time immemorial, and in this country from its first colonization, to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers, &c., and in so doing to fix a maximum of charge to be made for services rendered, accommodations furnished, and articles sold. To this day, statutes are to be found in many of the States upon some or all these subjects; and we think it has never yet been successfully contended that such legislation came within any of the constitutional prohibitions against interference with private property. With the Fifth Amendment in force, Congress, in 1820, conferred power upon the city of Washington "to regulate . . . the rates of wharfage at private wharves, . . . the sweeping of chimneys, and to fix the rates of fees therefor, . . . and the weight and quality of bread," 3 Stat. 587, sect. 7; and, in 1848, "to make all necessary regulations respecting hackney carriages and the rates of fare of the same, and the rates of hauling by cartmen, wagoners, carmen,

and draymen, and the rates of commission of auctioneers," 9 Id. 224, sect. 2.

From this it is apparent that, down to the time of the adoption of the Fourteenth Amendment, it was not supposed that statutes regulating the use, or even the price of the use, of private property necessarily deprived an owner of his property without due process of law. Under some circumstances they may, but not under all. The amendment does not change the law in this particular: it simply prevents the States from doing that which will operate as such a deprivation.

This brings us to inquire as to the principles upon which this power of regulation rests, in order that we may determine what is within and what without its operative effect. Looking, then, to the common law, from whence came the right which the Constitution protects, we find that when private property is "affected with a public interest, it ceases to be *juris privati* only." This was said by Lord Chief Justice Hale more than two hundred years ago, in his treatise *De Portibus Maris*, 1 Harg. Law Tracts, 78, and has been accepted without objection as an essential element in the law of property ever since. Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control. . . . [Here follow passages from Sir Matthew Hale's writings, as to ferries and wharves.]

This statement of the law by Lord Hale was cited with approbation and acted upon by Lord Kenyon at the beginning of the present century, in *Bolt* v. *Stennett*, 8 T. R. 606.

And the same has been held as to warehouses and warehousemen. In *Aldnutt* v. *Inglis*, 12 East, 527, decided in 1810, it appeared that the London Dock Company had built warehouses in which wines were taken in store at such rates of charge as the company and the owners might agree upon. Afterwards the company obtained authority, under the general warehousing Act, to receive wines from importers before the duties upon the importation were paid; and the question was, whether they could charge arbitrary rates for such storage, or must be content with a reasonable compensation. . . . [Here follow long quotations from the opinions in this case, in which it is held that the charges must be reasonable.]

In later times, the same principle came under consideration in the Supreme Court of Alabama. That court was called upon, in 1841, to decide whether the power granted to the city of Mobile to regulate the weight and price of bread was unconstitutional, and it was contended that "it would interfere with the right of the citizen to pursue his lawful trade or calling in the mode his judgment might dictate;" but the court

said, "there is no motive . . . for this interference on the part of the legislature with the lawful actions of individuals, or the mode in which private property shall be enjoyed, unless such calling affects the public interest, or private property is employed in a manner which directly affects the body of the people. Upon this principle, in this State, tavern-keepers are licensed; . . . and the County Court is required, at least once a year, to settle the rates of innkeepers. Upon the same principle is founded the control which the legislature has always exercised in the establishment and regulation of mills, ferries, bridges, turnpike roads, and other kindred subjects." *Mobile* v. *Yuille*, 3 Ala. N. s. 140.

From the same source comes the power to regulate the charges of common carriers, which was done in England as long ago as the third year of the reign of William and Mary, and continued until within a comparatively recent period. And in the first statute we find the following suggestive preamble, to wit: —

"And whereas divers wagoners and other carriers, by combination amongst themselves, have raised the prices of carriage of goods in many places to excessive rates, to the great injury of the trade: Be it, therefore, enacted," &c. 3 W. & M. c. 12, § 24; 3 Stat. at Large (Great Britain), 481.

Common carriers exercise a sort of public office, and have duties to perform in which the public is interested. *New Jersey Nav. Co.* v. *Merchants' Bank*, 6 How. 382. Their business is, therefore, "affected with a public interest," within the meaning of the doctrine which Lord Hale has so forcibly stated.

But we need not go further. Enough has already been said to show that, when private property is devoted to a public use, it is subject to public regulation. It remains only to ascertain whether the warehouses of these plaintiffs in error, and the business which is carried on there, come within the operation of this principle.

For this purpose we accept as true the statements of fact contained in the elaborate brief of one of the counsel of the plaintiffs in error. From these it appears that "the great producing region of the West and North-west sends its grain by water and rail to Chicago, where the greater part of it is shipped by vessel for transportation to the seaboard by the Great Lakes, and some of it is forwarded by railway to the Eastern ports. . . . Vessels, to some extent, are loaded in the Chicago harbor, and sailed through the St. Lawrence directly to Europe. . . . The quantity [of grain] received in Chicago has made it the greatest grain market in the world. This business has created a demand for means by which the immense quantity of grain can be handled or stored, and these have been found in grain warehouses, which are commonly called elevators, because the grain is elevated from the boat or car, by machinery operated by steam, into the bins prepared for its reception, and elevated from the bins, by a like process, into the vessel or car which is to carry it on. . . . In this way the largest traffic between the

citizens of the country north and west of Chicago and the citizens of the country lying on the Atlantic coast north of Washington is in grain which passes through the elevators of Chicago. In this way the trade in grain is carried on by the inhabitants of seven or eight of the great States of the West with four or five of the States lying on the sea-shore, and forms the largest part of interstate commerce in these States. The grain warehouses or elevators in Chicago are immense structures, holding from 300,000 to 1,000,000 bushels at one time, according to size. They are divided into bins of large capacity and great strength. . . . They are located with the river harbor on one side and the railway tracks on the other; and the grain is run through them from car to vessel, or boat to car, as may be demanded in the course of business. It has been found impossible to preserve each owner's grain separate, and this has given rise to a system of inspection and grading, by which the grain of different owners is mixed, and receipts issued for the number of bushels which are negotiable,and redeemable in like kind, upon demand. This mode of conducting the business was inaugurated more than twenty years ago, and has grown to immense proportions. The railways have found it impracticable to own such elevators, and public policy forbids the transaction of such business by the carrier; the ownership has, therefore, been by private individuals, who have embarked their capital and devoted their industry to such business as a private pursuit."

In this connection it must also be borne in mind that, although in 1874 there were in Chicago fourteen warehouses adapted to this particular business, and owned by about thirty persons, nine business firms controlled them, and that the prices charged and received for storage were such "as have been from year to year agreed upon and established by the different elevators or warehouses in the city of Chicago, and which rates have been annually published in one or more newspapers printed in said city, in the month of January in each year, as the established rates for the year then next ensuing such publication." Thus it is apparent that all the elevating facilities through which these vast productions "of seven or eight great States of the West" must pass on the way "to four or five of the States on the sea-shore" may be a "virtual" monopoly.

Under such circumstances it is difficult to see why, if the common carrier, or the miller, or the ferryman, or the innkeeper, or the wharfinger, or the baker, or the cartman, or the hackney-coachman, pursues a public employment and exercises "a sort of public office," these plaintiffs in error do not. They stand, to use again the language of their counsel, in the very "gateway of commerce," and take toll from all who pass. Their business most certainly "tends to a common charge, and is become a thing of public interest and use." Every bushel of grain for its passage "pays a toll, which is a common charge," and, therefore, according to Lord Hale, every such warehouseman "ought to be under public regulation, *viz.*, that he . . . take but reasonable

toll." Certainly, if any business can be clothed "with a public interest and cease to be *juris privati* only," this has been. It may not be made so by the operation of the Constitution of Illinois or this statute, but it is by the facts.

We also are not permitted to overlook the fact that, for some reason, the people of Illinois, when they revised their Constitution in 1870, saw fit to make it the duty of the General Assembly to pass laws "for the protection of producers, shippers, and receivers of grain and produce," art. 13, sect. 7; and by sect. 5 of the same article, to require all railroad companies receiving and transporting grain in bulk or otherwise to deliver the same at any elevator to which it might be consigned, that could be reached by any track that was or could be used by such company, and that all railroad companies should permit connections to be made with their tracks, so that any public warehouse, &c., might be reached by the cars on their railroads. This indicates very clearly that during the twenty years in which this peculiar business had been assuming its present "immense proportions," something had occurred which led the whole body of the people to suppose that remedies such as are usually employed to prevent abuses by virtual monopolies might not be inappropriate here. For our purposes we must assume that, if a state of facts could exist that would justify such legislation, it actually did exist when the statute now under consideration was passed. For us the question is one of power, not of expediency. If no state of circumstances could exist to justify such a statute, then we may declare this one void, because in excess of the legislative power of the State. But if it could, we must presume it did. Of the propriety of legislative interference within the scope of legislative power, the legislature is the exclusive judge.

Neither is it a matter of any moment that no precedent can be found for a statute precisely like this. It is conceded that the business is one of recent origin, that its growth has been rapid, and that it is already of great importance. And it must also be conceded that it is a business in which the whole public has a direct and positive interest. It presents, therefore, a case for the application of a long-known and well-established principle in social science, and this statute simply extends the law so as to meet this new development of commercial progress. There is no attempt to compel these owners to grant the public an interest in their property, but to declare their obligations, if they use it in this particular manner.

It matters not in this case that these plaintiffs in error had built their warehouses and established their business before the regulations complained of were adopted. What they did was from the beginning subject to the power of the body politic to require them to conform to such regulations as might be established by the proper authorities for the common good. They entered upon their business and provided themselves with the means to carry it on subject to this condition. If they did not wish to submit themselves to such interference, they should not

have clothed the public with an interest in their concerns. The same principle applies to them that does to the proprietor of a hackney-carriage, and as to him it has never been supposed that he was exempt from regulating statutes or ordinances because he had purchased his horses and carriage and established his business before the statute or the ordinance was adopted.

It is insisted, however, that the owner of property is entitled to a reasonable compensation for its use, even though it be clothed with a public interest, and that what is reasonable is a judicial and not a legislative question.

As has already been shown, the practice has been otherwise. In countries where the common law prevails, it has been customary from time immemorial for the legislature to declare what shall be a reasonable compensation under such circumstances, or, perhaps more properly speaking, to fix a maximum beyond which any charge made would be unreasonable. Undoubtedly, in mere private contracts, relating to matters in which the public has no interest, what is reasonable must be ascertained judicially. But this is because the legislature has no control over such a contract. So, too, in matters which do affect the public interest, and as to which legislative control may be exercised, if there are no statutory regulations upon the subject, the courts must determine what is reasonable. The controlling fact is the power to regulate at all. If that exists, the right to establish the maximum of charge, as one of the means of regulation, is implied. In fact, the common-law rule, which requires the charge to be reasonable, is itself a regulation as to price. Without it the owner could make his rates at will, and compel the public to yield to his terms, or forego the use.

But a mere common-law regulation of trade or business may be changed by statute. A person has no property, no vested interest, in any rule of the common law. That is only one of the forms of municipal law, and is no more sacred than any other. Rights of property which have been created by the common law cannot be taken away without due process; but the law itself, as a rule of conduct, may be changed at the will, or even at the whim, of the legislature, unless prevented by constitutional limitations. Indeed, the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances. To limit the rate of charge for services rendered in a public employment, or for the use of property in which the public has an interest, is only changing a regulation which existed before. It establishes no new principle in the law, but only gives a new effect to an old one.

We know that this is a power which may be abused; but that is no argument against its existence. For protection against abuses by legislatures the people must resort to the polls, not to the courts.

After what has already been said, it is unnecessary to refer at length to the effect of the other provision of the Fourteenth Amendment which is relied upon, *viz.*, that no State shall "deny to any person within its

jurisdiction the equal protection of the laws." Certainly, it cannot be claimed that this prevents the State from regulating the fares of hackmen or the charges of draymen in Chicago, unless it does the same thing in every other place within its jurisdiction. But, as has been seen, the power to regulate the business of warehouses depends upon the same principle as the power to regulate hackmen and draymen, and what cannot be done in the one case in this particular cannot be done in the other.

We come now to consider the effect upon this statute of the power of Congress to regulate commerce.

It was very properly said in the case of the *State Tax on Railway Gross Receipts*, 15 Wall. 293, that "it is not everything that affects commerce that amounts to a regulation of it, within the meaning of the Constitution." The warehouses of these plaintiffs in error are situated and their business carried on exclusively within the limits of the State of Illinois. They are used as instruments by those engaged in State as well as those engaged in interstate commerce, but they are no more necessarily a part of commerce itself than the dray or the cart by which, but for them, grain would be transferred from one railroad station to another. Incidentally they may become connected with interstate commerce, but not necessarily so. Their regulation is a thing of domestic concern, and, certainly, until Congress acts in reference to their interstate relations, the State may exercise all the powers of government over them, even though in so doing it may indirectly operate upon commerce outside its immediate jurisdiction. We do not say that a case may not arise in which it will be found that a State, under the form of regulating its own affairs, has encroached upon the exclusive domain of Congress, in respect to interstate commerce, but we do say that, upon the facts as they are represented to us in this record, that has not been done.

The remaining objection, to wit, that the statute in its present form is repugnant to sect. 9, art. 1, of the Constitution of the United States, because it gives preference to the ports of one State over those of another, may be disposed of by the single remark that this provision operates only as a limitation of the powers of Congress, and in no respect affects the States in the regulation of their domestic affairs.

We conclude, therefore, that the statute in question is not repugnant to the Constitution of the United States, and that there is no error in the judgment. In passing upon this case we have not been unmindful of the vast importance of the questions involved. This and cases of a kindred character were argued before us more than a year ago by most eminent counsel, and in a manner worthy of their well-earned reputations. We have kept the cases long under advisement, in order that their decision might be the result of our mature deliberations.

Judgment affirmed.

[FIELD, J., gave a dissenting opinion, in which STRONG, J., concurred.]

RAILROAD COMPANY *v.* HUSEN.

SUPREME COURT OF THE UNITED STATES. 1877.

[95 *U. S.* 465.] [1]

ERROR to the Supreme Court of the State of Missouri. *Mr. James Carr*, for the plaintiff in error. *Mr. M. A. Low*, *contra*.

MR. JUSTICE STRONG delivered the opinion of the court.

Five assignments of error appear in this record; but they raise only a single question. It is, whether the statute of Missouri, upon which the action in the State court was founded, is in conflict with the clause of the Constitution of the United States that ordains "Congress shall have power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes." The statute, approved Jan. 23, 1872, by its first section, enacted as follows: "No Texas, Mexican, or Indian cattle shall be driven or otherwise conveyed into, or remain, in any county in this State, between the first day of March and the first day of November in each year, by any person or persons whatsoever." A later section is in these words: "If any person or persons shall bring into this State any Texas, Mexican, or Indian cattle, in violation of the first section of this Act, he or they shall be liable, in all cases, for all damages sustained on account of disease communicated by said cattle." Other sections make such bringing of cattle into the State a criminal offence, and provide penalties for it. It was, however, upon the provisions we have quoted that this action was brought against the railroad company that had conveyed the cattle into the county. It is noticeable that the statute interposes a direct prohibition against the introduction into the State of all Texas, Mexican, or Indian cattle during eight months of each year, without any distinction between such as may be diseased and such as are not. It is true a proviso to the first section enacts that "when such cattle shall come across the line of the State, loaded upon a railroad car or steamboat, and shall pass through the State without being unloaded, such shall not be construed as prohibited by the Act; but the railroad company or owners of a steamboat performing such transportation shall be responsible for damages which may result from the disease called the Spanish or Texas fever, should the same occur along the line of transportation; and the existence of such disease along the line of such route shall be *prima facie* evidence that such disease has been communicated by such transportation." This proviso imposes burdens and liabilities for transportation through the State, though the cattle be not unloaded, while the body of the section absolutely prohibits the introduction of any such cattle into the State, with the single exception mentioned.

It seems hardly necessary to argue at length, that, unless the statute

[1] The statement of facts is omitted. — ED.

can be justified as a legitimate exercise of the police power of the State, it is a usurpation of the power vested exclusively in Congress. It is a plain regulation of interstate commerce, a regulation extending to prohibition. Whatever may be the power of a State over commerce that is completely internal, it can no more prohibit or regulate that which is interstate than it can that which is with foreign nations. Power over one is given by the Constitution of the United States to Congress in the same words in which it is given over the other, and in both cases it is necessarily exclusive. That the transportation of property from one State to another is a branch of interstate commerce is undeniable, and no attempt has been made in this case to deny it.

The Missouri statute is a plain interference with such transportation, an attempted exercise over it of the highest possible power, — that of destruction. It meets at the borders of the State a large and common subject of commerce, and prohibits its crossing the State line during two thirds of each year, with a proviso, however, that such cattle may come across the line loaded upon a railroad car or steamboat, and pass through the State without being unloaded. But even the right of steamboat owners and railroad companies to transport such property through the State is loaded by the law with onerous liabilities, because of their agency in the transportation. The object and effect of the statute are, therefore, to obstruct interstate commerce, and to discriminate between the property of citizens of one State and that of citizens of other States. This court has heretofore said that interstate transportation of passengers is beyond the reach of a State legislature. And if, as we have held, State taxation of persons passing from one State to another, or a State tax upon interstate transportation of passengers, is prohibited by the Constitution because a burden upon it, *a fortiori*, if possible, is a State tax upon the carriage of merchandise from State to State. Transportation is essential to commerce, or rather it is commerce itself; and every obstacle to it, or burden laid upon it by legislative authority, is regulation. *Case of the State Freight Tax*, 15 Wall. 232; *Ward* v. *Maryland*, 12 Id. 418; *Welton* v. *The State of Missouri*, 91 U. S. 275; *Henderson et al.* v. *Mayor of the City of New York et al.*, 92 Id. 259; *Chy Lung* v. *Freeman et al.*, Id. 275. The two latter of these cases refer to obstructions against the admission of persons into a State, but the principles asserted are equally applicable to all subjects of commerce.

We are thus brought to the question whether the Missouri statute is a lawful exercise of the police power of the State. We admit that the deposit in Congress of the power to regulate foreign commerce and commerce among the States was not a surrender of that which may properly be denominated police power. What that power is, it is difficult to define with sharp precision. It is generally said to extend to making regulations promotive of domestic order, morals, health, and safety. As was said in *Thorpe* v. *The Rutland & Burlington Railroad Co.*, 27 Vt. 149, "it extends to the protection of the lives, limbs,

health, comfort, and quiet of all persons, and the protection of all property within the State. According to the maxim, *Sic utere tuo ut alienum non lædas*, which being of universal application, it must, of course, be within the range of legislative action to define the mode and manner in which every one may so use his own as not to injure others." . . . It may also be admitted that the police power of a State justifies the adoption of precautionary measures against social evils. Under it a State may legislate to prevent the spread of crime, or pauperism, or disturbance of the peace. It may exclude from its limits convicts, paupers, idiots, and lunatics, and persons likely to become a public charge, as well as persons afflicted by contagious or infectious diseases; a right founded, as intimated in the *Passenger Cases*, 7 How. 283, by Mr. Justice Greer, in the sacred law of self-defence. *Vide* 3 Sawyer, 283. The same principle, it may also be conceded, would justify the exclusion of property dangerous to the property of citizens of the State; for example, animals having contagious or infectious diseases. All these exertions of power are in immediate connection with the protection of persons and property against noxious acts of other persons, or such a use of property as is injurious to the property of others. They are self-defensive.

But whatever may be the nature and reach of the police power of a State, it cannot be exercised over a subject confided exclusively to Congress by the Federal Constitution. It cannot invade the domain of the national government. It was said in *Henderson et al.* v. *Mayor of the City of New York et al.*, *supra*, to "be clear, from the nature of our complex form of government, that whenever the statute of a State invades the domain of legislation which belongs exclusively to the Congress of the United States, it is void, no matter under what class of powers it may fall, or how closely allied it may be to powers conceded to belong to the States." Substantially the same thing was said by Chief Justice Marshall in *Gibbons* v. *Ogden*, 9 Wheat. 1. Neither the unlimited powers of a State to tax, nor any of its large police powers, can be exercised to such an extent as to work a practical assumption of the powers properly conferred upon Congress by the Constitution. Many acts of a State may, indeed, affect commerce, without amounting to a regulation of it, in the constitutional sense of the term. And it is sometimes difficult to define the distinction between that which merely affects or influences and that which regulates or furnishes a rule of conduct. There is no such difficulty in the present case. While we unhesitatingly admit that a State may pass sanitary laws, and laws for the protection of life, liberty, health, or property within its borders; while it may prevent persons and animals suffering under contagious or infectious diseases, or convicts, &c., from entering the State; while for the purpose of self-protection it may establish quarantine, and reasonable inspection laws, it may not interfere with transportation into or through the State, beyond what is absolutely necessary for its self-protection. It may not, under cover of exert-

ing its police powers, substantially prohibit or burden either foreign or interstate commerce. Upon this subject the cases in 92 U. S. to which we have referred are very instructive. In *Henderson* v. *The Mayor, &c.*, the statute of New York was defended as a police regulation to protect the State against the influx of foreign paupers; but it was held to be unconstitutional, because its practical result was to impose a burden upon all passengers from foreign countries. And it was laid down that, "in whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect." The reach of the statute was far beyond its professed object, and far into the realm which is within the exclusive jurisdiction of Congress. So in the case of *Chy Lung* v. *Freeman*, where the pretence was the exclusion of lewd women; but as the statute was more far-reaching, and affected other immigrants, not of any class which the State could lawfully exclude, we held it unconstitutional. Neither of these cases denied the right of a State to protect herself against paupers, convicted criminals, or lewd women, by necessary and proper laws, in the absence of legislation by Congress, but it was ruled that the right could only arise from vital necessity, and that it could not be carried beyond the scope of that necessity. These cases, it is true, speak only of laws affecting the entrance of persons into a State; but the constitutional doctrines they maintain are equally applicable to interstate transportation of property. They deny validity to any State legislation professing to be an exercise of police power for protection against evils from abroad, which is beyond the necessity for its exercise wherever it interferes with the rights and powers of the Federal government.

Tried by this rule, the statute of Missouri is a plain intrusion upon the exclusive domain of Congress. It is not a quarantine law. It is not an inspection law. It says to all natural persons and to all transportation companies, "You shall not bring into the State any Texas cattle or any Mexican cattle or Indian cattle, between March 1 and Dec. 1 in any year, no matter whether they are free from disease or not, no matter whether they may do an injury to the inhabitants of the State or not; and if you do bring them in, even for the purpose of carrying them through the State without unloading them, you shall be subject to extraordinary liabilities." Such a statute, we do not doubt, it is beyond the power of the State to enact. To hold otherwise would be to ignore one of the leading objects which the Constitution of the United States was designed to secure.

In coming to such a conclusion, we have not overlooked the decisions of very respectable courts in Illinois, where statutes similar to the one we have before us have been sustained. *Yeasel* v. *Alexander*, 58 Ill. 254. Regarding the statutes as mere police regulations, intended to protect domestic cattle against infectious disease, those courts have refused to inquire whether the prohibition did not extend beyond the danger to be apprehended, and whether, therefore, the statutes were not something more than exertions of police power. That inquiry, they

have said, was for the legislature and not for the courts. With this we cannot concur. The police power of a State cannot obstruct foreign commerce or interstate commerce beyond the necessity for its exercise; and under color of it objects not within its scope cannot be secured at the expense of the protection afforded by the Federal Constitution. And as its range sometimes comes very near to the field committed by the Constitution to Congress, it is the duty of the courts to guard vigilantly against any needless intrusion.

Judgment reversed, and the record remanded with instructions to reverse the judgment of the Circuit Court of Grundy County, and to direct that court to award a new trial.[1]

IN *Beer Co.* v. *Mass.*, 97 U. S. 25, 32 (1878), on error to the Superior Court of Massachusetts, the plaintiff in error, having been incorporated in that State, in 1828, for the purpose of manufacturing malt liquors, denied the validity of a prohibitory liquor law of 1869, on the ground that it impaired the obligation of the contract of their charter. The Supreme Court of the United States (BRADLEY, J.), after holding that the Legislature of Massachusetts had reserved to itself power "to pass any law it saw fit," continued: "But there is another question in the case, which, as it seems to us, is equally decisive.

"The plaintiff in error was incorporated 'for the purpose of manufacturing malt liquors in all their varieties,' it is true; and the right to manufacture, undoubtedly, as the plaintiff's counsel contends, included the incidental right to dispose of the liquors manufactured. But although this right or capacity was thus granted in the most unqualified form, it cannot be construed as conferring any greater or more sacred right than any citizen had to manufacture malt liquor; nor as exempting the corporation from any control therein to which a citizen would be subject, if the interests of the community should require it. If the public safety or the public morals require the discontinuance of any

[1] In *Kimmish* v. *Ball*, 129 U. S. 217, 222 (1889), the court (FIELD, J.) said: "The case is, therefore, reduced to this, whether the State may not provide that whoever permits diseased cattle in his possession to run at large within its limits shall be liable for any damages caused by the spread of the disease occasioned thereby; and upon that we do not entertain the slightest doubt. Our answer, therefore, to the first question upon which the judge below differed is in the negative, that the section in question is not unconstitutional by reason of any conflict with the commercial clause of the Constitution.

"As to the second question, our answer is also in the negative. There is no denial of any rights and privileges to citizens of other States which are accorded to citizens of Iowa. No one can allow diseased cattle to run at large in Iowa without being held responsible for the damages caused by the spread of disease thereby; and the clause of the Constitution declaring that the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States does not give non-resident citizens of Iowa any greater privileges and immunities in that State than her own citizens there enjoy. So far as liability is concerned for the act mentioned, citizens of other States and citizens of Iowa stand upon the same footing. *Paul* v. *Virginia*, 8 Wall. 168." Compare *Harrigan* v. *Conn. River Lumber Co.*, 129 Mass. 580. — ED.

manufacture or traffic, the hand of the legislature cannot be stayed from providing for its discontinuance, by any incidental inconvenience which individuals or corporations may suffer. All rights are held subject to the police power of the State.

"We do not mean to say that property actually in existence, and in which the right of the owner has become vested, may be taken for the public good without due compensation. But we infer that the liquor in this case, as in the case of *Bartemeyer* v. *Iowa*, 18 Wall. 129, was not in existence when the liquor law of Massachusetts was passed. Had the plaintiff in error relied on the existence of the property prior to the law, it behooved it to show that fact. But no such fact is shown, and no such point is taken. The plaintiff in error boldly takes the ground that, being a corporation, it has a right, by contract, to manufacture and sell beer forever, notwithstanding and in spite of any exigencies which may occur in the morals or the health of the community, requiring such manufacture to cease. We do not so understand the rights of the plaintiff. The legislature had no power to confer any such rights.

"Whatever differences of opinion may exist as to the extent and boundaries of the police power, and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does extend to the protection of the lives, health, and property of the citizens, and to the preservation of good order and the public morals. The legislature cannot, by any contract, divest itself of the power to provide for these objects. They belong emphatically to that class of objects which demand the application of the maxim, *Salus populi suprema lex;* and they are to be attained and provided for by such appropriate means as the legislative discretion may devise. That discretion can no more be bargained away than the power itself. *Boyd* v. *Alabama*, 94 U. S. 645.

"Since we have already held, in the case of *Bartemeyer* v. *Iowa*, that as a measure of police regulation, looking to the preservation of public morals, a State law prohibiting the manufacture and sale of intoxicating liquors is not repugnant to any clause of the Constitution of the United States, we see nothing in the present case that can afford any sufficient ground for disturbing the decision of the Supreme Court of Massachusetts." . . . *Judgment affirmed.*

In the *Head Money Cases*, 112 U. S. 580, 590 (1884), in sustaining an Act of Congress of 1882, imposing "a duty of fifty cents for each and every passenger not a citizen of the United States who shall come by steam or sail vessel from a foreign port to any port within the United States," Miller, J., for the court, said: "This Act of Congress is similar in its essential features to many statutes enacted by States of the Union for the protection of their own citizens, and for the good of the immigrants who land at seaports within their borders.

"That the purpose of these statutes is humane, is highly beneficial

to the poor and helpless immigrant, and is essential to the protection of the people in whose midst they are deposited by the steamships, is beyond dispute. That the power to pass such laws should exist in some legislative body in this country is equally clear. This court has decided distinctly and frequently, and always after a full hearing from able counsel, that it does not belong to the States. That decision did not rest in any case on the ground that the State and its people were not deeply interested in the existence and enforcement of such laws, and were not capable of enforcing them if they had the power to enact them; but on the ground that the Constitution, in the division of powers which it declares between the States and the general government, has conferred this power on the latter to the exclusion of the former. We are now asked to decide that it does not exist in Congress, which is to hold that it does not exist at all — that the framers of the Constitution have so worded that remarkable instrument, that the ships of all nations, including our own, can, without restraint or regulation, deposit here, if they find it to their interest to do so, the entire European population of criminals, paupers, and diseased persons, without making any provision to preserve them from starvation, and its concomitant sufferings, even for the first few days after they have left the vessel.

"This court is not only asked to decide this, but it is asked to overrule its decision, several times made with unanimity, that the power does reside in Congress, is conferred upon that body by the express language of the Constitution, and the attention of Congress directed to the duty which arises from that language to pass the very law which is here in question.

"That these statutes are regulations of commerce — of commerce with foreign nations — is conceded in the argument in this case; and that they constitute a regulation of that class which belongs exclusively to Congress is held in all the cases in this court. It is upon these propositions that the court has decided in all these cases that the State laws are void. . . . [Here the court considers an objection to the imposition in question as being not uniform and not levied to "provide for the common defence and general welfare of the United States."]

"If it were necessary to prove that the imposition of this contribution on owners of ships is made for the general welfare of the United States, it would not be difficult to show that it is so, and particularly that it is among the means which Congress may deem necessary and proper for that purpose; and beyond this we are not permitted to inquire.

"But the true answer to all these objections is that the power exercised in this instance is not the taxing power. The burden imposed on the ship owner by this statute is the mere incident of the regulation of commerce — of that branch of foreign commerce which is involved in immigration."

HEAD *v.* AMOSKEAG MANUFACTURING COMPANY.

SUPREME COURT OF THE UNITED STATES, 1885.

[113 *U. S.* 9.]

THIS was a writ of error to reverse a judgment of the Supreme Court of the State of New Hampshire against the plaintiff in error, upon a petition filed by the defendant in error (a corporation established by the laws of New Hampshire for the manufacture of cotton, woollen, iron and other materials) for the assessment of damages for the flowing of his land by its mill-dam at Amoskeag Falls on the Merrimack River, under the general mill Act of that State of 1868, ch. 20, which is copied in the margin. [It is omitted here; the substance of it sufficiently appears in what follows.]

In the petition filed in the State court, the Amoskeag Manufacturing Company alleged that it had been authorized by its charter to purchase and hold real estate, and to erect thereon, such dams, canals, mills, buildings, machines and works as it might deem necessary or useful in carrying on its manufactures and business; that it had purchased the land on both sides of the Merrimack River at Amoskeag Falls, including the river and falls, and had there built mills, dug canals, and established works, at the cost of several millions of dollars, and, for the purpose of making the whole power of the river at the falls available for the use of those mills, had constructed a dam across the river; that the construction of the mills and dam, to raise the water for working the mills, for creating a reservoir of water, and for equalizing its flow, was of public use and benefit to the people of the State, and necessary for the use of the mills for which it was designed; and that Head, the owner of a tract of land, described in the petition, and bounded by the river, claimed damages for the overflowing thereof by the dam, which the corporation had been unable satisfactorily to adjust; and prayed that it might be determined whether the construction of the mills and dam, and the flowing, if any, of Head's land to the depth and extent that it might or could be flowed thereby, were or might be of public use or benefit to the people of the State, and whether they were necessary for the mills, and that damages, past or future, to the land by the construction of the dam might be assessed according to the statute.

At successive stages of the proceedings, by demurrer, by request to the court after the introduction of the evidence upon a trial by jury, and by motion in arrest of judgment, Head objected that the statute was unconstitutional, and that the petition could not be maintained, because they contemplated the taking of his property for private use, in violation of the Fourteenth Amendment of the Constitution of the United States, which declares that no State shall deprive any per-

son of property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws; as well as in violation of the Constitution of the State, the Bill of Rights of which declares that all men have certain natural, essential and inherent rights, among which are the acquiring, possessing and protecting property, and that every member of the community has a right to be protected in the enjoyment of his property.

His objections were overruled by the highest court of New Hampshire, and final judgment was entered, adjudging that the facts alleged in the petition were true, and that, upon payment or tender of the damages assessed by the verdict, with interest, and fifty per cent added, making in all the sum of $572.43, the company have the right to erect and maintain the dam, and to flow his land forever to the depth and extent to which it might or could be flowed or injured thereby. 56 N. H. 386; 59 N. H. 332, 563.

Mr. C. R. Morrison, for plaintiff in error.

Mr. George F. Hoar and *Mr. B. Wadleigh*, for defendant in error.

MR. JUSTICE GRAY delivered the opinion of the court. He recited the facts as above stated, and continued:

The position that the plaintiff in error has been denied the equal protection of the laws was not insisted upon at the argument. The single question presented for decision is whether he has been deprived of his property without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States. It is only as bearing upon that question, that this court, upon a writ of error to a State court, has jurisdiction to consider whether the statute conforms to the Constitution of the State.

The charter of the Amoskeag Manufacturing Company, which authorized it to erect and maintain its mills and dam, gave it no right to flow the lands of others. *Eastman* v. *Amoskeag Manufacturing Co.*, 44 N. H. 143. The proceedings in the State court were had under the general mill Act of New Hampshire, which enacts that any person, or any corporation authorized by its charter so to do, may erect or maintain on his or its own land a water mill and mill-dam upon any stream not navigable, paying to the owners of lands flowed the damages which, upon a petition filed in court by either party, may be assessed, by a committee or by a jury; for the flowing of the lands to the depth and extent to which they may or can be flowed by the dam. N. H. Stat. 1868, ch. 20.

The plaintiff in error contends that his property has been taken by the State of New Hampshire for private use, and that any taking of private property for private use is without due process of law.

The defendant in error contends that the raising of a water power upon a running stream for manufacturing purposes is a public use; that the statute is a constitutional regulation of the rights of riparian owners; and that the remedy given by the statute is due process of law.

General mill Acts exist in a great majority of the States of the Union. Such Acts, authorizing lands to be taken or flowed *in invitum*, for the erection and maintenance of mills, existed in Virginia, Maryland, Delaware and North Carolina, as well as in Massachusetts, New Hampshire and Rhode Island, before the Declaration of Independence; and exist at this day in each of these States, except Maryland, where they were repealed in 1832. One passed in North Carolina in 1777 has remained upon the statute-book of Tennessee. They were enacted in Maine, Kentucky, Missouri and Arkansas, soon after their admission into the Union. They were passed in Indiana, Illinois, Michigan, Wisconsin, Iowa, Nebraska, Minnesota, Mississippi, Alabama and Florida, while they were yet Territories, and re-enacted after they became States. They were also enacted in Pennsylvania in 1803, in Connecticut in 1864, and more recently in Vermont, Kansas, Oregon, West Virginia and Georgia, but were afterwards repealed in Georgia. The principal statutes of the several States are collected in the margin. [The note refers to the statutes of twenty-nine States. It is omitted here.]

In most of those States, their validity has been assumed, without dispute; and they were never adjudged to be invalid anywhere until since 1870, and then in three States only, and for incompatibility with their respective constitutions. *Loughbridge* v. *Harris* (1871), 42 Georgia, 500; *Tyler* v. *Beacher* (1871), 44 Vermont, 648; *Ryerson* v. *Brown* (1877), 35 Michigan, 333. The earlier cases in Tennessee, Alabama and New York, containing dicta to the same effect, were decided upon other grounds. *Harding* v. *Goodlett*, 3 Yerger, 40; *Memphis Railroad* v. *Memphis*, 4 Coldwell, 406; *Moore* v. *Wright*, 34 Alabama, 311, 333; *Bottoms* v. *Brewer*, 54 Alabama, 288; *Hay* v. *Cohoes Co.*, 3 Barb. 42, 47, and 2 N. Y. 159.

The principal objects, no doubt, of the earlier Acts were grist mills; and it has been generally admitted, even by those courts which have entertained the most restricted view of the legislative power, that a grist mill which grinds for all comers, at tolls fixed by law, is for a public use. See also *Blair* v. *Cuming County*, 111 U. S. 363.

But the statutes of many States are not so limited, either in terms, or in the usage under them. In Massachusetts, for more than half a century, the mill Acts have been extended to mills for any manufacturing purpose. Mass. Stat. 1824, ch. 153; *Wolcott Woollen Manufacturing Co.* v. *Upham*, 5 Pick. 292; *Palmer Co.* v. *Ferrill*, 17 Pick. 58, 65. And throughout New England, as well as in Pennsylvania, Virginia, North Carolina, Kentucky, and many of the Western States, the statutes are equally comprehensive.

It has been held in many cases of high authority, that special Acts of incorporation, granted by the legislature for the establishment of dams to increase and improve the water power of rivers and navigable waters, for mechanical and manufacturing purposes, are for a public use. *Scudder* v. *Trenton Delaware Falls Co.*, Saxton, 694, 728, 729; *Boston & Roxbury Mill Corporation* v. *Newman*, 12 Pick. 467;

Hazen v. *Essex Co.*, 12 Cush. 475; *Commonwealth* v. *Essex Co.*, 13 Gray, 239, 251, 252; *Hankins* v. *Lawrence*, 8 Blackford, 266; *Great Falls Manufacturing Co.* v. *Fernald*, 47 N. H. 444.

In some of those cases, the authority conferred by general mill Acts upon any owner of land upon a stream to erect and maintain a mill on his own land and to flow the land of others, for manufacturing purposes, has been considered as resting on the right of eminent domain, by reason of the advantages inuring to the public from the improvement of water power and the promotion of manufactures. See also *Holyoke Co.* v. *Lyman*, 15 Wall. 500, 506, 507; *Beekman* v. *Saratoga & Schenectady Railroad*, 3 Paige, 45, 73; *Talbot* v. *Hudson*, 16 Gray, 417, 426. And the validity of general mill Acts, when directly controverted, has often been upheld upon that ground, confirmed by long usage or prior decisions. *Jordan* v. *Woodward*, 40 Maine, 317; *Olmstead* v. *Camp*, 33 Conn. 532; *Todd* v. *Austin*, 34 Conn. 78; *Venard* v. *Cross*, 8 Kansas, 248; *Harding* v. *Funk*, 8 Kansas, 315; *Miller* v. *Troost*, 14 Minnesota, 282; *Newcomb* v. *Smith*, 1 Chandler, 71; *Fisher* v. *Horicon Co.*, 10 Wisconsin, 351; *Babb* v. *Mackey*, 10 Wisconsin, 314; *Burnham* v. *Thompson*, 35 Iowa, 421.

In New Hampshire, from which the present case comes, the legislature of the Province in 1718 passed an Act (for the most part copied from the Massachusetts Act of 1714), authorizing the owners of mills to flow lands of others, paying damages assessed by a jury. The Act of 1718 continued in force until the adoption of the first Constitution of the State in 1784, and afterwards until June 20, 1792, and was then repealed, upon a general revision of the statutes, shortly before the State Constitution of 1792 took effect. The provisions of the Bill of Rights, on which the plaintiff in error relied in the court below, were exactly alike in the two constitutions. Special Acts authorizing the flowing of lands upon the payment of damages were passed afterwards from time to time; among others, the statute of July 8, 1862, authorizing the Great Falls Manufacturing Company to erect a dam upon Salmon Falls River, which was adjudged by the Supreme Judicial Court of New Hampshire in 1867, in an opinion delivered by Chief Justice Perley, to be consistent with the Constitution of that State, because the taking authorized was for a public use. *Great Falls Manufacturing Co.* v. *Fernald*, 47 N. H. 444. The statute now in question, the first general mill Act passed by the legislature of the State, was passed and took effect on July 3, 1868; was held in *Ash* v. *Cummings*, 50 N. H. 591, after elaborate argument against it, to be constitutional, upon the ground of the decision in *Great Falls Manufacturing Co.* v. *Fernald*; and was enforced without question in *Portland* v. *Morse*, 51 N. H. 188, and in *Town* v. *Faulkner*, 56 N. H. 255. In the case at bar, and in another case since, the State court held its constitutionality to be settled by the former decisions. *Amoskeag Manufacturing Co.* v. *Head*, 56 N. H. 386, and 59 N. H. 332, 563; *Same* v. *Worcester*, 60 N. H. 522.

The question whether the erection and maintenance of mills for

manufacturing purposes under a general mill Act, of which any owner of land upon a stream not navigable may avail himself at will, can be upheld as a taking, by delegation of the right of eminent domain, of private property for public use, in the constitutional sense, is so important and far reaching, that it does not become this court to express an opinion upon it, when not required for the determination of the rights of the parties before it. We prefer to rest the decision of this case upon the ground that such a statute, considered as regulating the manner in which the rights of proprietors of lands adjacent to a stream may be asserted and enjoyed, with a due regard to the interests of all, and to the public good, is within the constitutional power of the legislature.

When property, in which several persons have a common interest, cannot be fully and beneficially enjoyed in its existing condition, the law often provides a way in which they may compel one another to submit to measures necessary to secure its beneficial enjoyment, making equitable compensation to any whose control of or interest in the property is thereby modified.

In the familiar case of land held by several tenants in common, or even by joint tenants with right of survivorship, any one of them may compel a partition, upon which the court, if the land cannot be equally divided, will order owelty to be paid, or in many States, under statutes the constitutionality of which has never been denied, will, if the estate is such that it cannot be divided, either set it off to one and order him to compensate the others in money, or else order the whole estate to be sold. *King* v. *Reed*, 11 Gray, 490; *Bentley* v. *Long Dock Co.*, 1 McCarter, 480; s. c. on appeal, nom. *Manners* v. *Bentley*, 2 McCarter, 501; *Mead* v. *Mitchell*, 17 N. Y. 210; *Richardson* v. *Monson*, 23 Conn. 94. Water rights held in common, incapable of partition at law, may be the subject of partition in equity, either by apportioning the time and extent of use, or by a sale of the right and a division of the proceeds. *Smith* v. *Smith*, 10 Paige, 470; *De Witt* v. *Harvey*, 4 Gray, 486; *McGillivray* v. *Evans*, 27 California, 92.

At the common law, as Lord Coke tells us, "If two tenants in common, or joint tenants, be of an house or mill, and it fall in decay, and the one is willing to repair the same, and the other will not, he that is willing shall have a writ *de reparatione facienda;* and the writ saith, *ad reparationem et sustentationem ejusdem domus teneantur;* whereby it appeareth that owners are in that case bound *pro bono publico* to maintain houses and mills which are for habitation and use of men." Co. Lit. 200 *b;* 4 Kent Com. 370. In the same spirit, the statutes of Massachusetts, for a hundred and seventy-five years, have provided that any tenant in common of a mill in need of repair may notify a general meeting of all the owners for consultation, and that, if any one refuses to attend, or to agree with the majority, or to pay his share, the majority may cause the repairs to be made, and recover his share of the expenses out of the mill or its profits or earnings. Mass. Prov. Stat. 1709, ch.

3, 1 Prov. Laws (State ed.) 641, and Anc. Chart. 388; Stat. 1795, ch. 74, §§ 5–7; Rev. Stat. 1836, ch. 116, §§ 44–58; Gen. Stat. 1860, ch. 149, §§ 53–64; Pub. Stat. 1882, ch. 190, §§ 59–70. And the statutes of New Hampshire, for more than eighty years, have made provision for compelling the repair of mills in such cases. *Roberts* v. *Peavey*, 7 Foster, 477, 493.

The statutes which have long existed in many States authorizing the majority of the owners in severalty of adjacent meadow or swamp lands to have commissioners appointed to drain and improve the whole tract, by cutting ditches or otherwise, and to assess and levy the amount of the expense upon all the proprietors in proportion to the benefits received, have been often upheld, independently of any effect upon the public health, as reasonable regulations for the general advantage of those who are treated for this purpose as owners of a common property. *Coomes* v. *Burt*, 22 Pick. 422; *Wright* v. *Boston*, 9 Cush. 233, 241; *Sherman* v. *Tobey*, 3 Allen, 7; *Lowell* v. *Boston*, 111 Mass. 454, 469; *French* v. *Kirkland*, 1 Paige, 117; *People* v. *Brooklyn*, 4 N. Y. 419, 438; *Coster* v. *Tide Water Co.*, 3 C. E. Green, 54, 68, 518, 531; *O'Reiley* v. *Kankakee Valley Draining Co.*, 32 Indiana, 169.

By the maritime law, based, as Lord Tenterden observed, on the consideration that the actual employment of ships is "a matter, not merely of private advantage to the owners, but of public benefit to the State," and recognized in the decisions and the rules of this court, courts of admiralty, when the part-owners of a ship cannot agree upon her employment, authorize the majority to send her to sea, on giving security to the dissenting minority, to bring back and restore the ship, or, if she be lost, to pay them the value of their shares; and in such case the minority can neither recover part of the profits of the voyage nor compensation for the use of the ship. Abbott on Shipping, pt. 1, ch. 3, §§ 2, 3; *The Steamboat Orleans*, 11 Pet. 175, 183; Rule 20 in Admiralty, 3 How. vii.; *The Marengo*, 1 Lowell, 52. If the part-owners are equally divided in opinion upon the manner of employing the ship, then, according to the general maritime law, recognized and applied by Mr. Justice Washington, the ship may be ordered to be sold and the proceeds distributed among them. *The Seneca*, 18 Am. Jur. 485; s. c. 3 Wall. Jr. 395. See also Story on Partnership, § 439; *The Nelly Schneider*, 3 P. D. 152.

But none of the cases, thus put by way of illustration, so strongly call for the interposition of the law as the case before us.

The right to the use of running water is *publici juris*, and common to all the proprietors of the bed and banks of the stream from its source to its outlet. Each has a right to the reasonable use of the water as it flows past his land, not interfering with a like reasonable use by those above or below him. One reasonable use of the water is the use of the power, inherent in the fall of the stream and the force of the current, to drive mills. That power cannot be used without damming up the water, and thereby causing it to flow back. If the water thus

dammed up by one riparian proprietor spread over the lands of others, they could at common law bring successive actions against him for the injury so done them, or even have the dam abated. Before the mill Acts, therefore, it was often impossible for a riparian proprietor to use the water power at all, without the consent of those above him. The purpose of these statutes is to enable any riparian proprietor to erect a mill and use the water power of the stream, provided he does not interfere with an earlier exercise by another of a like right or with any right of the public; and to substitute, for the common-law remedies of repeated actions for damages and prostration of the dam, a new form of remedy, by which any one whose land is flowed can have assessed, once for all, either in a gross sum or by way of annual damages, adequate compensation for the injury.

This view of the principle upon which general mill Acts rest has been fully and clearly expounded in the judgments delivered by Chief Justice Shaw in the Supreme Judicial Court of Massachusetts.

In delivering the opinion of the court in a case decided in 1832, he said: "The statute of 1796 is but a revision of a former law, and the origin of these regulations is to be found in the provincial statute of 1714. They are somewhat at variance with that absolute right of dominion and enjoyment which every proprietor is supposed by law to have in his own soil; and in ascertaining their extent it will be useful to inquire into the principle upon which they are founded. We think they will be found to rest for their justification, partly upon the interest which the community at large has in the use and employment of mills, and partly upon the nature of the property, which is often so situated that it could not be beneficially used without the aid of this power. A stream of water often runs through the lands of several proprietors. One may have a sufficient mill-site on his own land, with ample space on his own land for a mill-pond or reservoir, but yet, from the operation of the well-known physical law that fluids will seek and find a level, he cannot use his own property without flowing the water back more or less on the lands of some other proprietor. We think the power given by statute was intended to apply to such cases, and that the legislature meant to provide that, as the public interest in such case coincides with that of the mill-owner, and as the mill-owner and the owner of lands to be flowed cannot both enjoy their full rights, without some interference, the latter shall yield to the former, so far that the former may keep up his mill and head of water, notwithstanding the damage done to the latter, upon payment of an equitable compensation for the real damage sustained, to be ascertained in the mode provided by the statute." "From this view of the object and purpose of the statute, we think it quite manifest that it was designed to provide for the most useful and beneficial occupation and enjoyment of natural streams and watercourses, where the absolute right of each proprietor to use his own land and water privileges, at his own pleasure, cannot be fully enjoyed, and one must of necessity, in some degree, yield to the other." *Fiske* v. *Framingham Manufacturing Co.*, 12 Pick. 68, 70–72.

In another case, decided almost twenty years later, he said: "The relative rights of land-owners and mill-owners are founded on the established rule of the common law, that every proprietor, through whose territory a current of water flows, in its course towards the sea, has an equal right to the use of it, for all reasonable and beneficial purposes, including the power of such stream for driving mills, subject to a like reasonable and beneficial use, by the proprietors above him and below him, on the same stream. Consequently no one can deprive another of his equal right and beneficial use, by corrupting the stream, by wholly diverting it, or stopping it from the proprietor below him, or raise it artificially, so as to cause it to flow back on the land of the proprietor above. This rule, in this Commonwealth, is slightly modified by the mill Acts, by the well-known provision, that when a proprietor erects a dam on his own land, and the effect is, by the necessary operation of natural laws, that the water sets back upon some land of the proprietor above, a consequence which he may not propose as a distinct purpose, but cannot prevent, he shall not thereby be regarded as committing a tort, and obliged to prostrate his dam, but may keep up his dam, paying annual or gross damages, the equitable assessment of which is provided for by the Acts. It is not a right to take and use the land of the proprietor above, against his will, but it is an authority to use his own land and water privilege to his own advantage and for the benefit of the community. It is a provision by law, for regulating the rights of proprietors, on one and the same stream, from its rise to its outlet, in a manner best calculated, on the whole, to promote and secure their common rights in it." *Bates* v. *Weymouth Iron Co.*, 8 Cush. 548, 552, 553.

Other opinions of Chief Justice Shaw illustrate the same view. *Williams* v. *Nelson*, 23 Pick. 141, 143; *French* v. *Braintree Manufacturing Co.*, 23 Pick. 216, 218–221; *Cary* v. *Daniels*, 8 Met. 466, 476, 477; *Murdock* v. *Stickney*, 8 Cush. 113, 116; *Gould* v. *Boston Duck Co.*, 13 Gray, 442, 450. It finds more or less distinct expression in other authorities. *Lowell* v. *Boston*, 111 Mass. 464–466; *United States* v. *Ames*, 1 Woodb. & Min. 76, 88; *Waddy* v. *Johnson*, 5 Iredell, 333, 339; *Jones* v. *Skinner*, 61 Maine, 25, 28; *Omstead* v. *Camp*, 33 Conn. 547, 550; Chief Justice Redfield, in 12 Am. Law Reg. (N. S.) 498–500. And no case has been cited in which it has been considered and rejected.

Upon principle and authority, therefore, independently of any weight due to the opinions of the courts of New Hampshire and other States, maintaining the validity of general mill Acts as taking private property for public use, in the strict constitutional meaning of that phrase, the statute under which the Amoskeag Manufacturing Company has flowed the land in question is clearly valid as a just and reasonable exercise of the power of the legislature, having regard to the public good, in a more general sense, as well as to the rights of the riparian proprietors, to regulate the use of the water power of running streams, which without

some such regulation could not be beneficially used. The statute does not authorize new mills to be erected to the detriment of existing mills and mill privileges. And by providing for an assessment of full compensation to the owners of lands flowed, it avoids the difficulty which arose in the case of *Pumpelly* v. *Green Bay Co.*, 13 Wall. 166.

Being a constitutional exercise of legislative power, and providing a suitable remedy, by trial in the regular course of justice, to recover compensation for the injury to the land of the plaintiff in error, it has not deprived him of his property without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States. *Walker* v. *Sauvinet*, 92 U. S. 90; *Davidson* v. *New Orleans*, 96 U. S. 97; *Hurtado* v. *California*, 110 U. S. 516; *Hagar* v. *Reclamation District*, 111 U. S. 701. *Judgment affirmed.*[1]

MR. JUSTICE BLATCHFORD did not sit in this case, or take any part in its decision.

WURTS *v.* HOAGLAND ET AL.

SUPREME COURT OF THE UNITED STATES. 1885.

[114 *U. S.* 606.]

THIS was a writ of error by the devisees of Mary V. Wurts to reverse a judgment confirming an assessment of commissioners for the drainage of lands under the statute of New Jersey of March 8, 1871, the material provisions of which are as follows. [These will be found in a note.[2]]

[1] Compare *Lowell* v. *Boston*, 111 Mass. 454, 464–471 (1873), *Turner* v. *Nye*, 154 Mass. 579 (1891), *infra*, 893. — ED.

[2] By § 1, "the Board of Managers of the Geological Survey, on the application of at least five owners of separate lots of land included in any tract of land in this State which is subject to overflow from freshets, or which is usually in a low, marshy, boggy or wet condition," are authorized to examine the tract, and, if they deem it for the interest of the public and of the land owners to be affected thereby, then to make surveys, and decide upon and adopt a system of drainage, and report it to the Supreme Court of the State; and thereupon the court, upon reasonable notice published in a newspaper circulating in the county where the tract is, shall appoint three commissioners to superintend and carry out the system of drainage so adopted and reported; "provided, that if, at the time fixed for such appointment of commissioners, it shall appear to the court by the written remonstrance of the owners of a majority of the said low and wet lands duly authenticated by affidavit, that they are opposed to the drainage thereof at the common expense, then the said court shall not appoint such commissioners."

By § 2, the commissioners shall cause the tract to be drained in accordance with the general plan of the board of managers, and, after the completion of the work, report to the Supreme Court the expense thereof, together with a general description of the lands which, in their judgment, ought to contribute to the expense; notice of the report shall be published for four weeks, in order that any persons interested may examine the report, and file objections to it; if any such objections are filed within the four weeks, the Supreme Court shall determine upon the same in a summary manner,

By proceedings had in accordance with this statute, the Board of Managers of the Geological Survey, upon the application of more than five owners of separate lots of land situated in the tract of land known as the Great Meadows on the Pequest River, examined and surveyed the entire tract, and reported a plan for draining it to the Supreme Court, and on November 15, 1872, three commissioners were appointed to carry the plan into execution.

Pending the proceedings, on March 19, 1874, a supplemental statute was passed, by § 2 of which, "if the said commissioners, after having commenced the drainage of such tract, and proceeded therewith, shall, before the drainage of the same shall be completed, be compelled to suspend the completion thereof, from any inability at that time to raise the money required therefor, they shall proceed to ascertain the tracts of land benefited or intended to be benefited by said drainage, and the relative proportions in which the said respective tracts have been or will be benefited thereby, and also the expenses already incurred in said drainage, and as near as may be the additional expenses required for the completion thereof," and make and report to the court an assessment of such expenses.

In accordance with that provision of the statute of 1874, the commissioners, before completing the work, made and reported to the court an assessment based upon an estimate of contemplated benefits, which

and, without further notice, make an order directing the commissioners "to distribute and assess the amount of said expense and interest, upon the lands contained within the territory reported by them originally, or as corrected by the Supreme Court, in proportion, as near as they can judge, to the benefit derived from said drainage by the several parcels of land to be assessed;" the assessment, when completed, shall be deposited in some convenient place for inspection by the parties interested, and notice of the completion of the assessment, and of the place where it is deposited, published for six weeks, designating a time and place when and where the commissioners will meet to hear objections to the assessment; and the commissioners, having heard and decided upon such objections as shall be made to them, shall proceed to complete their assessment and file it in the clerk's office of the Supreme Court, and notice of the filing shall be published for four weeks, after which, if no objections have been made to the assessment, it shall be confirmed by the court; any objections filed within the four weeks the Supreme Court shall hear and determine in a summary manner, but "shall not reverse said assessment or any part thereof, except for some error in law, or in the principles of assessment, made or committed by said commissioners;" if for any such cause the assessment or any part thereof shall be reversed, it shall be referred to the commissioners to be corrected accordingly, and, when it shall have been corrected and filed, like proceedings shall be had, until the court shall finally confirm the assessment; and thereupon the commissioners shall publish notice for four weeks, requiring the several owners or other parties interested in the lands assessed to pay their assessments.

By § 3, further provisions are made for collecting the assessment by demand on the owner of the lands assessed, and if he cannot be found, or neglects or refuses to pay, then by sale of his land for the least number of years that any person will take the same.

By § 5, the commissioners may from time to time borrow the necessary moneys to carry on the work of draining the lands, and give their bonds as such commissioners therefor, and pledge for the repayment thereof the assessment to be made as aforesaid.

was, for that reason, upon objections filed by Mrs. Wurts, set aside by an order of the Supreme Court, affirmed by the Court of Errors. 10 Vroom, 433; 12 Vroom, 175.

On May 17, 1879, after the completion of the work, the commissioners made a report to the court, pursuant to the statute of 1871, showing the expense to have been $107,916.07. No objections to that report having been filed after four weeks' notice, the court on June 23, ordered the commissioners to distribute that sum "upon the land mentioned in their said report, in proportion, as nearly as they can judge, to the benefit derived from said drainage by the several parcels of land to be assessed." The commissioners made an assessment accordingly, the proportion of which on the lands of Mrs. Wurts was $13,347.84, and, after notice to and hearing of all parties who desired to object to the assessment, reported it to the Supreme Court, which directed it to be modified as to certain lands of other parties lying outside the original survey, and in other respects confirmed the assessment notwithstanding objections made to it by the devisees of Mrs. Wurts; and its judgment was affirmed in the Court of Errors. 13 Vroom, 553; 14 Vroom, 456. The judgment of the Court of Errors was the final judgment in the case, and this writ of error was addressed to the Supreme Court because at the time of suing out the writ of error the record had been transmitted to that court and was in its possession. 105 U. S. 701.

The error assigned was that "the Act of March 8, 1871, upon which the said judgment and proceedings are founded, violates the Constitution of the United States in this, that it deprives the plaintiffs in error of their property without due process of law, and denies to them the equal protection of the laws, and violates the first section of the Fourteenth Amendment to the Constitution of the United States."

Mr. Samuel Dickson and *Mr. J. G. Shipman*, for plaintiffs in error.

Mr. Theodore Little, for defendants in error.

MR. JUSTICE GRAY, after making the foregoing statement of facts, delivered the opinion of the court.

General laws authorizing the drainage of tracts of swamp and low lands, by commissioners appointed upon proceedings instituted by some of the owners of the lands, and the assessment of the whole expense of the work upon all the lands within the tract in question, have long existed in the State of New Jersey, and have been sustained and acted on by her courts, under the Constitution of 1776, as well as under that of 1844. Stats. December 23, 1783, Wilson's Laws, 382; November 29, 1788, and November 24, 1792, Paterson's Laws, 84, 119; *Jones* v. *Lore*, Pennington, 1048; *Doremus* v. *Smith*, 1 Southard, 142; *Westcott* v. *Garrison*, 1 Halsted, 132; *State* v. *Frank & Guisbert Creek Co.*, 2 J. S. Green, 301; *State* v. *Newark*, 3 Dutcher, 185, 194; *Berdan* v. *Riser Drainage Co.*, cited 3 C. E. Green, 69; *Coster* v.

Tide Water Co., 3 C. E. Green, 54, 68, 518, 531; *State* v. *Blake*, 6 Vroom, 208, and 7 Vroom, 442; *Hoagland* v. *Wurts*, 12 Vroom, 175, 179.

In *State* v. *Newark*, 3 Dutcher, 185, 194, the Supreme Court said: "Laws for the drainage or embanking of low grounds, and to provide for the expense, for the mere benefit of the proprietors, without reference to the public good, are to be classed, not under the taxing, but the police power of the government."

In *Coster* v. *Tide Water Co.*, 3 C. E. Green, 54, 518, the same view was strongly asserted in the Court of Chancery and in the Court of Errors. The point there decided was that a statute providing for the drainage of a large tract of land overflowed by tide-water, by a corporation chartered for the purpose, none of the members of which owned any lands within the tract, if it could be maintained as an exercise of the right of eminent domain for a public use, yet could not authorize an assessment on the owners of such lands for anything beyond the benefits conferred upon them. But the case was clearly and sharply distinguished from the case of the drainage of lands for the exclusive benefit of the owners upon proceedings instituted by some of them.

Chancellor Zabriskie said: "But there is another branch of legislative power that may be appealed to, as authorizing the taking of the lands required for the works to drain these meadows. It is the power of the government to prescribe public regulations for the better and more economical management of property of persons whose property adjoins, or which, from some other reason, can be better managed and improved by some joint operation, such as the power of regulating the building of party walls; making and maintaining partition fences and ditches; constructing ditches and sewers for the draining of uplands or marshes, which can more advantageously be drained by a common sewer or ditch. This is a well-known legislative power, recognized and treated of by all jurisconsults and writers upon law through the civilized world; a branch of legislative power exercised by this State before and since the Revolution, and before and since the adoption of the present Constitution, and repeatedly recognized by our courts. The legislature has power to regulate these subjects, either by general law, or by particular laws for certain localities or particular and defined tracts of land. When the Constitution vested the legislative power in the Senate and General Assembly, it conferred the power to make these public regulations as a well understood part of that legislative power." "The principle of them all is, to make an improvement common to all concerned, at the common expense of all. And to effect this object, the Acts provide that the works to effect the drainage may be located on any part of the lands drained, paying the owner of the land thus occupied compensation for the damage by such use. So far private property is taken by them; farther it is not. In none of them is the owner divested of his fee, and in most there is no corporation in which it could be vested, and for all other purposes the title of the land

remained in the owner. To effect such common drainage, power was in some cases given to continue these drains through adjacent lands not drained, upon compensation. All this was an ancient and well-known exercise of legislative power, and may well be considered as included in the grant of legislative power in the Constitution." 3 C. E. Green, 68–71.

Chief Justice Beasley, in delivering the judgment of the Court of Errors, enforced the same distinction, saying: "This case, with regard to the grounds on which it rests, is to be distinguished from that class of proceedings by which meadows and other lands are drained on the application of the land owners themselves. In the present instance, the State is the sole actor, and public necessity or convenience is the only justification of her intervention. But the regulations established by the legislative power, whereby the owners of meadow lands are compelled to submit to an equal burden of the expense incurred in their improvement, are rules of police of the same character as provisions concerning party walls and partition fences. To these cases, therefore, the principle upon which the decision of the present case rests is not to be extended." 3 C. E. Green, 531.

These full and explicit statements have been since treated by the courts of New Jersey as finally establishing the constitutionality of such statutes.

In *State* v. *Blake*, 6 Vroom, 208, and 7 Vroom, 442, a statute authorizing a tract of swamps and marsh lands to be drained by commissioners elected by the owners of the lands, and the entire expense assessed upon all the owners, was held to be constitutional, although no appeal was given from the assessment. In the Supreme Court it was said: "This branch of legislative power which regulates the construction of ditches and secures the drainage of meadows and marshy lands has been exercised so long, and is so fully recognized, that it is now too late to call it in question. It is clearly affirmed in *The Tide Water Co.* v. *Coster*, and cannot be opened to discussion." 6 Vroom, 211. And the Court of Errors, in a unanimous judgment, approved this statement of the Supreme Court, as well as that of Chief Justice Beasley, in *Coster* v. *Tide Water Co.*, above quoted, 7 Vroom, 447, 448.

The constitutionality of the statute of 1871, under which the proceedings in the case at bar were had, was upheld by the Supreme Court and the Court of Errors upon the ground of the previous decisions. *In re Lower Chatham Drainage*, 6 Vroom, 497, 501; *In re Pequest River Drainage*, 10 Vroom, 433, 434; 12 Vroom, 175, 179; 13 Vroom, 553, 554, and 14 Vroom, 456. The further suggestion made by the Supreme Court in 6 Vroom, 501, 506, and 10 Vroom, 434, that this statute could be maintained as a taking of private property for a public use, was disapproved by the Court of Errors in 12 Vroom, 178.

In *Kean* v. *Driggs Drainage Co.*, 16 Vroom, 91, cited for the plaintiffs in error, the statute that was held unconstitutional created a private corporation with power to drain lands without the consent or application

of any of the owners; and the Supreme Court observed that in the opinions of the Court of Errors in the present case and in *Coster* v. *Tide Water Co.*, the distinction was clearly drawn between meadow drainage for the exclusive benefit of the owners, to be done at their sole expense, and drainage undertaken by the public primarily as a matter of public concern, in which case the assessment upon land owners must be limited to benefits imparted. 16 Vroom, 94.

This review of the cases clearly shows that general laws for the drainage of large tracts of swamps and low lands, upon proceedings instituted by some of the proprietors of the lands to compel all to contribute to the expense of their drainage, have been maintained by the courts of New Jersey (without reference to the power of taking private property for the public use under the right of eminent domain, or to the power of suppressing a nuisance dangerous to the public health) as a just and constitutional exercise of the power of the legislature to establish regulations by which adjoining lands, held by various owners in severalty, and in the improvement of which all have a common interest, but which, by reason of the peculiar natural condition of the whole tract, cannot be improved or enjoyed by any of them without the concurrence of all, may be reclaimed and made useful to all at their joint expense. The case comes within the principle upon which this court upheld the validity of general mill Acts in *Head* v. *Amoskeag Manufacturing Co.*, 113 U. S. 9.

It is also well settled by the decisions of the courts of New Jersey that such proceedings are not within the provision of the Constitution of that State securing the right of trial by jury. New Jersey Constitution of 1776, art. 22; Constitution of 1844, art. 1, sec. 7; *Scudder* v. *Trenton Delaware Falls Co.*, Saxton, 694, 721–725; *In re Lower Chatham Drainage*, 7 Vroom, 442; *Howe* v. *Plainfield*, 8 Vroom, 145.

The statute of 1871 is applicable to any tract of land within the State which is subject to overflow from freshets, or which is usually in low, marshy, boggy or wet condition. It is only upon the application of at least five owners of separate lots of land included in the tract, that a plan of drainage can be adopted. All persons interested have opportunity by public notice to object to the appointment of commissioners to execute that plan, and no commissioners can be appointed against the remonstrance of the owners of the greater part of the lands. All persons interested have also opportunity by public notice to be heard before the court on the commissioners' report of the expense of the work, and of the lands which in their judgment ought to contribute; as well as before the commissioners, and, on any error in law or in the principles of assessment, before the court, upon the amount of the assessment.

As the statute is applicable to all lands of the same kind, and as no person can be assessed under it for the expense of drainage without notice and opportunity to be heard, the plaintiffs in error have neither

been denied the equal protection of the laws, nor been deprived of their property without due process of law, within the meaning of the Fourteenth Amendment of the Constitution of the United States. *Barbier* v. *Connolly*, 113 U. S. 27, 31; *Walker* v. *Sauvinet*, 92 U. S. 90; *Davidson* v. *New Orleans*, 96 U. S. 97; *Hagar* v. *Reclamation District*, 111 U. S. 701. *Judgment affirmed.*

YICK WO *v.* HOPKINS. WO LEE *v.* HOPKINS.

SUPREME COURT OF THE UNITED STATES. 1886.

[118 *U. S.* 356.]

THESE two cases were argued as one and depended upon precisely the same state of facts; the first coming here upon a writ of error to the Supreme Court of the State of California, the second on appeal from the Circuit Court of the United States for that district.

The plaintiff in error, Yick Wo, on August 24, 1885, petitioned the Supreme Court of California for a writ of *habeas corpus*, alleging that he was illegally deprived of his personal liberty by the defendant as sheriff of the city and county of San Francisco.

The sheriff made return to the writ that he held the petitioner in custody by virtue of a sentence of the Police Judges Court, No. 2, of the city and county of San Francisco, whereby he was found guilty of a violation of certain ordinances of the board of supervisors of that county, and adjudged to pay a fine of $10, and, in default of payment, be imprisoned in the county jail at the rate of one day for each dollar of fine until said fine should be satisfied, and a commitment in consequence of non-payment of said fine.

The ordinances for the violation of which he had been found guilty were set out as follows: —

Order No. 1569, passed May 26, 1880, prescribing the kind of buildings in which laundries may be located.

"The people of the city and county of San Francisco do ordain as follows:

"SEC. 1. It shall be unlawful, from and after the passage of this order, for any person or persons to establish, maintain, or carry on a laundry within the corporate limits of the city and county of San Francisco without having first obtained the consent of the board of supervisors, except the same be located in a building constructed either of brick or stone.

"SEC. 2. It shall be unlawful for any person to erect, build, or maintain, or cause to be erected, built, or maintained, over or upon the roof of any building now erected or which may hereafter be erected within the limits of said city and county, any scaffolding, without first obtaining the written permission of the board of supervisors, which permit

shall state fully for what purpose said scaffolding is to be erected and used, and such scaffolding shall not be used for any other purpose than that designated in such permit.

"SEC. 3. Any person who shall violate any of the provisions of this order shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not more than one thousand dollars, or by imprisonment in the county jail not more than six months, or by both such fine and imprisonment."

Order No. 1587, passed July 28, 1880, the following section:

"SEC. 68. It shall be unlawful, from and after the passage of this order, for any person or persons to establish, maintain, or carry on a laundry within the corporate limits of the city and county of San Francisco without having first obtained the consent of the board of supervisors, except the same be located in a building constructed either of brick or stone."

The following facts were also admitted on the record: That petitioner is a native of China and came to California in 1861, and is still a subject of the Emperor of China; that he has been engaged in the laundry business in the same premises and building for twenty-two years last past; that he had a license from the board of fire wardens, dated March 3, 1884, from which it appeared "that the above described premises have been inspected by the board of fire wardens, and upon such inspection said board found all proper arrangements for carrying on the business; that the stoves, washing and drying apparatus, and the appliances for heating smoothing irons are in good condition, and that their use is not dangerous to the surrounding property from fire, and that all proper precautions have been taken to comply with the provisions of order No. 1617, defining 'the fire limits of the city and county of San Francisco and making regulations concerning the erection and use of buildings in said city and county,' and of order No. 1670, 'prohibiting the kindling, maintenance, and use of open fires in houses;' that he had a certificate from the health officer that the same premises had been inspected by him, and that he found that they were properly and sufficiently drained, and that all proper arrangements for carrying on the business of a laundry, without injury to the sanitary condition of the neighborhood, had been complied with; that the city license of the petitioner was in force and expired October 1st, 1885; and that the petitioner applied to the board of supervisors, June 1st, 1885, for consent of said board to maintain and carry on his laundry, but that said board, on July 1st, 1885, refused said consent." It is also admitted to be true, as alleged in the petition, that, on February 24, 1880, "there were about 320 laundries in the city and county of San Francisco, of which about 240 were owned and conducted by subjects of China, and of the whole number, *viz.*, 320, about 310 were constructed of wood, the same material that constitutes nine-tenths of the houses in the city of San Francisco. The capital thus invested by the subjects of China was not less than two hundred thousand dollars, and they paid annually for rent,

license, taxes, gas, and water about one hundred and eighty thousand dollars."

It was alleged in the petition, that "your petitioner and more than one hundred and fifty of his countrymen have been arrested upon the charge of carrying on business without having such special consent, while those who are not subjects of China, and who are conducting eighty odd laundries under similar conditions, are left unmolested and free to enjoy the enhanced trade and profits arising from this hurtful and unfair discrimination. The business of your petitioner, and of those of his countrymen similarly situated, is greatly impaired, and in many cases practically ruined by this system of oppression to one kind of men and favoritism to all others."

The statement therein contained as to the arrest, &c., was admitted to be true, with the qualification only, that the eighty odd laundries referred to are in wooden buildings without scaffolds on the roofs.

It was also admitted "that petitioner and 200 of his countrymen similarly situated petitioned the board of supervisors for permission to continue their business in the various houses which they had been occupying and using for laundries for more than twenty years, and such petitions were denied, and all the petitions of those who were not Chinese, with one exception of Mrs. Mary Meagles, were granted."

By section 2 of article XI. of the Constitution of California it is provided that "any county, city, town, or township may make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws."

By section 74 of the Act of April 19, 1856, usually known as the Consolidation Act, the board of supervisors is empowered, among other things, "to provide by regulation for the prevention and summary removal of nuisances to public health, the prevention of contagious diseases; . . . to prohibit the erection of wooden buildings within any fixed limits where the streets shall have been established and graded; . . . to regulate the sale, storage, and use of gunpowder or other explosive or combustible materials and substances, and make all needful regulations for protection against fire; to make such regulations concerning the erection and use of buildings as may be necessary for the safety of the inhabitants."

The Supreme Court of California, in the opinion pronouncing the judgment in this case, said: . . . "The order No. 1569 and section 68 of order No. 1587 are not in contravention of common right or unjust, unequal, partial, or oppressive, in such sense as authorizes us in this proceeding to pronounce them invalid."

After answering the position taken in behalf of the petitioner, that the ordinances in question had been repealed, the court added: "We have not deemed it necessary to discuss the question in the light of supposed infringement of petitioner's rights under the Constitution of the United States, for the reason that we think the principles upon which contention on that head can be based have in effect been set at rest by

the cases of *Barbier* v. *Connolly*, 113 U. S. 27, and *Soon Hing* v. *Crowley*, 113 U. S. 703." The writ was accordingly discharged and the prisoner remanded.

In the other case the appellant, Wo Lee, petitioned for his discharge from an alleged illegal imprisonment, upon a state of facts shown upon the record, precisely similar to that in the case of Yick Wo. In disposing of the application, the learned Circuit Judge, Sawyer, in his opinion, 26 Fed. Rep. 471, after quoting the ordinance in question, proceeded at length as follows: . . . [Here follows a strong statement of the judge's personal opinion that this ordinance violates the Constitution and treaties of the United States.]

But, in deference to the decision of the Supreme Court of California in the case of Yick Wo, and contrary to his own opinion as thus expressed, the circuit judge discharged the writ and remanded the prisoner.

Mr. Hall McAllister, *Mr. L. H. Van Schaick*, and *Mr. D. L. Smoot*, for plaintiffs in error.

Mr. Alfred Clarke and *Mr. H. G. Sieberst*, for defendant in error.

MR. JUSTICE MATTHEWS delivered the opinion of the court.

In the case of the petitioner, brought here by writ of error to the Supreme Court of California, our jurisdiction is limited to the question, whether the plaintiff in error has been denied a right in violation of the Constitution, laws, or treaties of the United States. The question whether his imprisonment is illegal, under the Constitution and laws of the State, is not open to us. And although that question might have been considered in the Circuit Court in the application made to it, and by this court on appeal from its order, yet judicial propriety is best consulted by accepting the judgment of the State court upon the points involved in that inquiry.

That, however, does not preclude this court from putting upon the ordinances of the supervisors of the county and city of San Francisco an independent construction; for the determination of the question whether the proceedings under these ordinances and in enforcement of them are in conflict with the Constitution and laws of the United States, necessarily involves the meaning of the ordinances, which, for that purpose, we are required to ascertain and adjudge.

We are consequently constrained, at the outset, to differ from the Supreme Court of California upon the real meaning of the ordinances in question. That court considered these ordinances as vesting in the board of supervisors a not unusual discretion in granting or withholding their assent to the use of wooden buildings as laundries, to be exercised in reference to the circumstances of each case, with a view to the protection of the public against the dangers of fire. We are not able to concur in that interpretation of the power conferred upon the supervisors. There is nothing in the ordinances which points to such a regulation of the business of keeping and conducting laundries. They seem intended to confer, and actually do confer, not a discretion to be exer-

cised upon a consideration of the circumstances of each case, but a naked and arbitrary power to give or withhold consent, not only as to places, but as to persons. So that, if an applicant for such consent, being in every way a competent and qualified person, and having complied with every reasonable condition demanded by any public interest, should, failing to obtain the requisite consent of the supervisors to the prosecution of his business, apply for redress by the judicial process of *mandamus*, to require the supervisors to consider and act upon his case, it would be a sufficient answer for them to say that the law had conferred upon them authority to withhold their assent, without reason and without responsibility. The power given to them is not confided to their discretion in the legal sense of that term, but is granted to their mere will. It is purely arbitrary, and acknowledges neither guidance nor restraint.

This erroneous view of the ordinances in question led the Supreme Court of California into the further error of holding that they were justified by the decisions of this court in the cases of *Barbier* v. *Connolly*, 113 U. S. 27, and *Soon Hing* v. *Crowley*, 113 U. S. 703. . . .

The ordinance drawn in question in the present case is of a very different character. It does not prescribe a rule and conditions for the regulation of the use of property for laundry purposes, to which all similarly situated may conform. It allows without restriction the use for such purposes of buildings of brick or stone; but, as to wooden buildings, constituting nearly all those in previous use, it divides the owners or occupiers into two classes, not having respect to their personal character and qualifications for the business, nor the situation and nature and adaptation of the buildings themselves, but merely by an arbitrary line, on one side of which are those who are permitted to pursue their industry by the mere will and consent of the supervisors, and on the other those from whom that consent is withheld, at their mere will and pleasure. And both classes are alike only in this, that they are tenants at will, under the supervisors, of their means of living. The ordinance, therefore, also differs from the not unusual case, where discretion is lodged by law in public officers or bodies to grant or withhold licenses to keep taverns, or places for the sale of spirituous liquors, and the like, when one of the conditions is that the applicant shall be a fit person for the exercise of the privilege, because in such cases the fact of fitness is submitted to the judgment of the officer, and calls for the exercise of a discretion of a judicial nature.

The rights of the petitioners, as affected by the proceedings of which they complain, are not less, because they are aliens and subjects of the Emperor of China. By the third article of the treaty between this Government and that of China, concluded November 17, 1880, 22 Stat. 827, it is stipulated: "If Chinese laborers, or Chinese of any other class, now either permanently or temporarily residing in the territory of the United States, meet with ill treatment at the hands of any other persons, the Government of the United States will exert all its powers to devise

measures for their protection, and to secure to them the same rights, privileges, immunities, and exemptions as may be enjoyed by the citizens or subjects of the most favored nation, and to which they are entitled by treaty." . . . [For the passage here omitted see *ante*, p. 532.]

It is contended on the part of the petitioners, that the ordinances for violations of which they are severally sentenced to imprisonment, are void on their face, as being within the prohibitions of the Fourteenth Amendment; and, in the alternative, if not so, that they are void by reason of their administration, operating unequally, so as to punish in the present petitioners what is permitted to others as lawful, without any distinction of circumstances — an unjust and illegal discrimination, it is claimed, which, though not made expressly by the ordinances, is made possible by them.

When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power. Sovereignty itself is, of course, not subject to law, for it is the author and source of law; but in our system, while sovereign powers are delegated to the agencies of government, sovereignty itself remains with the people, by whom and for whom all government exists and acts. And the law is the definition and limitation of power. It is, indeed, quite true, that there must always be lodged somewhere, and in some person or body, the authority of final decision; and in many cases of mere administration the responsibility is purely political, no appeal lying except to the ultimate tribunal of the public judgment, exercised either in the pressure of opinion or by means of the suffrage. But the fundamental rights to life, liberty, and the pursuit of happiness, considered as individual possessions, are secured by those maxims of constitutional law which are the monuments showing the victorious progress of the race in securing to men the blessings of civilization under the reign of just and equal laws, so that, in the famous language of the Massachusetts Bill of Rights, the government of the Commonwealth "may be a government of laws and not of men." For, the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself.

There are many illustrations that might be given of this truth, which would make manifest that it was self-evident in the light of our system of jurisprudence. The case of the political franchise of voting is one. Though not regarded strictly as a natural right, but as a privilege merely conceded by society according to its will, under certain conditions, nevertheless it is regarded as a fundamental political right, because preservative of all rights.

In reference to that right, it was declared by the Supreme Judicial Court of Massachusetts, in *Capen* v. *Foster*, 12 Pick. 485, 489, in

the words of Chief Justice Shaw, "that in all cases where the Constitution has conferred a political right or privilege, and where the Constitution has not particularly designated the manner in which that right is to be exercised, it is clearly within the just and constitutional limits of the legislative power, to adopt any reasonable and uniform regulations, in regard to the time and mode of exercising that right, which are designed to secure and facilitate the exercise of such right, in a prompt, orderly, and convenient manner;" nevertheless, "such a construction would afford no warrant for such an exercise of legislative power, as, under the pretence and color of regulating, should subvert or injuriously restrain the right itself." It has accordingly been held generally in the States, that, whether the particular provisions of an Act of legislation, establishing means for ascertaining the qualifications of those entitled to vote, and making previous registration in lists of such, a condition precedent to the exercise of the right, were or were not reasonable regulations, and accordingly valid or void, was always open to inquiry, as a judicial question. See *Daggett* v. *Hudson*, 1 Western Reporter, 789, decided by the Supreme Court of Ohio, where many of the cases are collected; *Monroe* v. *Collins*, 17 Ohio St. 665.

The same principle has been more freely extended to the quasi-legislative acts of inferior municipal bodies, in respect to which it is an ancient jurisdiction of judicial tribunals to pronounce upon the reasonableness and consequent validity of their by-laws. In respect to these, it was the doctrine, that every by-law must be reasonable, not inconsistent with the charter of the corporation, nor with any statute of Parliament, nor with the general principles of the common law of the land, particularly those having relation to the liberty of the subject or the rights of private property. Dillon on Municipal Corporations, 3d ed., § 319, and cases cited in notes. Accordingly, in the case of *The State of Ohio ex rel. &c.* v. *The Cincinnati Gas-Light and Coke Company*, 18 Ohio St. 262, 300, an ordinance of the city council purporting to fix the price to be charged for gas, under an authority of law giving discretionary power to do so, was held to be bad, if passed in bad faith, fixing an unreasonable price, for the fraudulent purpose of compelling the gas company to submit to an unfair appraisement of their works. And a similar question, very pertinent to the one in the present cases, was decided by the Court of Appeals of Maryland, in the case of the *City of Baltimore* v. *Radecke*, 49 Maryland, 217. . . . [Here follows a statement of this case. The case itself is found *infra*, p. 864.]

This conclusion, and the reasoning on which it is based, are deductions from the face of the ordinance, as to its necessary tendency and ultimate actual operation. In the present cases we are not obliged to reason from the probable to the actual, and pass upon the validity of the ordinances complained of, as tried merely by the opportunities which their terms afford, of unequal and unjust discrimination in their administration. For the cases present the ordinances in actual operation, and the facts shown establish an administration directed so exclu-

sively against a particular class of persons as to warrant and require the conclusion, that, whatever may have been the intent of the ordinances as adopted, they are applied by the public authorities charged with their administration, and thus representing the State itself, with a mind so unequal and oppressive as to amount to a practical denial by the State of that equal protection of the laws which is secured to the petitioners, as to all other persons, by the broad and benign provisions of the Fourteenth Amendment to the Constitution of the United States. Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution. This principle of interpretation has been sanctioned by this court in *Henderson* v. *Mayor of New York*, 92 U. S. 259; *Chy Lung* v. *Freeman*, 92 U. S. 275; *Ex parte Virginia*, 100 U. S. 339; *Neal* v. *Delaware*, 103 U. S. 370; and *Soon Hing* v. *Crowley*, 113 U. S. 703.

The present cases, as shown by the facts disclosed in the record, are within this class. It appears that both petitioners have complied with every requisite, deemed by the law or by the public officers charged with its administration, necessary for the protection of neighboring property from fire, or as a precaution against injury to the public health. No reason whatever, except the will of the supervisors, is assigned why they should not be permitted to carry on, in the accustomed manner, their harmless and useful occupation, on which they depend for a livelihood. And while this consent of the supervisors is withheld from them and from two hundred others who have also petitioned, all of whom happen to be Chinese subjects, eighty others, not Chinese subjects, are permitted to carry on the same business under similar conditions. The fact of this discrimination is admitted. No reason for it is shown, and the conclusion cannot be resisted, that no reason for it exists except hostility to the race and nationality to which the petitioners belong, and which in the eye of the law is not justified. The discrimination is, therefore, illegal, and the public administration which enforces it is a denial of the equal protection of the laws and a violation of the Fourteenth Amendment of the Constitution. The imprisonment of the petitioners is, therefore, illegal, and they must be discharged. To this end,

The judgment of the Supreme Court of California in the case of Yick Wo, and that of the Circuit Court of the United States for the District of California in the case of Wo Lee, are severally reversed, and the cases remanded, each to the proper court, with directions to discharge the petitioners from custody and imprisonment.[1]

[1] See *Ho Ah Kow* v. *Nunan*, 5 Sawyer U. S. C. C. 552 (1879); *Parrott's Case*, 6 Ib 349 (1880); *In re Ah Chong*, 6 Ib. 451; *Ex parte Sing Lee*, 96 Cal. 354 (1892). — Ed.

MUGLER v. KANSAS.

SUPREME COURT OF THE UNITED STATES, 1887.

[123 *U. S.* 623.]

[Two cases, entitled as above, on error to the Supreme Court of Kansas, and another case, *Kansas* v. *Ziebold*, on appeal from the Circuit Court of the United States for the District of Kansas, are here grouped together.]

The Constitution of the State of Kansas contains the following article, being art. 15 of § 10, which was adopted by the people November 2, 1880:

"The manufacture and sale of intoxicating liquors shall be forever prohibited in this State, except for medical, scientific, and mechanical purposes."

The Legislature of Kansas enacted a statute to carry this into effect, the provisions of which are set forth by the court in its opinion in this case, to which reference is made. This statute [approved Feb. 19, 1881] took effect on the 1st of May, 1881.

The plaintiff in error, Mugler, the proprietor of a brewery in Saline County, Kansas, was indicted in the District Court in that county in November, 1881, for offences against this statute.

The first indictment against him contained five counts charging that he, on five different specified days in November, 1881, in the county of Saline, "unlawfully did sell, barter, and give away spirituous, malt, vinous, fermented, and other intoxicating liquors," he "not having a permit to sell intoxicating liquors, as provided by law, contrary to the statutes," &c.; and a sixth count charging that in Saline County, at a time named in that month, he "did unlawfully keep and maintain a certain common nuisance, to wit:" his brewery, then and there "kept and used for the illegal selling, bartering, and giving away, and illegal keeping for sale, barter, and use of intoxicating liquors, in violation of the provisions of an Act," &c.

The parties made an agreed statement of facts, which was all the evidence introduced in the case, and which was as follows:

"It is hereby stipulated and agreed that the facts in the above-entitled case are, and that the evidence would prove them to be, as follows:

"That the defendant, Peter Mugler, has been a resident of the State of Kansas continually since the year 1872; that, being foreign born, he in that year declared his intention to become a citizen of the United States, and always since that time intending to become such citizen, he did, in the month of June, 1881, by the judgment of the District Court of Wyandotte County, Kansas, become a full citizen of the United States, and since that time has been a citizen of the United States and of the State of Kansas.

"That in the year 1877 said defendant erected and furnished a brewery on lots Nos. 152 and 154 on Third Street, in the city of Salina, Saline County, Kansas, for use in the manufacture of a malt liquor commonly known as beer; that such building was specially constructed and adapted for the manufacture of such malt liquor, at an actual cost and expense to said defendant of ten thousand dollars, and was used by him for the purposes for which it was designed and intended after its completion in 1877 and up to May 1, 1881.

"That of the beer so manufactured and on hand prior to February 19, 1881, said defendant made one sale since May 1, 1881, which is the sale charged in the first count of the indictment, said sale being made on the above-described premises; that the beer so sold was in the original packages in which it was placed after its manufacture, and was not sold for use nor used on said premises; and that at the time of such sale said defendant had no permit to sell intoxicating liquors, as provided by chapter 128 of Laws of 1881."

Mugler was adjudged to be guilty, and was sentenced to pay a fine of one hundred dollars and costs, and motions for a new trial and in arrest of judgment were overruled. This judgment being affirmed by the Supreme Court of the State on appeal, the cause was brought here by writ of error on his motion.

The indictment in the second case charged that, on the first day of November, 1881, in Saline County he "did unlawfully manufacture, and aid, assist, and abet in the manufacture of vinous, spirituous, malt, fermented, and other intoxicating liquors, in violation of the provisions of an Act," &c., he then and there "not having taken out and not having a permit to manufacture intoxicating liquors as provided by law, contrary to the statutes," &c.

The parties made the following agreed statement of facts which was all the evidence introduced in the case.

"It is hereby stipulated and agreed that the facts in the above-entitled case are, and that the evidence would prove them to be, as follows:

"That the defendant, Peter Mugler, had been a resident of the State of Kansas continually since the year 1872; that, being foreign born, he in that year declared his intention to become a citizen of the United States, and always since that time intending to become such citizen, he did, in the month of June, 1881, by the judgment of the District Court of Wyandotte County, Kansas, become a full citizen of the United States and of the State of Kansas.

"That in the year 1877 said defendant erected and furnished a brewery on lots Nos. 152 and 154 on Third Street, in the city of Salina, Saline County, Kansas, for use in the manufacture of an intoxicating malt liquor commonly known as beer.

"That such building was specially constructed and adapted for the manufacture of such malt liquor, at an actual cost and expense to said defendant of ten thousand dollars, and was used by him for the pur-

poses for which it was designed and intended after its completion in 1877 and up to May 1st, 1881. That said brewery was at all times after its completion and on May 1, 1881, worth the sum of ten thousand dollars for use in the manufacture of said beer, and is not worth to exceed the sum of twenty-five hundred dollars for any other purpose. That said defendant, since October 1, 1881, has used said brewery in the manner and for the purpose for which it was constructed and adapted by the manufacturing therein of such intoxicating malt liquors, and at the time of such manufacture of said malt liquors said defendant had no permit to manufacture the same for medical, scientific, or mechanical purposes, as provided by chapter 128 of Laws of 1881."

The defendant was adjudged to be guilty, and was fined one hundred dollars and costs, and, as in the other case, motions for a new trial and in arrest of judgment were overruled, and the judgment being affirmed by the Supreme Court of the State of Kansas on appeal, the defendant sued out a writ of error to review it. . . . [The assignment of errors is here set forth. It sufficiently appears in the opinion.]

Mr. George G. Vest, for plaintiff in error.

Mr. B. S. Bradford, Attorney-General of the State of Kansas, *Mr. George R. Peck*, *Mr. J. B. Johnson* and *Mr. George J. Barker*, for defendant in error, submitted on their brief.

On the 7th March, 1885, the Legislature of Kansas passed an Act "amendatory of and supplemental to" the Act of 1881. Among other changes made, § 13 was amended so as to read as shown in the footnote.[1]

[1] For convenience this section is reprinted here, although it will be found, *infra*, in the opinion of the court.

"Sec. 13. All places where intoxicating liquors are manufactured, sold, bartered, or given away in violation of any of the provisions of this Act, or where intoxicating liquors are kept for sale, barter, or delivery in violation of this Act are hereby declared to be common nuisances, and upon the judgment of any court having jurisdiction finding such a place to be a nuisance under this section, the sheriff, his deputy, or under sheriff, or any constable of the proper county, or marshal of any city where the same is located, shall be directed to shut up and abate such place by taking possession thereof and destroying all intoxicating liquors found therein, together with all signs, screens, bars, bottles, glasses, and other property used in keeping and maintaining said nuisance, and the owner or keeper thereof shall, upon conviction, be adjudged guilty of maintaining a common nuisance, and shall be punished by a fine of not less than one hundred dollars nor more than five hundred dollars and by imprisonment in the county jail not less than thirty days nor more than ninety days. The attorney-general, county attorney, or any citizen of the county where such nuisance exists, or is kept, or is maintained, may maintain an action in the name of the State to abate and perpetually enjoin the same. The injunction shall be granted at the commencement of the action, and no bond shall be required. Any person violating the terms of any injunction granted in such proceeding, shall be punished as for contempt, by a fine of not less than one hundred nor more than five hundred dollars, or by imprisonment in the county jail not less than thirty days nor more than six months, or by both such fine and imprisonment, in the discretion of the court."

On the 13th August, 1886, there was filed in the office of the District Court for the County of Atchison, Kansas, an information against Ziebold and his partner, who were proprietors of a brewery there. The information prayed that the brewery might be adjudged to be a common nuisance; that it be ordered to be shut up and abated; that the defendants be enjoined from using or permitting to be used the premises as a place where intoxicating liquors were sold, bartered, or given away, or were kept for barter, sale, or gift, otherwise than by authority of law; and that the defendants might be enjoined from keeping the brewery open, and from selling, bartering, or giving away, or keeping for sale, barter, gift, or use in or about the premises, or manufacturing for barter, sale, or gift in the State of Kansas, any malt, vinous, spirituous, fermented, or other intoxicating liquors, and from permitting such liquors to be sold, &c., or kept for sale, &c., or manufactured for sale, &c. in the State of Kansas. On the defendants' motion this case was removed to the Circuit Court of the United States, where an amended bill in equity was filed, praying for the relief asked for in the State court. After joinder of issue and hearing the Circuit Court dismissed the bill, from which decree the State appealed.

Mr. S. B. Bradford, Attorney-General of the State of Kansas, *Mr. Edwin A. Austin*, Assistant Attorney-General of that State, and *Mr. J. F. Tufts*, Assistant Attorney General for Atchison County, Kansas, for appellant submitted on their brief. October 25, 1887, *Mr. Bradford* moved the court to reopen the cause and reassign it for argument. October 26, 1887, the court denied the motion.

Mr. Joseph H. Choate, for appellee, *Mr. Robert M. Eaton* and *Mr. John C. Tomlinson* were with him on his brief.

MR. JUSTICE HARLAN delivered the opinion of the court: —

These cases involve an inquiry into the validity of certain statutes of Kansas relating to the manufacture and sale of intoxicating liquors. . . .

By a statute of Kansas, approved March 3, 1868, it was made a misdemeanor, punishable by fine and imprisonment, for any one, directly or indirectly, to sell spirituous, vinous, fermented, or other intoxicating liquors, without having a dram-shop, tavern, or grocery license. It was also enacted, among other things, that every place where intoxicating liquors were sold in violation of the statute should be taken, held, and deemed to be a common nuisance; and it was required that all rooms, taverns, eating-houses, bazaars, restaurants, groceries, coffee-houses, cellars, or other places of public resort where intoxicating liquors were sold, in violation of law, should be abated as public nuisances. Gen. Stat. Kansas, 1868, c. 35, § 6.

But, in 1880, the people of Kansas adopted a more stringent policy. On the 2d of November of that year, they ratified an amendment to the State Constitution, which declared that the manufacture and sale of intoxicating liquors should be forever prohibited in that State, except for medical, scientific, and mechanical purposes.

In order to give effect to that amendment, the legislature repealed the Act of 1868, and passed an Act, approved February 19, 1881, to take effect May 1, 1881, entitled "An Act to prohibit the manufacture and sale of intoxicating liquors, except for medical, scientific, and mechanical purposes, and to regulate the manufacture and sale thereof for such excepted purposes." Its first section provides "that any person or persons who shall manufacture, sell, or barter any spirituous, malt, vinous, fermented, or other intoxicating liquors shall be guilty of a misdemeanor: *Provided, however*, That such liquors may be sold for medical, scientific, and mechanical purposes, as provided in this Act." The second section makes it unlawful for any person to sell or barter for either of such excepted purposes any malt, vinous, spirituous, fermented, or other intoxicating liquors without having procured a druggist's permit therefor, and prescribes the conditions upon which such permit may be granted. The third section relates to the giving by physicians of prescriptions for intoxicating liquors to be used by their patients, and the fourth, to the sale of such liquors by druggists. The fifth section forbids any person from manufacturing or assisting in the manufacture of intoxicating liquors in the State, except for medical, scientific, and mechanical purposes, and makes provision for the granting of licenses to engage in the business of manufacturing liquors for such excepted purposes. The seventh section declares it to be a misdemeanor for any person, not having the required permit, to sell or barter, directly or indirectly, spirituous, malt, vinous, fermented, or other intoxicating liquors; the punishment prescribed being, for the first offence, a fine not less than one hundred nor more than five hundred dollars, or imprisonment in the county jail not less than twenty nor more than ninety days; for the second offence, a fine of not less than two hundred nor more than five hundred dollars, or imprisonment in the county jail not less than sixty days nor more than six months; and for every subsequent offence, a fine not less than five hundred nor more than one thousand dollars, or imprisonment in the county jail not less than three months nor more than one year, or both such fine and imprisonment, in the discretion of the court. The eighth section provides for similar fines and punishments against persons who manufacture, or aid, assist, or abet the manufacture of any intoxicating liquors without having the required permit. The thirteenth section declares, among other things, all places where intoxicating liquors are manufactured, sold, bartered, or given away, or are kept for sale, barter, or use, in violation of the Act, to be common nuisances; and provides that upon the judgment of any court having jurisdiction finding such place to be a nuisance, the proper officer shall be directed to shut up and abate the same.

Under that statute, the prosecutions against Mugler were instituted. It contains other sections in addition to those above referred to; but as they embody merely the details of the general scheme adopted by the

State for the prohibition of the manufacture and sale of intoxicating liquors, except for the purposes specified, it is unnecessary to set them out.

On the 7th of March, 1885, the legislature passed an Act amendatory and supplementary to that of 1881. The thirteenth section of the former Act, being the one upon which the suit against Ziebold & Hagelin is founded, will be given in full in a subsequent part of this opinion. . . .

The general question in each case is, whether the foregoing statutes of Kansas are in conflict with that clause of the Fourteenth Amendment, which provides that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law."

That legislation by a State prohibiting the manufacture within her limits of intoxicating liquors, to be there sold or bartered for general use as a beverage, does not necessarily infringe any right, privilege, or immunity secured by the Constitution of the United States, is made clear by the decisions of this court, rendered before and since the adoption of the Fourteenth Amendment; to some of which, in view of questions to be presently considered, it will be well to refer. . . . [Here follows a statement of *The License Cases*, 5 How. 504, and quotations from *Bartmeyer* v. *Iowa*, 18 Wall. 129, and *Beer Co.* v. *Mass.*, 97 U. S. 25.]

Finally, in *Foster* v. *Kansas*, 112 U S. 201, 206, the court said that the question as to the constitutional power of a State to prohibit the manufacture and sale of intoxicating liquors was no longer an open one in this court. These cases rest upon the acknowledged right of the States of the Union to control their purely internal affairs, and, in so doing, to protect the health, morals, and safety of their people by regulations that do not interfere with the execution of the powers of the general government, or violate rights secured by the Constitution of the United States. The power to establish such regulations, as was said in *Gibbons* v. *Ogden*, 9 Wheat. 1, 203, reaches everything within the territory of a State not surrendered to the national government.

It is, however, contended, that, although the State may prohibit the manufacture of intoxicating liquors for sale or barter within her limits, for general use as a beverage, "no convention or legislature has the right, under our form of government, to prohibit any citizen from manufacturing for his own use, or for export, or storage, any article of food or drink not endangering or affecting the rights of others." The argument made in support of the first branch of this proposition, briefly stated, is, that in the implied compact between the State and the citizen certain rights are reserved by the latter, which are guaranteed by the constitutional provision protecting persons against being deprived of life, liberty, or property, without due process of law, and with which the State cannot interfere; that among those rights is that

of manufacturing for one's use either food or drink; and that while, according to the doctrines of the Commune, the State may control the tastes, appetites, habits, dress, food, and drink of the people, our system of government, based upon the individuality and intelligence of the citizen, does not claim to control him, except as to his conduct to others, leaving him the sole judge as to all that only affects himself.

It will be observed that the proposition, and the argument made in support of it, equally concede that the right to manufacture drink for one's personal use is subject to the condition that such manufacture does not endanger or affect the rights of others. If such manufacture does prejudicially affect the rights and interests of the community, it follows, from the very premises stated, that society has the power to protect itself, by legislation, against the injurious consequences of that business. As was said in *Munn* v. *Illinois*, 94 U. S. 113, 124, while power does not exist with the whole people to control rights that are purely and exclusively private, government may require "each citizen to so conduct himself, and so use his own property, as not unnecessarily to injure another."

But by whom, or by what authority, is it to be determined whether the manufacture of particular articles of drink, either for general use or for the personal use of the maker, will injuriously affect the public? Power to determine such questions, so as to bind all, must exist somewhere; else society will be at the mercy of the few, who, regarding only their own appetites or passions, may be willing to imperil the peace and security of the many, provided only they are permitted to do as they please. Under our system that power is lodged with the legislative branch of the government. It belongs to that department to exert what are known as the police powers of the State, and to determine, primarily what measures are appropriate or needful for the protection of the public morals, the public health, or the public safety.

It does not at all follow that every statute enacted ostensibly for the promotion of these ends, is to be accepted as a legitimate exertion of the police powers of the State. There are, of necessity, limits beyond which legislation cannot rightfully go. . . .

The courts are not bound by mere forms, nor are they to be misled by mere pretences. They are at liberty — indeed, are under a solemn duty — to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution.

Keeping in view these principles, as governing the relations of the judicial and legislative departments of government with each other, it is difficult to perceive any ground for the judiciary to declare that

the prohibition by Kansas of the manufacture or sale, within her limits, of intoxicating liquors for general use there as a beverage, is not fairly adapted to the end of protecting the community against the evils which confessedly result from the excessive use of ardent spirits. There is no justification for holding that the State, under the guise merely of police regulations, is here aiming to deprive the citizen of his constitutional rights; for we cannot shut out of view the fact, within the knowledge of all, that the public health, the public morals, and the public safety, may be endangered by the general use of intoxicating drinks; nor the fact, established by statistics accessible to every one, that the idleness, disorder, pauperism, and crime existing in the country are, in some degree at least, traceable to this evil. If, therefore, a State deems the absolute prohibition of the manufacture and sale, within her limits, of intoxicating liquors for other than medical, scientific, and manufacturing purposes, to be necessary to the peace and security of society, the courts cannot, without usurping legislative functions, override the will of the people as thus expressed by their chosen representatives. They have nothing to do with the mere policy of legislation. Indeed, it is a fundamental principle in our institutions, indispensable to the preservation of public liberty, that one of the separate departments of government shall not usurp powers committed by the Constitution to another department. And so, if, in the judgment of the legislature, the manufacture of intoxicating liquors for the maker's own use, as a beverage, would tend to cripple, if it did not defeat, the effort to guard the community against the evils attending the excessive use of such liquors, it is not for the courts, upon their views as to what is best and safest for the community, to disregard the legislative determination of that question. So far from such a regulation having no relation to the general end sought to be accomplished, the entire scheme of prohibition, as embodied in the Constitution and laws of Kansas, might fail, if the right of each citizen to manufacture intoxicating liquors for his own use as a beverage were recognized. Such a right does not inhere in citizenship. Nor can it be said that government interferes with or impairs any one's constitutional rights of liberty or of property, when it determines that the manufacture and sale of intoxicating drinks, for general or individual use, as a beverage, are, or may become, hurtful to society, and constitute, therefore, a business in which no one may lawfully engage. Those rights are best secured, in our government, by the observance, upon the part of all, of such regulations as are established by competent authority to promote the common good. No one may rightfully do that which the law-making power, upon reasonable grounds, declares to be prejudicial to the general welfare.

This conclusion is unavoidable, unless the Fourteenth Amendment of the Constitution takes from the States of the Union those powers of police that were reserved at the time the original Constitution was adopted. But this court has declared, upon full consideration, in

Barbier v. *Connolly*, 113 U. S. 27, 31, that the Fourteenth Amendment had no such effect. . . .

. . . It is contended that, as the primary and principal use of beer is as a beverage; as their respective breweries were erected when it was lawful to engage in the manufacture of beer for every purpose; as such establishments will become of no value as property, or, at least, will be materially diminished in value, if not employed in the manufacture of beer for every purpose; the prohibition upon their being so employed is, in effect, a taking of property for public use without compensation, and depriving the citizen of his property without due process of law. In other words, although the State, in the exercise of her police powers, may lawfully prohibit the manufacture and sale, within her limits, of intoxicating liquors to be used as a beverage, legislation having that object in view cannot be enforced against those who, at the time, happen to own property, the chief value of which consists in its fitness for such manufacturing purposes, unless compensation is first made for the diminution in the value of their property, resulting from such prohibitory enactments.

This interpretation of the Fourteenth Amendment is inadmissible. It cannot be supposed that the States intended, by adopting that Amendment, to impose restraints upon the exercise of their powers for the protection of the safety, health, or morals of the community. In respect to contracts, the obligations of which are protected against hostile State legislation, this court in *Butchers' Union Co.* v. *Crescent City Co.*, 111 U. S. 746, 751, said that the State could not, by any contract, limit the exercise of her power to the prejudice of the public health and the public morals. So, in *Stone* v. *Mississippi*, 101 U. S. 814, 816, where the Constitution was invoked against the repeal by the State of a charter, granted to a private corporation, to conduct a lottery, and for which that corporation paid to the State a valuable consideration in money, the court said: "No legislature can bargain away the public health or the public morals. The people themselves cannot do it, much less their servants. . . . Government is organized with a view to their preservation, and cannot divest itself of the power to provide for them." Again, in *New Orleans Gas Co.* v. *Louisiana Light Co.*, 115 U. S. 650, 672: "The constitutional prohibition upon State laws impairing the obligation of contracts does not restrict the power of the State to protect the public health, the public morals, or the public safety, as the one or the other may be involved in the execution of such contracts. Rights and privileges arising from contracts with a State are subject to regulations for the protection of the public health, the public morals, and the public safety, in the same sense, and to the same extent, as are all contracts and all property, whether owned by natural persons or corporations."

The principle, that no person shall be deprived of life, liberty, or property, without due process of law, was embodied, in substance, in the constitutions of nearly all, if not all, of the States at the time of the adop-

tion of the Fourteenth Amendment; and it has never been regarded as incompatible with the principle, equally vital, because essential to the peace and safety of society, that all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community. *Beer Co.* v. *Massachusetts*, 97 U. S. 25, 32; *Commonwealth* v. *Alger*, 7 Cush. 53. An illustration of this doctrine is afforded by *Patterson* v. *Kentucky*, 97 U. S. 501. . . . [Here follows a statement of this case.]

See also *United States* v. *Dewitt*, 9 Wall. 41; *License Tax Cases*, 5 Wall. 462; *Pervear* v. *Commonwealth*, 5 Wall. 475.

Another decision, very much in point upon this branch of the case, is *Fertilizing Co.* v. *Hyde Park*, 97 U. S. 659, 667, also decided after the adoption of the Fourteenth Amendment. The court there sustained the validity of an ordinance of the village of Hyde Park, in Cook County, Illinois, passed under legislative authority, forbidding any person from transporting through that village offal or other offensive or unwholesome matter, or from maintaining or carrying on an offensive or unwholesome business or establishment within its limits. The Fertilizing Company had, at large expense, and under authority expressly conferred by its charter, located its works at a particular point in the county. Besides, the charter of the village, at that time, provided that it should not interfere with parties engaged in transporting animal matter from Chicago, or from manufacturing it into a fertilizer or other chemical product. The enforcement of the ordinance in question operated to destroy the business of the company, and seriously to impair the value of its property. As, however, its business had become a nuisance to the community in which it was conducted, producing discomfort, and often sickness, among large masses of people. the court maintained the authority of the village, acting under legislative sanction, to protect the public health against such nuisance. It said: "We cannot doubt that the police power of the State was applicable and adequate to give an effectual remedy. That power belonged to the States when the Federal Constitution was adopted. They did not surrender it, and they all have it now. It extends to the entire property and business within their local jurisdiction. Both are subject to it in all proper cases. It rests upon the fundamental principle that every one shall so use his own as not to wrong and injure another. To regulate and abate nuisances is one of its ordinary functions."

It is supposed by the defendants that the doctrine for which they contend is sustained by *Pumpelly* v. *Green Bay Co.*, 13 Wall. 166. But in that view we do not concur. That was an action for the recovery of damages for the overflowing of the plaintiff's land by water, resulting from the construction of a dam across a river. The defence was that the dam constituted a part of the system adopted by the State for improving the navigation of Fox and Wisconsin rivers; and it was contended that as the damages of which the plaintiff complained were only the result of the improvement, under legislative sanction, of a

navigable stream, he was not entitled to compensation from the State or its agents. The case, therefore, involved the question whether the overflowing of the plaintiff's land, to such an extent that it became practically unfit to be used, was a taking of property, within the meaning of the Constitution of Wisconsin, providing that "the property of no person shall be taken for public use without just compensation therefor." This court said it would be a very curious and unsatisfactory result, were it held that, "if the government refrains from the absolute conversion of real property to the uses of the public, it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction, without making any compensation, because, in the narrowest sense of that word, it is not *taken* for the public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen, as those rights stood at the common law, instead of the government, and make it an authority for the invasion of private right under the pretext of the public good, which had no warrant in the laws or practices of our ancestors." pp. 177, 178.

These principles have no application to the case under consideration. The question in *Pumpelly* v. *Green Bay Company* arose under the State's power of eminent domain; while the question now before us arises under what are, strictly, the police powers of the State, exerted for the protection of the health, morals, and safety of the people. That case, as this court said in *Transportation Co.* v. *Chicago*, 99 U. S. 635, 642, was an extreme qualification of the doctrine, universally held, that "acts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though these consequences may impair its use," do not constitute a taking within the meaning of the constitutional provision, or entitle the owner of such property to compensation from the State or its agents, or give him any right of action. It was a case in which there was a "permanent flooding of private property," a "physical invasion of the real estate of the private owner, and a practical ouster of his possession." His property was, in effect, required to be devoted to the use of the public, and, consequently, he was entitled to compensation.

As already stated, the present case must be governed by principles that do not involve the power of eminent domain, in the exercise of which property may not be taken for public use without compensation. A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit. Such legislation does not disturb the owner in the control or use of his property for lawful purposes, nor restrict his right to dispose of it, but is only a declaration by the State that its use by any one, for certain forbidden purposes, is prejudicial to the public interests. Nor can legislation of that character come within the Fourteenth Amendment, in any case,

unless it is apparent that its real object is not to protect the community, or to promote the general well-being, but, under the guise of police regulation, to deprive the owner of his liberty and property, without due process of law. The power which the States have of prohibiting such use by individuals of their property as will be prejudicial to the health, the morals, or the safety of the public, is not — and, consistently with the existence and safety of organized society, cannot be — burdened with the condition that the State must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community. The exercise of the police power by the destruction of property which is itself a public nuisance, or the prohibition of its use in a particular way, whereby its value becomes depreciated, is very different from taking property for public use, or from depriving a person of his property without due process of law. In the one case, a nuisance only is abated; in the other, unoffending property is taken away from an innocent owner.

It is true, that, when the defendants in these cases purchased or erected their breweries, the laws of the State did not forbid the manufacture of intoxicating liquors. But the State did not thereby give any assurance, or come under an obligation, that its legislation upon that subject would remain unchanged. Indeed, as was said in *Stone* v. *Mississippi*, above cited, the supervision of the public health and the public morals is a governmental power, "continuing in its nature," and "to be dealt with as the special exigencies of the moment may require;" and that, "for this purpose, the largest legislative discretion is allowed, and the discretion cannot be parted with any more than the power itself." So in *Beer Co.* v. *Massachusetts*, 97 U. S. 32: "If the public safety or the public morals require the discontinuance of any manufacture or traffic, the hand of the legislature cannot be stayed from providing for its discontinuance by any incidental inconvenience which individuals or corporations may suffer."

It now remains to consider certain questions relating particularly to the thirteenth section of the Act of 1885. That section — which takes the place of § 13 of the Act of 1881 — is as follows. . . . [This is given *ante*, p. 784, note.]

It is contended by counsel in the case of *Kansas* v. *Ziebold & Hagelin*, that the entire scheme of this section is an attempt to deprive persons who come within its provisions of their property and of their liberty without due process of law; especially, when taken in connection with that clause of § 14 (amendatory of § 21 of the Act of 1881) which provides that "in prosecutions under this Act, by indictment or otherwise, . . . it shall not be necessary in the first instance for the State to prove that the party charged did not have a permit to sell intoxicating liquors for the excepted purposes."

We are unable to perceive anything in these regulations inconsistent with the constitutional guarantees of liberty and property. The State

having authority to prohibit the manufacture and sale of intoxicating liquors for other than medical, scientific, and mechanical purposes, we do not doubt her power to declare that any place, kept and maintained for the illegal manufacture and sale of such liquors, shall be deemed a common nuisance, and be abated, and, at the same time, to provide for the indictment and trial of the offender. One is a proceeding against the property used for forbidden purposes, while the other is for the punishment of the offender.

It is said that by the thirteenth section of the Act of 1885, the legislature, finding a brewery within the State in actual operation, without notice, trial, or hearing, by the mere exercise of its arbitrary caprice, declares it to be a common nuisance, and then prescribes the consequences which are to follow inevitably by judicial mandate required by the statute, and involving and permitting the exercise of no judicial discretion or judgment; that the brewery being found in operation, the court is not to determine whether it is a common nuisance, but, under the command of the statute, is to find it to be one; that it is not the liquor made, or the making of it, which is thus enacted to be a common nuisance, but the place itself, including all the property used in keeping and maintaining the common nuisance; that the judge having thus signed without inquiry — and, it may be, contrary to the fact and against his own judgment — the edict of the legislature, the court is commanded to take possession by its officers of the place and shut it up; nor is all this destruction of property, by legislative edict, to be made as a forfeiture consequent upon conviction of any offence, but merely because the legislature so commands; and it is done by a court of equity, without any previous conviction first had, or any trial known to the law.

This, certainly, is a formidable arraignment of the legislation of Kansas, and if it were founded upon a just interpretation of her statutes, the court would have no difficulty in declaring that they could not be enforced without infringing the constitutional rights of the citizen. But those statutes have no such scope and are attended with no such results as the defendants suppose. The court is not required to give effect to a legislative "decree" or "edict," unless every enactment by the law-making power of a State is to be so characterized. It is not declared that every establishment is to be deemed a common nuisance because it may have been maintained prior to the passage of the statute as a place for manufacturing intoxicating liquors. The statute is prospective in its operation, that is, it does not put the brand of a common nuisance upon any place, unless, after its passage, that place is kept and maintained for purposes declared by the legislature to be injurious to the community. Nor is the court required to adjudge any place to be a common nuisance simply because it is charged by the State to be such. It must first find it to be of that character; that is, must ascertain, in some legal mode, whether since the statute was passed the place in question has been, or is being, so used, as to make it a common nuisance.

Equally untenable is the proposition that proceedings in equity for the purposes indicated in the thirteenth section of the statute are inconsistent with due process of law. "In regard to public nuisances," Mr. Justice Story says, "the jurisdiction of courts of equity seems to be of a very ancient date, and has been distinctly traced back to the reign of Queen Elizabeth. The jurisdiction is applicable not only to public nuisances, strictly so called, but also to purprestures upon public rights and property. . . . In case of public nuisances, properly so called, an indictment lies to abate them, and to punish the offenders. But an information, also, lies in equity to redress the grievance by way of injunction." 2 Story's Eq. §§ 921, 922. The ground of this jurisdiction in cases of purpresture, as well as of public nuisances, is the ability of courts of equity to give a more speedy, effectual, and permanent remedy, than can be had at law. They can not only prevent nuisances that are threatened, and before irreparable mischief ensues, but arrest or abate those in progress, and, by perpetual injunction protect the public against them in the future; whereas courts of law can only reach existing nuisances, leaving future acts to be the subject of new prosecutions or proceedings. This is a salutary jurisdiction, especially where a nuisance affects the health, morals, or safety of the community. Though not frequently exercised, the power undoubtedly exists in courts of equity thus to protect the public against injury. *District Attorney* v. *Lynn and Boston Railroad Co.*, 16 Gray, 242, 245; *Attorney-General* v. *New Jersey Railroad*, 2 Green, Ch. 139; *Attorney-General* v. *Tudor Ice Co.*, 104 Mass. 239, 244; *State* v. *Mayor*, 5 Porter (Ala.), 279, 294; *Hoole* v. *Attorney-General*, 22 Ala. 190, 194; *Attorney-General* v. *Hunter*, 1 Dev. Eq. 12; *Attorney-General* v. *Forbes*, 2 Myl. & Cr. 123, 129, 133; *Attorney-General* v. *Great Northern Railway Co.*, 1 Drew. & Sm. 154, 161; Eden on Injunctions, 259; Kerr on Injunctions (2d ed.), 168.

As to the objection that the statute makes no provision for a jury trial in cases like this one, it is sufficient to say that such a mode of trial is not required in suits in equity brought to abate a public nuisance. The statutory direction that an injunction issue at the commencement of the action is not to be construed as dispensing with such preliminary proof as is necessary to authorize an injunction pending the suit. The court is not to issue an injunction simply because one is asked, or because the charge is made that a common nuisance is maintained in violation of law. The statute leaves the court at liberty to give effect to the principle that an injunction will not be granted to restrain a nuisance, except upon clear and satisfactory evidence that one exists. Here the fact to be ascertained was, not whether a place, kept and maintained for purposes forbidden by the statute, was, *per se*, a nuisance — that fact being conclusively determined by the statute itself — but whether the place in question was so kept and maintained.

If the proof upon that point is not full or sufficient, the court can refuse an injunction, or postpone action until the State first obtains the

verdict of a jury in her favor. In this case, it cannot be denied that the defendants kept and maintained a place that is within the statutory definition of a common nuisance. Their petition for the removal of the cause from the State court, and their answer to the bill, admitted every fact necessary to maintain this suit, if the statute, under which it was brought, was constitutional.

Touching the provision that in prosecutions, by indictment or otherwise, the State need not, in the first instance, prove that the defendant has not the permit required by the statute, we may remark that, if it has any application to a proceeding like this, it does not deprive him of the presumption that he is innocent of any violation of law. It is only a declaration that when the State has proven that the place described is kept and maintained for the manufacture or sale of intoxicating liquors — such manufacture or sale being unlawful except for specified purposes, and then only under a permit — the prosecution need not prove a negative, namely, that the defendant has not the required license or permit. If the defendant has such license or permit, he can easily produce it, and thus overthrow the *prima facie* case established by the State.

A portion of the argument in behalf of the defendants is to the effect that the statutes of Kansas forbid the manufacture of intoxicating liquors to be exported, or to be carried to other States, and, upon that ground, are repugnant to the clause of the Constitution of the United States, giving Congress power to regulate commerce with foreign nations and among the several States. We need only say, upon this point, that there is no intimation in the record that the beer which the respective defendants manufactured was intended to be carried out of the State or to foreign countries. And, without expressing an opinion as to whether such facts would have constituted a good defence, we observe that it will be time enough to decide a case of that character when it shall come before us.[1]

For the reasons stated, we are of opinion that the judgments of the Supreme Court of Kansas have not denied to Mugler, the plaintiff in error, any right, privilege, or immunity secured to him by the Constitution of the United States, and its judgment, in each case, is, accordingly, affirmed. We are, also, of opinion that the Circuit Court of the United States erred in dismissing the bill of the State against Ziebold & Hagelin. The decree in that case is reversed, and the cause remanded, with directions to enter a decree granting to the State such relief as the Act of March 7, 1885, authorizes.[2]

[FIELD, J., gave a dissenting opinion.]

[1] *Held*, that they would not, in *Kidd* v. *Pearson*, 128 U. S. 1 (1888). — ED.

[2] As to the relation between this extensive power of the States and the Constitution and laws of the United States, see *Bowman* v. *Chic. & N. W. Ry. Co.*, 125 U. S. 465 (1888); *Leisy* v. *Hardin*, 135 U. S. 100 (1890), and *In re Rahrer*, 140 U. S. 545 (1891). — ED.

In *Smith* v. *Alabama*, 124 U. S. 465 (1888), on error to the Supreme Court of Alabama, the validity was in question of a statute of that State requiring all locomotive engineers to be examined and licensed by a State Court. In holding this valid, MATTHEWS, J., for the court, said: "The grant of power to Congress in the Constitution to regulate commerce with foreign nations and among the several States, it is conceded, is paramount over all legislative powers which, in consequence of not having been granted to Congress, are reserved to the States. It follows that any legislation of a State, although in pursuance of an acknowledged power reserved to it, which conflicts with the actual exercise of the power of Congress over the subject of commerce, must give way before the supremacy of the national authority. As the regulation of commerce may consist in abstaining from prescribing positive rules for its conduct, it cannot always be said that the power to regulate is dormant because not affirmatively exercised. And when it is manifest that Congress intends to leave that commerce, which is subject to its jurisdiction, free and unfettered by any positive regulations, such intention would be contravened by State laws operating as regulations of commerce as much as though these had been expressly forbidden. In such cases, the existence of the power to regulate commerce in Congress has been construed to be not only paramount but exclusive, so as to withdraw the subject as the basis of legislation altogether from the States. . . . But the provisions on the subject contained in the statute of Alabama under consideration are not regulations of interstate commerce. It is a misnomer to call them such. Considered in themselves, they are parts of that body of the local law which, as we have already seen, properly governs the regulation between carriers of passengers and merchandise and the public who employ them, which are not misplaced until they come in conflict with express enactments of Congress in the exercise of its power over commerce, and which, until so displaced, according to the evident intention of Congress, remain as the law governing carriers in the discharge of their obligations, whether engaged in the purely internal commerce of the State or in commerce among the States." [1]

[1] A like result was reached in *Nashville, &c. Railway* v. *Ala.*, 128 U. S. 96 (1888), in considering another statute of the same State requiring, in the case of various classes of railroad employees, an examination and a certificate of fitness, as regards color-blindness and defective vision, from a State board of medical men. See *Jamieson* v. *Ind. Nat. Gas Co.*, 128 Ind. 555. — ED.

CROWLEY *v.* CHRISTENSEN.

SUPREME COURT OF THE UNITED STATES. 1890.

[137 *U. S.* 86.]

THIS was an appeal from an order of the Circuit Court of the United States for the Northern District of California discharging, on *habeas corpus*, the petitioner for the writ, the appellee here, from the custody of the chief of police of the city and county of San Francisco, by whom he was held under a warrant of arrest issued by the Police Court of that municipality, upon a charge of having engaged in and carried on in that city the business of selling spirituous, malt, and fermented liquors and wines in less quantities than one quart, without the license required by the ordinance of the city and county. The ordinance referred to provided that every person who sold such liquors or wines in quantities less than one quart should be designated as "a retail liquor-dealer" and as "a grocer and retail liquor-dealer," and that no license as such liquor-dealer, after January 1, 1886, "shall be issued by the collector of licenses, unless the person desiring the same shall have obtained the written consent of a majority of the Board of Police Commissioners of the city and county of San Francisco to carry on or conduct said business; but, in case of refusal of such consent, upon application, said Board of Police Commissioners shall grant the same upon the written recommendation of not less than twelve citizens of San Francisco owning real estate in the block or square in which said business of retail liquor-dealer or grocery and retail liquor-dealer is to be carried on;" and that such license should be issued for a period of only three months. The ordinance further declared that any person violating this provision should be deemed guilty of a misdemeanor.

The Constitution of California provides, in the eleventh section of Article 11, that "any county, city, town, or township may make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws."

The petitioner had, previously to June 10, 1889, carried on the business of retail liquor-dealer in San Francisco for some years, under licenses from the Board of Police Commissioners, but his last license was to expire on the 17th of that month. Previously to its expiration he was informed by the Police Commissioners that they had withdrawn their consent to the further issue of a license to him. He afterwards tendered to the collector of license fees, through which officer it was the practice of the Board to issue the licenses, the sum required for a new license, but the tender was not accepted, and his application for a new license was refused. He then applied to the Police Commissioners for a hearing before them on the question of revoking their consent to the issue of a further license to him. Such hearing was accorded to him, and the time fixed for it was the 24th of June. But, before any hearing

was had, he was arrested upon a warrant of the Police Court upon the charge of carrying on the business of a retail liquor-dealer without a license. He then obtained from the Supreme Court of the State a writ of *habeas corpus* to be discharged from the arrest, but that court, on the 2d of August, 1890, held the ordinance valid and remanded him to the custody of the chief of police. He then applied for the allowance of an appeal from this order to the Supreme Court of the United States, but it was refused by the Chief Justice of the State Court, and the Associate Justice of the Supreme Court of the United States assigned to the circuit, who could have allowed the appeal, was absent from the State. On the 7th of August following a new complaint was made against the petitioner, charging him with unlawfully engaging in and carrying on in San Francisco the business of a retail liquor-dealer without a license under the ordinance of the city and county. Upon this complaint a warrant was issued under which he was arrested. He thereupon applied to the Circuit Court of the United States for a writ of *habeas corpus*, which was issued.

In return to the writ, the chief of police, the appellant here, stated that he held the petitioner under the warrant mentioned by the petitioner and several other warrants issued by the Police Court of the city and county, upon different charges, made at different times, of his conducting and carrying on the business of a retail liquor-dealer in San Francisco without a license, as required by the ordinance of the city and county. He also stated, among other things, that a further license to the petitioner was refused by the Police Commissioners, because they had reason to believe that the business was carried on by him under his existing license in such a manner as to be offensive, and violative of the criminal laws of the State and of the rights of others. In support of this charge it was averred that in that business the petitioner was assisted by one whom he represented and claimed to be his wife, and that she had on one occasion stolen one hundred and sixty dollars from a person who visited his saloon, and been convicted of the offence in the Superior Court of the city and county, and sentenced to be imprisoned for one year, and on another occasion had stolen a watch and a scarf-pin from a person at the saloon, and was held to answer for the charge. It was also averred that there were more than sixteen citizens of San Francisco owning real estate in the block on which the petitioner carried on his business. It did not appear that on the hearing of the application any proof was offered of the facts alleged either in the petition or in the return. The case was heard upon exceptions or demurrer to the return. To that part respecting the alleged larceny by the wife and her conviction, the demurrer was on the ground that the return also showed that an appeal had been taken from the conviction, which was then pending, and that she might be acquitted of the offence charged.

Several objections were urged by the petitioner to the ordinance. Some of them were of a technical character, and could not be considered. Of the others only one was noticed, which was, that by it "the State of

California, by its officers, denies to him the equal protection of the laws,' and makes and enforces against him a law which abridges his privileges and immunities as a citizen of the United States," contrary to the Fourteenth Amendment to the Constitution of the United States.

The court held that the ordinance made the business of the petitioner depend upon the arbitrary will of others, and in that respect denied to him the equal protection of the laws, and accordingly ordered his discharge. 43 Fed. Rep. 243. From that order the case was brought to this court by appeal under §§ 763 and 764 of the Revised Statutes, this latter section as amended by the Act of March 3, 1885, c. 353, 23 Stat. 437.

Mr. Davis Louderback and *Mr. J. D. Page*, for appellant.

Mr. Alfred Clarke and *Mr. Joseph D. Redding*, for appellee.

MR. JUSTICE FIELD, after stating the case as above, delivered the opinion of the court.

It is undoubtedly true that it is the right of every citizen of the United States to pursue any lawful trade or business, under such restrictions as are imposed upon all persons of the same age, sex, and condition. But the possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order, and morals of the community. Even liberty itself, the greatest of all rights, is not unrestricted license to act according to one's own will. It is only freedom from restraint under conditions essential to the equal enjoyment of the same right by others. It is then liberty regulated by law. The right to acquire, enjoy, and dispose of property is declared in the Constitutions of several States to be one of the inalienable rights of man. But this declaration is not held to preclude the legislature of any State from passing laws respecting the acquisition, enjoyment, and disposition of property. What contracts respecting its acquisition and disposition shall be valid and what void or voidable; when they shall be in writing and when they may be made orally; and by what instruments it may be conveyed or mortgaged are subjects of constant legislation. And as to the enjoyment of property, the rule is general that it must be accompanied with such limitations as will not impair the equal enjoyment by others of their property. *Sic utere tuo ut alienum non lædas* is a maxim of universal application.

For the pursuit of any lawful trade or business, the law imposes similar conditions. Regulations respecting them are almost infinite, varying with the nature of the business. Some occupations by the noise made in their pursuit, some by the odors they engender, and some by the dangers accompanying them, require regulations as to the locality in which they shall be conducted. Some by the dangerous character of the articles used, manufactured, or sold require, also, special qualifications in the parties permitted to use, manufacture, or sell them. All this is but common knowledge, and would hardly be mentioned were it not for the position often taken, and vehemently pressed, that there is something

wrong in principle and objectionable in similar restrictions when applied to the business of selling by retail, in small quantities, spirituous and intoxicating liquors. It is urged that, as the liquors are used as a beverage, and the injury following them, if taken in excess, is voluntarily inflicted and is confined to the party offending, their sale should be without restrictions, the contention being that what a man shall drink, equally with what he shall eat, is not properly matter for legislation.

There is in this position an assumption of a fact which does not exist, that when the liquors are taken in excess the injuries are confined to the party offending. The injury, it is true, first falls upon him in his health, which the habit undermines; in his morals, which it weakens; and in the self-abasement which it creates. But, as it leads to neglect of business and waste of property and general demoralization, it affects those who are immediately connected with and dependent upon him. By the general concurrence of opinion of every civilized and Christian community, there are few sources of crime and misery to society equal to the dram shop, where intoxicating liquors, in small quantities, to be drunk at the time, are sold indiscriminately to all parties applying. The statistics of every State show a greater amount of crime and misery attributable to the use of ardent spirits obtained at these retail liquor saloons than to any other source. The sale of such liquors in this way has therefore been, at all times, by the courts of every State, considered as the proper subject of legislative regulation. Not only may a license be exacted from the keeper of the saloon before a glass of his liquors can be thus disposed of, but restrictions may be imposed as to the class of persons to whom they may be sold, and the hours of the day and the days of the week on which the saloons may be opened. Their sale in that form may be absolutely prohibited. It is a question of public expediency and public morality, and not of Federal law. The police power of the State is fully competent to regulate the business — to mitigate its evils or to suppress it entirely. There is no inherent right in a citizen to thus sell intoxicating liquors by retail; it is not a privilege of a citizen of the State or of a citizen of the United States. As it is a business attended with danger to the community it may, as already said, be entirely prohibited, or be permitted under such conditions as will limit to the utmost its evils. The manner and extent of regulation rest in the discretion of the governing authority. That authority may vest in such officers as it may deem proper the power of passing upon applications for permission to carry it on, and to issue licenses for that purpose. It is a matter of legislative will only. As in many other cases, the officers may not always exercise the power conferred upon them with wisdom or justice to the parties affected. But that is a matter which does not affect the authority of the State; nor is it one which can be brought under the cognizance of the courts of the United States.

The Constitution of California vests in the municipality of the city and county of San Francisco the right to make "all such local, police,

sanitary, and other regulations as are not in conflict with general laws." The Supreme Court of the State has decided that the ordinance in question, under which the petitioner was arrested and is held in custody, was thus authorized and is valid. That decision is binding upon us unless some inhibition of the Constitution or of a law of the United States is violated by it. We do not perceive that there is any such violation. The learned Circuit Judge[1] saw in the provisions of the ordinance empowering the police commissioners to grant or refuse their assent to the application of the petitioner for a license, or failing to obtain their assent upon application, requiring it to be given upon the recommendation of twelve citizens owning real estate in the block or square in which his business as a retail dealer in liquors was to be carried on, the delegation of arbitrary discretion to the police commissioners, and to real estate owners of the block, which might be and was exercised to deprive the petitioner of the equal protection of the laws. And he considers that his view in this respect is supported by the decision in *Yick Wo* v. *Hopkins*, 118 U. S. 356.

In that case it appeared that an ordinance of the city and county of San Francisco passed in July, 1880, declared that it should be unlawful after its passage "for any person or persons to establish, maintain, or carry on a laundry within the corporate limits of the city and county of San Francisco without having first obtained the consent of the board of supervisors, except the same be located in a building constructed either of brick or stone." The ordinance did not limit the power of the supervisors to grant such consent, where the business was carried on in wooden buildings. It left that matter to the arbitrary discretion of the board. Under the ordinance the consent of the supervisors was refused to the petitioner to carry on the laundry business in wooden buildings, where it had been conducted by him for over twenty years. He had, at the time, a certificate from the board of fire wardens that his premises had been inspected by them, and upon such inspection they had found all proper arrangements for carrying on the business, and that all proper precautions had been taken to comply with the provisions of the ordinance defining the fire limits of the city and county; and also a certificate from the health officer that the premises had been inspected by him and were properly and sufficiently drained, and that all proper arrangements for carrying on the business of a laundry without injury to the sanitary conditions of the neighborhood had been complied with. The limits of the city and county embraced a territory some ten miles wide by fifteen or more in length, much of it being occupied at the time, as stated by the Circuit Judge, as farming and pasture lands, and much of it being unoccupied sand banks, in many places without buildings within a quarter or half a mile of each other. It appeared also that, in the practical administration of the ordinance, consent was given by the board of supervisors to some parties to carry on the laun-

[1] For his opinion, see *In re Christensen*, 43 Fed. Rep. 245. — Ed.

dry business in buildings other than those of brick or stone, but that all applications coming from the Chinese, of whom the petitioner was one, to carry on the business in such buildings were refused. This court said of the ordinance: "It allows without restriction the use for such purposes of buildings of brick or stone; but, as to wooden buildings, constituting nearly all those in previous use, it divides the owners or occupants into two classes, not having respect to their personal character and qualifications for the business, nor the situation and nature and adaptation of the buildings themselves, but merely by an arbitrary line, on one side of which are those who are permitted to pursue their industry by the mere will and consent of the supervisors, and, on the other, those from whom that consent is withheld, at their mere will and pleasure. And both classes are alike only in this, that they are tenants at will, under the supervisors, of their means of living. The ordinance, therefore, also differs from the not unusual case, where discretion is lodged by law in public officers or bodies to grant or withhold licenses to keep taverns, or places for the sale of spirituous liquors and the like, when one of the conditions is that the applicant shall be a fit person for the exercise of the privilege, because in such cases the fact of fitness is submitted to the judgment of the officer, and calls for the exercise of a discretion of a judicial nature."

It will thus be seen that that case was essentially different from the one now under consideration, the ordinance there held invalid vesting uncontrolled discretion in the board of supervisors with reference to a business harmless in itself and useful to the community; and the discretion appearing to have been exercised for the express purpose of depriving the petitioner of a privilege that was extended to others. In the present case the business is not one that any person is permitted to carry on without a license, but one that may be entirely prohibited or subjected to such restrictions as the governing authority of the city may prescribe.

It would seem that some stress is placed upon the allegation of the petitioner that there were not twelve persons owners of real property in the block where the business was to be carried on. This allegation is denied in the return, which alleges that there were more than sixteen such property holders. As the case was heard upon exceptions or demurrer to the return, its averments must be taken as true. At common law no evidence was necessary to support the return. It was deemed to import verity until impeached. Hurd on Habeas Corpus, book 2, c. 3, §§ 8, 9, and 10; Church on Same, § 122. And this rule is not changed by any statute of the United States. It must, therefore, be considered as a fact in the case that there were more than sixteen owners of real estate in the block. But if the fact were otherwise, and there was not the number stated in the petition, the result would not be affected. If there were no property holders in the block, the discretionary authority would be exercised finally by the police commissioners, and their refusal to grant the license is not a matter for review by this court, as it violates

no principle of Federal law. We however find in the return a statement which would fully justify the action of the commissioners. It is averred that in the conduct of the liquor business the petitioner was assisted by his wife, and that she was twice arrested for larcenies committed from persons visiting his saloon, and in one case convicted of the offence and sentenced to be imprisoned, and in the other held to answer. These larcenies alone were a sufficient indication of the character of the place in which the business was conducted, for the exercise of the discretion of the police commissioners in refusing a further license to the petitioner.

The order discharging the petitioner must be

Reversed, and the cause remanded with directions to take further proceedings in conformity with this opinion, and it is so ordered.[1]

BUDD *v.* NEW YORK.
NEW YORK EX REL. ANNAN *v.* WALSH.
NEW YORK EX REL. PINTO *v.* WALSH.

SUPREME COURT OF THE UNITED STATES. 1892.

[143 *U. S.* 517.][2]

[ERROR to the Superior Court of Buffalo, New York, and to the Supreme Court of New York.]

Mr. Benjamin F. Tracy and *Mr. William N. Dykman*, for Annan and Pinto, plaintiffs in error. *Mr. Spencer Clinton*, for Budd, plaintiff in error. *Mr. J. A. Hyland*, for the defendants in error in 644 and 645. *Mr. George T. Quinby* filed a brief for the defendants in error in 719 [*Budd* v. *N. Y.*].

MR. JUSTICE BLATCHFORD, after stating the case, delivered the opinion of the court.

The main question involved in these cases is whether this court will adhere to its decision in *Munn* v. *Illinois*, 94 U. S. 113.

The Court of Appeals of New York, in *People* v. *Budd*, 117 N. Y. 1, held that chapter 581 of the laws of 1888 did not violate the constitutional guarantee protecting private property, but was a legitimate exercise of the police power of the State over a business affected with a public interest. In regard to the indictment against Budd, it held

[1] See *Ex parte Sing Lee*, 96 Cal. 354 (1892). Compare *Chic. Ry. Co.* v. *Minn.*, *ante*, p. 660, and note, p. 673. In *Sharp* v. *Wakefield*, [1891] Appeal Cases, 173, 182, a case relating to licenses for selling intoxicating liquors, LORD BRAMWELL said: "Houses of public entertainment and for the sale of drink have been in this country, and in many others, the subject of regulation for police purposes; not for what one may call economic purposes, like the fixing of the price of bread or the wages of labor, but for the maintenance of order."— ED.

[2] The facts are sufficiently given in the opinion. — ED.

that the charge of exacting more than the statute rate for elevating was proved, and that as to the alleged overcharge for shovelling, it appeared that the carrier was compelled to pay $4 for each 1000 bushels of grain, which was the charge of the shovellers' union, by which the work was performed, and that the union paid the elevator, for the use of the latter's steam shovel, $1.75 for each 1000 bushels. The court held that there was no error in submitting to the jury the question as to the overcharge for shovelling; that the intention of the statute was to confine the charge to the "actual cost" of the outside labor required; and that a violation of the Act in that particular was proved; but that, as the verdict and sentence were justified by proof of the overcharge for elevating, even if the alleged overcharge for shovelling was not made out, the ruling of the Superior Court of Buffalo could not have prejudiced Budd. Of course, this court, in these cases, can consider only the Federal questions involved.

It is claimed, on behalf of Budd, that the statute of the State of New York is unconstitutional, because contrary to the provisions of section 1 of the Fourteenth Amendment to the Constitution of the United States, in depriving the citizen of his property without due process of law; that it is unconstitutional in fixing the maximum charge for elevating, receiving, weighing and discharging grain by means of floating and stationary elevators and warehouses at five-eighths of one cent a bushel and in forbidding the citizen to make any profit upon the use of his property or labor; and that the police power of the State extends only to property or business which is devoted by its owner to the public, by a grant to the public of the right to demand its use. It is claimed on behalf of Annan and Pinto that floating and stationary elevators in the port of New York are private property, not affected with any public interest, and not subject to the regulation of rates.

"Trimming" in the canal-boat, spoken of in the statute, is shovelling the grain from one place to another, and is done by longshoremen with scoops or shovels; and "trimming" the ship's cargo when loading is stowing it and securing it for the voyage. Floating elevators are primarily boats. Some are scows, and have to be towed from place to place by steam tugs; but the majority are propellers. When the floating elevator arrives at the ship and makes fast alongside of her, the canal-boat carrying the grain is made fast on the other side of the elevator. A long wooden tube, called "the leg of the elevator," and spoken of in the statute, is lowered from the tower of the elevator so that its lower end enters the hold of the canal-boat in the midst of the grain. The "spout" of the elevator is lowered into the ship's hold. The machinery of the elevator is then set in motion, the grain is elevated out of the canal-boat, received and weighed in the elevator, and discharged into the ship. The grain is lifted in "buckets" fastened to an endless belt which moves up and down in the leg of the elevator. The lower end of the leg is buried in the grain so that the buckets are

submerged in it. As the belt moves, each bucket goes up full of grain, and at the upper end of the leg, in the elevator tower, empties its contents into the hopper which receives the grain. The operation would cease unless the grain was trimmed or shovelled to the leg as fast as it is carried up by the buckets. There is a gang of longshoremen who shovel the grain from all parts of the hold of the canal-boat to "the leg of the elevator," so that the buckets may be always covered with grain at the lower end of the leg. This "trimming or shovelling to the leg of the elevator," when the canal-boat is unloading, is that part of the work which the elevator owner is required to do at the "actual cost."

In the Budd and Pinto cases, the elevator was a stationary one on land; and in the Annan case, it was a floating elevator. In the Budd case, the Court of Appeals held that the words "actual cost," used in the statute, were intended to exclude any charge by the elevator beyond the sum specified, for the use of its machinery in shovelling, and the ordinary expenses of operating it, and to confine the charge to the actual cost of the outside labor required for trimming and bringing the grain to the leg of the elevator; and that the purpose of the statute could be easily evaded and defeated if the elevator owner were permitted to separate the services, and charge for the use of the steam shovel any sum which might be agreed upon between him and the shovellers' union, and thereby, under color of charging for the use of his steam shovel, exact from the carrier a sum for elevating beyond the rate fixed therefor by the statute.

The Court of Appeals, in its opinion in the Budd case, considered fully the question as to whether the legislature had power, under the Constitution of the State of New York, to prescribe a maximum charge for elevating grain by stationary elevators, owned by individuals or corporations who had appropriated their property to that use and were engaged in that business; and it answered the inquiry in the affirmative. It also reviewed the case of *Munn* v. *Illinois*, 94 U. S. 113, and arrived at the conclusion that this court there held that the legislation in question in that case was a lawful exercise of legislative power, and did not infringe that clause of the Fourteenth Amendment to the Constitution of the United States which provides that no State shall "deprive any person of life, liberty or property without due process of law;" and that the legislation in question in that case was similar to, and not distinguishable in principle from, the Act of the State of New York.

In regard to *Munn* v. *Illinois*, the Court of Appeals said that the question in that case was raised by an individual owning an elevator and warehouse in Chicago, erected for, and in connection with which he had carried on, the business of elevating and storing grain, many years prior to the passage of the Act in question, and prior also to the adoption of the amendment to the Constitution of Illinois in 1870, declaring all elevators and warehouses, where grain or other property

is stored for a compensation, to be public warehouses. The Court of Appeals then cited the cases of *People ex rel. etc.* v. *B. & A. R. R. Co.*, 70 N. Y. 569; *Bertholf* v. *O'Reilly*, 74 N. Y. 509; *B. E. S. R. R. Co.* v. *B. S. R. R. Co.*, 111 N. Y. 132; and *People* v. *King*, 110 N. Y. 418, as cases in which *Munn* v. *Illinois* had been referred to by it, and said that it could not overrule and disregard *Munn* v. *Illinois* without subverting the principle of its own decision in *People* v. *King*, and certainly not without disregarding many of its deliberate expressions in approval of the principle of *Munn* v. *Illinois*.

The Court of Appeals further examined the question whether the power of the legislature to regulate the charge for elevating grain, where the business was carried on by individuals upon their own premises, fell within the scope of the police power, and whether the statute in question was necessary for the public welfare. It affirmed that, while no general power resided in the legislature to regulate private business, prescribe the conditions under which it should be conducted, fix the price of commodities or services, or interfere with freedom of contract, and while the merchant, manufacturer, artisan and laborer, under our system of government, are left to pursue and provide for their own interests in their own way, untrammelled by burdensome and restrictive regulations, which, however common in rude and irregular times, are inconsistent with constitutional liberty, yet there might be special conditions and circumstances which brought the business of elevating grain within principles which, by the common law and the practice of free governments, justified legislative control and regulation in the particular case, so that the statute would be constitutional; that the control which, by common law and by statute, was exercised over common carriers, was conclusive upon the point that the right of the legislature to regulate the charges for services in connection with the use of property did not depend in every case upon the question whether there was a legal monopoly, or whether special governmental privileges or protection had been bestowed; that there were elements of publicity in the business of elevating grain which peculiarly affected it with a public interest; that those elements were found in the nature and extent of the business, its relation to the commerce of the State and country, and the practical monopoly enjoyed by those engaged in it; that about 120,000,000 bushels of grain come annually to Buffalo from the West; that the business of elevating grain at Buffalo is connected mainly with lake and canal transportation; that the grain received at New York in 1887 by way of the Erie Canal and Hudson River, during the season of canal navigation, exceeded 46,000,000 bushels, an amount very largely in excess of the grain received during the same period by rail and by river and coastwise vessels; that the elevation of that grain from lake vessels to canal-boats takes place at Buffalo, where there are thirty or forty elevators, stationary and floating; that a large proportion of the surplus cereals of the country passes through the elevators at Buffalo and finds

submerged in it. As the belt moves, each bucket goes up full of grain, and at the upper end of the leg, in the elevator tower, empties its contents into the hopper which receives the grain. The operation would cease unless the grain was trimmed or shovelled to the leg as fast as it is carried up by the buckets. There is a gang of longshoremen who shovel the grain from all parts of the hold of the canal-boat to "the leg of the elevator," so that the buckets may be always covered with grain at the lower end of the leg. This "trimming or shovelling to the leg of the elevator," when the canal-boat is unloading, is that part of the work which the elevator owner is required to do at the "actual cost."

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The Court of Appeals further examined the question whether the power of the legislature to regulate the charge for elevating grain, where the business was carried on by individuals upon their own premises, fell within the scope of the police power, and whether the statute in question was necessary for the public welfare. It affirmed that, while no general power resided in the legislature to regulate private business, prescribe the conditions under which it should be conducted, fix the price of commodities or services, or interfere with freedom of contract, and while the merchant, manufacturer, artisan and laborer, under our system of government, are left to pursue and provide for their own interests in their own way, untrammelled by burdensome and restrictive regulations, which, however common in rude and irregular times, are inconsistent with constitutional liberty, yet there might be special conditions and circumstances which brought the business of elevating grain within principles which, by the common law and the practice of free governments, justified legislative control and regulation in the particular case, so that the statute would be constitutional; that the control which, by common law and by statute, was exercised over common carriers, was conclusive upon the point that the right of the legislature to regulate the charges for services in connection with the use of property did not depend in every case upon the question whether there was a legal monopoly, or whether special governmental privileges or protection had been bestowed; that there were elements of publicity in the business of elevating grain which peculiarly affected it with a public interest; that those elements were found in the nature and extent of the business, its relation to the commerce of the State and country, and the practical monopoly enjoyed by those engaged in it; that about 120,000,000 bushels of grain come annually to Buffalo from the West; that the business of elevating grain at Buffalo is connected mainly with lake and canal transportation; that the grain received at New York in 1887 by way of the Erie Canal and Hudson River, during the season of canal navigation, exceeded 46,000,000 bushels, an amount very largely in excess of the grain received during the same period by rail and by river and coastwise vessels; that the elevation of that grain from lake vessels to canal-boats takes place at Buffalo, where there are thirty or forty elevators, stationary and floating; that a large proportion of the surplus cereals of the country passes through the elevators at Buffalo and finds

its way through the Erie Canal and Hudson River to the seaboard at New York, whence it is distributed to the markets of the world; that the business of elevating grain is an incident to the business of transportation, the elevators being indispensable instrumentalities in the business of the common carrier, and in a broad sense performing the work of carriers, being located upon or adjacent to the waters of the State, and transferring the cargoes of grain from the lake vessels to the canal-boats, or from the canal-boats to the ocean vessels, and thereby performing an essential service in transportation; that by their means the transportation of grain by water from the upper lakes to the seaboard is rendered possible; that the business of elevating grain thus has a vital relation to commerce in one of its most important aspects; that every excessive charge made in the course of the transportation of grain is a tax upon commerce; that the public has a deep interest that no exorbitant charges shall be exacted at any point, upon the business of transportation; and that whatever impaired the usefulness of the Erie Canal as a highway of commerce involved the public interest.

The Court of Appeals said that, in view of the foregoing exceptional circumstances, the business of elevating grain was affected with a public interest, within the language of Lord Chief Justice Hale, in his treatise *De Portibus Maris* (Harg. Law Tracts, 78); that the case fell within the principle which permitted the legislature to regulate the business of common carriers, ferrymen and hackmen, and interest on the use of money; that the underlying principle was, that business of certain kinds holds such a peculiar relation to the public interest that there is superinduced upon it the right of public regulation; and that the court rested the power of the legislature to control and regulate elevator charges upon the nature and extent of the business, the existence of a virtual monopoly, the benefit derived from the Erie Canal's creating the business and making it possible, the interest to trade and commerce, the relation of the business to the property and welfare of the State, and the practice of legislation in analogous cases, collectively creating an exceptional case and justifying legislative regulation.

The opinion further said that the criticism to which the case of *Munn* v. *Illinois* had been subjected proceeded mainly upon a limited and strict construction and definition of the police power; that there was little reason, under our system of government, for placing a close and narrow interpretation on the police power, or restricting its scope so as to hamper the legislative power in dealing with the varying necessities of society and the new circumstances as they arise calling for legislative intervention in the public interest; and that no serious invasion of constitutional guarantees by the legislature could withstand for a long time the searching influence of public opinion, which was sure to come sooner or later to the side of law, order and justice, however it might have been swayed for a time by passion or prejudice, or whatever aberrations might have marked its course.

We regard these views which we have referred to as announced by the Court of Appeals of New York, so far as they support the validity of the statute in question, as sound and just. . . .

This court, in *Munn* v. *Illinois*, the opinion being delivered by Chief Justice Waite, and there being a published dissent by only two justices, considered carefully the question of the repugnancy of the Illinois statute to the Fourteenth Amendment. It said, that under the powers of government inherent in every sovereignty, "the government regulates the conduct of its citizens one towards another, and the manner in which each shall use his own property, when such regulation becomes necessary for the public good;" and that, "in their exercise it has been customary in England from time immemorial, and in this country from its first colonization, to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers, etc., and in so doing to fix a maximum of charge to be made for services rendered, accommodations furnished, and articles sold." It was added: "To this day, statutes are to be found in many of the States upon some or all these subjects; and we think it has never yet been successfully contended that such legislation came within any of the constitutional prohibitions against interference with private property." It announced as its conclusions that, down to the time of the adoption of the Fourteenth Amendment, it was not supposed that statutes regulating the use, or even the price of the use, of private property necessarily deprived an owner of his property without due process of law; that, when private property was devoted to a public use, it was subject to public regulation; that Munn and Scott, in conducting the business of their warehouse, pursued a public employment and exercised a sort of public office, in the same sense as did a common carrier, miller, ferryman, innkeeper, wharfinger, baker, cartman or hackney coachman; that they stood in the very gateway of commerce and took toll from all who passed; that their business tended "to a common charge," and had become a thing of public interest and use; that the toll on the grain was a common charge; and that, according to Lord Chief Justice Hale, every such warehouseman "ought to be under a public regulation, *viz.*," that he "take but reasonable toll."

This court further held in *Munn* v. *Illinois*, that the business in question was one in which the whole public had a direct and positive interest; that the statute of Illinois simply extended the law so as to meet a new development of commercial progress; that there was no attempt to compel the owners of the warehouses to grant the public an interest in their property, but to declare their obligations if they used it in that particular manner; that it mattered not that Munn and Scott had built their warehouses and established their business before the regulations complained of were adopted; that, the property being clothed with a public interest, what was a reasonable compensation for its use was not a judicial, but a legislative question; that, in countries where the common law prevailed, it had been customary from time

immemorial for the legislature to declare what should be a reasonable compensation under such circumstances, or to fix a maximum beyond which any charge made would be unreasonable; that the warehouses of Munn and Scott were situated in Illinois and their business was carried on exclusively in that State; that the warehouses were no more necessarily a part of commerce itself than the dray or the cart by which, but for them, grain would be transferred from one railroad station to another; that their regulation was a thing of domestic concern; that, until Congress acted in reference to their interstate relations, the State might exercise all the powers of government over them, even though in so doing it might operate indirectly upon commerce outside its immediate jurisdiction; and that the provision of § 9 of article 1 of the Constitution of the United States operated only as a limitation of the powers of Congress, and did not affect the States in the regulation of their domestic affairs. The final conclusion of the court was, that the Act of Illinois was not repugnant to the Constitution of the United States; and the judgment was affirmed.

In *Sinking Fund Cases*, 99 U. S. 700, 747, Mr. Justice Bradley, who was one of the justices who concurred in the opinion of the court in *Munn* v. *Illinois*, speaking of that case, said: "The inquiry there was as to the extent of the police power in cases where the public interest is affected; and we held that when an employment or business becomes a matter of such public interest and importance as to create a common charge or burden upon the citizen; in other words, when it becomes a practical monopoly, to which the citizen is compelled to resort, and by means of which a tribute can be exacted from the community, it is subject to regulation by the legislative power." Although this was said in a dissenting opinion in *Sinking Fund Cases*, it shows what Mr. Justice Bradley regarded as the principle of the decision in *Munn* v. *Illinois*.

In *Spring Valley Water Works* v. *Schottler*, 110 U. S. 347, 354, this court said: "That it is within the power of the government to regulate the prices at which water shall be sold by one who enjoys a virtual monopoly of the sale, we do not doubt. That question is settled by what was decided on full consideration in *Munn* v. *Illinois*, 94 U. S. 113. As was said in that case, such regulations do not deprive a person of his property without due process of law."

In *Wabash &c. Railway Co.* v. *Illinois*, 118 U. S. 557, 569, Mr. Justice Miller, who had concurred in the judgment in *Munn* v. *Illinois*, referred, in delivering the opinion of the court, to that case, and said: "That case presented the question of a private citizen, or unincorporated partnership, engaged in the warehousing business in Chicago, free from any claim of right or contract under an Act of Incorporation of any State whatever, and free from the question of continuous transportation through several States. And in that case the court was presented with the question, which it decided, whether any one engaged in a public business, in which all the public had a right to require his

service, could be regulated by Acts of the Legislature in the exercise of this public function and public duty, so far as to limit the amount of charges that should be made for such services."

In *Dow* v. *Beidelman*, 125 U. S. 680, 686, it was said by Mr. Justice Gray, in delivering the opinion of the court, that in *Munn* v. *Illinois* the court, after affirming the doctrine that by the common law carriers or other persons exercising a public employment could not charge more than a reasonable compensation for their services, and that it is within the power of the legislature "to declare what shall be a reasonable compensation for such services, or perhaps, more properly speaking, to fix a maximum beyond which any charge made would be unreasonable," said that to limit the rate of charges for services rendered in the public employment, or for the use of property in which the public has an interest, was only changing a regulation which existed before, and established no new principle in the law, but only gave a new effect to an old one.

In *Chicago &c. Railway Co.* v. *Minnesota*, 134 U. S. 418, 461, it was said by Mr. Justice Bradley, in his dissenting opinion, in which Mr. Justice Gray and Mr. Justice Lamar concurred, that the decision of the court in that case practically overruled *Munn* v. *Illinois;* but the opinion of the court did not say so, nor did it refer to *Munn* v. *Illinois;* and we are of opinion that the decision in the case in 134 U. S. is, as will be hereafter shown, quite distinguishable from the present cases.

It is thus apparent that this court has adhered to the decision in *Munn* v. *Illinois* and to the doctrines announced in the opinion of the court in that case; and those doctrines have since been repeatedly enforced in the decisions of the courts of the States.

In *Railway* v. *Railway*, 30 Ohio St. 604, 616, in 1877, it was said, citing *Munn* v. *Illinois:* "When the owner of property devotes it to a public use, he, in effect, grants to the public an interest in such use, and must, to the extent of the use, submit to be controlled by the public, for the common good, as long as he maintains the use." That was a decision by the Supreme Court Commission of Ohio.

In *State* v. *Gas Company*, 34 Ohio St. 572, 582, in 1878, *Munn* v. *Illinois* was cited with approval, as holding that where the owner of property devotes it to a use in which the public have an interest, he in effect grants to the public an interest in such use, and must, to the extent of that interest, submit to be controlled by the public, for the common good, so long as he maintains the use; and the court added that in *Munn* v. *Illinois* the principle was applied to warehousemen engaged in receiving and storing grain; that it was held that their rates of charges were subject to legislative regulation; and that the principle applied with greater force to corporations when they were invested with franchises to be exercised to subserve the public interest.

The Supreme Court of Illinois, in *Ruggles* v. *People*, 91 Illinois, 256, 262, in 1878, cited *Munn* v. *People*, 69 Illinois, 80, which was

affirmed in *Munn* v. *Illinois*, as holding that it was competent for the General Assembly to fix the maximum charges by individuals keeping public warehouses for storing, handling and shipping grain, and that, too, when such persons had derived no special privileges from the State, but were, as citizens of the State, exercising the business of storing and handling grain for individuals.

The Supreme Court of Alabama, in *Davis* v. *The State*, 68 Alabama, 58, in 1880, held that a statute declaring it unlawful, within certain counties, to transport or move, after sunset and before sunrise of the succeeding day, any cotton in the seed, but permitting the owner or purchaser to remove it from the field to a place of storage, was not unconstitutional. Against the argument that the statute was such a despotic interference with the rights of private property as to be tantamount, in its practical effect, to a deprivation of ownership "without due process of law," the court said that the statute sought only to regulate and control the transportation of cotton in one particular condition of it, and was a mere police regulation, to which there was no constitutional objection, citing *Munn* v. *Illinois*. It added, that the object of the statute was to regulate traffic in the staple agricultural product of the State, so as to prevent a prevalent evil, which, in the opinion of the law-making power, might do much to demoralize agricultural labor and to destroy the legitimate profits of agricultural pursuits, to the public detriment, at least within the specified territory.

In *Baker* v. *The State*, 54 Wisconsin, 368, 373, in 1882, *Munn* v. *Illinois* was cited with approval by the Supreme Court of Wisconsin, as holding that the Legislature of Illinois had power to regulate public warehouses, and the warehousing and inspection of grain within that State, and to enforce its regulations by penalties, and that such legislation was not in conflict with any provision of the Federal Constitution.

The Court of Appeals of Kentucky, in 1882, in *Nash* v. *Page*, 80 Kentucky, 539, 545, cited *Munn* v. *Illinois*, as applicable to the case of the proprietors of tobacco warehouses in the city of Louisville, and held that the character of the business of the tobacco warehousemen was that of a public employment, such as made them subject, in their charges and their mode of conducting business, to legislative regulation and control, as having a practical monopoly of the sales of tobacco at auction.

In 1884, the Supreme Court of Pennsylvania, in *Girard Storage Co.* v. *Southwark Co.*, 105 Penn. St. 248, 252, cited *Munn* v. *Illinois* as involving the rights of a private person, and said that the principle involved in the ruling of this court was, that where the owner of such property as a warehouse devoted it to a use in which the public had an interest, he in effect granted to the public an interest in such use, and must, therefore, to the extent thereof, submit to be controlled by the public for the common good, as long as he maintained that use.

In *Sawyer* v. *Davis*, 136 Mass. 239, in 1884, the Supreme Judicial Court of Massachusetts said that nothing is better established than the

power of the legislature to make what are called police regulations, declaring in what manner property shall be used and enjoyed and business carried on, with a view to the good order and benefit of the community, even though they may interfere to some extent with the full enjoyment of private property, and although no compensation is given to a person so inconvenienced; and *Munn* v. *Illinois* was cited as holding that the rules of the common law which had from time to time been established, declaring or limiting the right to use or enjoy property, might themselves be changed as occasion might require.

The Supreme Court of Indiana, in 1885, in *Brechbill* v. *Randall*, 102 Indiana, 528, held that a statute was valid which required persons selling patent rights to file with the clerk of the county a copy of the patent, with an affidavit of genuineness and authority to sell, on the ground that the State had power to make police regulations for the protection of its citizens against fraud and imposition; and the court cited *Munn* v. *Illinois* as authority.

The Supreme Court of Nebraska, in 1885, in *Webster Telephone Case*, 17 Nebraska, 126, held that when a corporation or person assumed and undertook to supply a public demand, made necessary by the requirements of the commerce of the country, such as a public telephone, such demand must be supplied to all alike, without discrimination; and *Munn* v. *Illinois* was cited by the prevailing party and by the court. The defendant was a corporation, and had assumed to act in a capacity which was to a great extent public, and had undertaken to satisfy a public want or necessity, although it did not possess any special privileges by statute or any monopoly of business in a given territory; yet it was held that, from the very nature and character of its business, it had a monopoly of the business which it transacted. The court said that no statute had been deemed necessary to aid the courts in holding that where a person or company undertook to supply a public demand, which was "affected with a public interest," it must supply all alike who occupied a like situation, and not discriminate in favor of or against any.

In *Stone* v. *Yazoo & Miss. Valley R. Co.*, 62 Mississippi, 607, 639, the Supreme Court of Mississippi, in 1885, cited *Munn* v. *Illinois* as deciding that the regulation of warehouses for the storage of grain, owned by private individuals, and situated in Illinois, was a thing of domestic concern and pertained to the State, and as affirming the right of the State to regulate the business of one engaged in a public employment therein, although that business consisted in storing and transferring immense quantities of grain in its transit from the fields of production to the markets of the world.

In *Hockett* v. *The State*, 105 Indiana, 250, 258, in 1885, the Supreme Court of Indiana held that a statute of the State which prescribed the maximum price which a telephone company should charge for the use of its telephones was constitutional, and that in legal contemplation all the instruments and appliances used by a telephone

company in the transaction of its business were devoted to a public use, and the property thus devoted became a legitimate subject of legislative regulation. It cited *Munn* v. *Illinois* as a leading case in support of that proposition, and said that although that case had been the subject of comment and criticism, its authority as a precedent remained unshaken. This doctrine was confirmed in *Central Union Telephone Co.* v. *Bradbury*, 106 Indiana, 1, in the same year, and in *Central Union Telephone Co.* v. *The State*, 118 Indiana, 194, 207, in 1888, in which latter case *Munn* v. *Illinois* was cited by the court.

In *Chesapeake & Potomac Telephone Co.* v. *Balto. & Ohio Telegraph Co.*, 66 Maryland, 399, 414, in 1886, it was held that the telegraph and the telephone were public vehicles of intelligence, and those who owned or controlled them could no more refuse to perform impartially the functions which they had assumed to discharge than a railway company, as a common carrier, could rightfully refuse to perform its duty to the public; and that the legislature of the State had full power to regulate the services of telephone companies, as to the parties to whom facilities should be furnished. The court cited *Munn* v. *Illinois*, and said that it could no longer be controverted that the legislature of a State had full power to regulate and control, at least within reasonable limits, public employments and property used in connection therewith; that the operation of the telegraph and the telephone in doing a general business was a public employment, and the instruments and appliances used were property devoted to a public use and in which the public had an interest; and that, such being the case, the owner of the property thus devoted to public use must submit to have that use and employment regulated by public authority for the common good.

In the Court of Chancery of New Jersey, in 1889, in *Delaware, &c. Railroad Co.* v. *Central Stock-Yard Co.*, 45 N. J. Eq. 50, 60, it was held that the legislature had power to declare what services warehousemen should render to the public, and to fix the compensation that might be demanded for such services; and the court cited *Munn* v. *Illinois* as properly holding that warehouses for the storage of grain must be regarded as so far public in their nature as to be subject to legislative control, and that when a citizen devoted his property to a use in which the public had an interest, he in effect granted to the public an interest in that use, and rendered himself subject to control, in that use, by the body politic.

In *Zanesville* v. *Gas-Light Company*, 47 Ohio St. 1, in 1889, it was said by the Supreme Court of Ohio, that the principle was well established, that where the owner of property devotes it to a use in which the public have an interest, he in effect grants to the public an interest in such use, and must to the extent of that interest submit to be controlled by the public for the common good, as long as he maintains the use; and that such was the point of the decision in *Munn* v. *Illinois*.

We must regard the principle maintained in *Munn* v. *Illinois* as firmly established; and we think it covers the present cases, in respect to the charge for elevating, receiving, weighing and discharging the grain, as well as in respect to the charge for trimming and shovelling to the leg of the elevator when loading, and trimming the cargo when loaded. If the shovellers or scoopers chose, they might do the shovelling by hand, or might use a steam-shovel. A steam-shovel is owned by the elevator owner, and the power for operating it is furnished by the engine of the elevator; and if the scooper uses the steam-shovel, he pays the elevator owner for the use of it.

The answer to the suggestion that by the statute the elevator owner is forbidden to make any profit from the business of shovelling to the leg of the elevator is that made by the Court of Appeals of New York in the case of Budd, that the words "actual cost," used in the statute, were intended to exclude any charge by the elevator owner, beyond the sum specified for the use of his machinery in shovelling and the ordinary expenses of operating it, and to confine the charge to the actual cost of the outside labor required for trimming and bringing the grain to the leg of the elevator; and that the purpose of the statute could be easily evaded and defeated if the elevator owner was permitted to separate the services, and to charge for the use of his steam-shovel any sum which might be agreed upon between himself and the shovellers' union, and thereby, under color of charging for the use of his steam-shovel, to exact of the carrier a sum for elevating beyond the rate fixed by the statute.

We are of opinion that the Act of the Legislature of New York is not contrary to the Fourteenth Amendment to the Constitution of the United States, and does not deprive the citizen of his property without due process of law; that the Act, in fixing the maximum charges which it specifies, is not unconstitutional, nor is it so in limiting the charge for shovelling to the actual cost thereof; and that it is a proper exercise of the police power of the State.

On the testimony in the cases before us the business of elevating grain is a business charged with a public interest, and those who carry it on occupy a relation to the community analogous to that of common carriers. The elevator owner, in fact, retains the grain in his custody for an appreciable period of time, because he receives it into his custody, weighs it, and then discharges it, and his employment is thus analogous to that of a warehouseman. In the actual state of the business the passage of the grain to the city of New York and other places on the seaboard would, without the use of elevators, be practically impossible. The elevator at Buffalo is a link in the chain of transportation to the seaboard, and the elevator in the harbor of New York is a like link in the transportation abroad by sea. The charges made by the elevator influence the price of grain at the point of destination on the seaboard, and that influence extends to the prices of grain at the places abroad to which it goes. The elevator is devoted by its owner,

who engages in the business, to a use in which the public has an interest, and he must submit to be controlled by public legislation for the common good.

It is contended in the briefs for the plaintiffs in error in the Annan and Pinto cases that the business of the relators in handling grain was wholly private, and not subject to regulation by law; and that they had received from the State no charter, no privileges and no immunity, and stood before the law on a footing with the laborers they employed to shovel grain, and were no more subject to regulation than any other individual in the community. But these same facts existed in *Munn* v. *Illinois*. In that case, the parties offending were private individuals, doing a private business, without any privilege or monopoly granted to them by the State. Not only is the business of elevating grain affected with a public interest, but the records show that it is an actual monopoly, besides being incident to the business of transportation and to that of a common carrier, and thus of a quasi-public character. The Act is also constitutional as an exercise of the police power of the State.

So far as the statute in question is a regulation of commerce, it is a regulation of commerce only on the waters of the State of New York. It operates only within the limits of that State, and is no more obnoxious as a regulation of interstate commerce than was the statute of Illinois in respect to warehouses, in *Munn* v. *Illinois*. It is of the same character with navigation laws in respect to navigation within the State, and laws regulating wharfage rates within the State, and other kindred laws.[1] . . .

In the cases before us, the records do not show that the charges fixed by the statute are unreasonable, or that property has been taken without due process of law, or that there has been any denial of the equal protection of the laws; even if under any circumstances we could determine that the maximum rate fixed by the legislature was unreasonable.

In *Georgia Banking Co.* v. *Smith*, 128 U. S. 174, 179, in the opinion of the court, delivered by Mr. Justice Field, it was said that this court had adjudged in numerous instances that the legislature of a State had the power to prescribe the charges of a railroad company for the carriage of persons and merchandise within its limits, in the absence of any contract to the contrary, subject to the limitation that the carriage is not required without reward, or upon conditions amounting to the taking of property for public use without just compensation, and that what is done does not amount to a regulation of foreign or interstate commerce.

It is further contended for the plaintiffs in error that the statute in question violates the Fourteenth Amendment, because it takes from the elevator owners the equal protection of the laws, in that it applies

[1] For a passage omitted here, see *ante*, p. 671. — ED.

only to places which have 130,000 population or more, and does not apply to places which have less than 130,000 population, and thus operates against elevator owners in the larger cities of the State. The law operates equally on all elevator owners in places having 130,000 population or more; and we do not perceive how they are deprived of the equal protection of the laws, within the meaning of the Fourteenth Amendment. *Judgments affirmed.*

[BREWER, J., gave a dissenting opinion in which FIELD, J., and BROWN, J., concurred.]

LAWTON v. STEELE.

SUPREME COURT OF THE UNITED STATES. 1894.

[14 *Sup. Court Rep.* 499.]

IN error to the Supreme Court of the State of New York.

This was an action at law instituted in the Supreme Court for the county of Jefferson by the plaintiffs in error against the defendant in error, together with Edward L. Sargent and Richard U. Sherman, for the conversion of fifteen hoop and fyke nets of the alleged value of $525. Defendants Steele and Sargent interposed a general denial. Defendant Sherman pleaded that he, with three others, constituted the "Commissioners of Fisheries" of the State of New York, with power to give directions to game and fish protectors with regard to the enforcement of the game law; that defendant Steele was a game and fish protector, duly appointed by the Governor of the State of New York, and that the nets sued for were taken possession of by said Steele, as such game and fish protector, upon the ground that they were maintained upon the waters of the State in violation of existing statutes for the protection of fish and game, and thereby became a public nuisance.

The facts were undisputed. The nets were the property of the plaintiffs, and were taken away by the defendant Steele, and destroyed. At the time of the taking, most of the nets were in the waters of the Black River Bay, being used for fishing purposes, and the residue were upon the shore of that bay, having recently been used for the same purpose. The plaintiffs were fishermen, and the defendant Steele was a State game and fish protector. The taking and destruction of the nets were claimed to have been justifiable under the statutes of the State relating to the protection of game and fish. Plaintiffs claimed there was no justification under the statutes, and if they constituted such justification upon their face, they were unconstitutional. Defendant Sherman was a State Fish Commissioner. Defendant Sargent was President of the Jefferson County Fish and Game Association. Plaintiffs claimed these defendants to be liable upon the ground that they instigated, incited, or directed the taking and destruction of the nets.

Upon trial before a jury a verdict was rendered, subject to the opinion of the court, in favor of the plaintiffs against defendant Steele for the sum of $216, and in favor of defendants Sargent and Sherman. A motion for a new trial was denied, and judgment entered upon the verdict for $216 damages and $166.09 costs. On appeal to the General Term this judgment was reversed, and a new trial ordered, and a further appeal allowed to the Court of Appeals. On appeal to the Court of Appeals, the order of the General Term granting a new trial was affirmed, and judgment absolute ordered for the defendant. 119 N. Y. 226. Plaintiffs thereupon sued out a writ of error from this court.

Levi H. Brown, for plaintiffs in error.

Elon R. Brown, for defendant in error.

MR. JUSTICE BROWN, after stating the facts in the foregoing language, delivered the opinion of the court.

This case involves the constitutionality of an Act of the Legislature of the State of New York known as chapter 591, Laws of New York of 1880, as amended by chapter 317, Laws of New York of 1883, entitled "An Act for the Appointment of Game and Fish Protectors."

By a subsequent Act enacted in 1886:

"Section 1. No person shall at any time kill or take from the waters of Henderson Bay or Lake Ontario, within one mile from the shore, between the most westerly point of Pillar Point and the boundary line between the counties of Jefferson and Oswego, . . . any fish of any kind by any device or means whatever otherwise than by hook and line or rod held in hand. But this section shall not apply to or prohibit the catching of minnows for bait, providing the person using nets for that purpose shall not set them, and shall throw back any trout, bass, or any other game fish taken, and keep only chubs, dace, suckers, or shiners.

"Sec. 2. Any person violating any of the provisions of this Act shall be guilty of a misdemeanor, and liable to a penalty of $50 for each offence." Laws, 1886, c. 141.

By the Act of 1880, as amended by the Act of 1883:

"Sec. 2. Any net, pound, or other means or device for taking or capturing fish, or whereby they may be taken or captured, set, put, floated, had, found, or maintained, in or upon any of the waters of this State, or upon the shores of or islands in any of the waters of this State, in violation of any existing or hereafter enacted statutes or laws for the protection of fish, is hereby declared to be, and is, a public nuisance, and may be abated and summarily destroyed by any person, and it shall be the duty of each and every protector aforesaid and of every game constable to seize and remove and forthwith destroy the same, . . . and no action for damages shall lie or be maintained against any person for or on account of any such seizure and destruction."

This last section was alleged to be unconstitutional and void for three reasons: (1) as depriving the citizen of his property without due

process of law; (2) as being in restraint of the liberty of the citizen; (3) as being an interference with the admiralty and maritime jurisdiction of the United States.

The trial court ruled the first of the above propositions in plaintiffs' favor, and the others against them, and judgment was thereupon entered in favor of the plaintiffs.

The constitutionality of the section in question was, however, sustained by the General Term and by the Court of Appeals, upon the ground of its being a lawful exercise of the police power of the State.

The extent and limits of what is known as the "police power" have been a fruitful subject of discussion in the appellate courts of nearly every State in the Union. It is universally conceded to include everything essential to the public safety, health, and morals, and to justify the destruction or abatement, by summary proceedings, of whatever may be regarded as a public nuisance. Under this power it has been held that the State may order the destruction of a house falling to decay, or otherwise endangering the lives of passers-by; the demolition of such as are in the path of a conflagration; the slaughter of diseased cattle; the destruction of decayed or unwholesome food; the prohibition of wooden buildings in cities; the regulation of railways and other means of public conveyance, and of interments in burial-grounds; the restriction of objectionable trades to certain localities; the compulsory vaccination of children; the confinement of the insane or those afflicted with contagious diseases; the restraint of vagrants, beggars, and habitual drunkards; the suppression of obscene publications and houses of ill fame; and the prohibition of gambling-houses and places where intoxicating liquors are sold. Beyond this, however, the State may interfere wherever the public interests demand it, and in this particular a large discretion is necessarily vested in the legislature to determine, not only what the interests of the public require, but what measures are necessary for the protection of such interests. *Barbier* v. *Connolly*, 113 U. S. 27; *Kidd* v. *Pearson*, 128 U. S. 1. To justify the State in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations. In other words, its determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts. . . . [Here reference is made to *Henderson* v. *Mayor*, 92 U. S. 259; *Chy Lung* v. *Freeman*, 92 U. S. 265; *R. R. Co.* v. *Husen*, 95 U. S. 465; *Rockwell* v. *Nearing*, 35 N. Y. 302; *Austin* v. *Murray*, 16 Pick. 121; *Watertown* v. *Mayo*, 109 Mass. 315; *The Slaughter-House Cases*, 16 Wall. 36; *In re Cheesebrough*, 78 N. Y. 232; and *Brown* v. *Perkins*, 12 Gray, 89.]

The preservation of game and fish, however, has always been treated as within the proper domain of the police power, and laws limiting the season within which birds and wild animals may be killed or exposed for sale, and prescribing the time and manner in which fish may be caught, have been repeatedly upheld by the courts. Thus in *Smith* v. *Maryland*, 18 How. 71, it was held that the State had a right to protect its fisheries in Chesapeake Bay by making it unlawful to take or capture oysters with a scoop or drag, and to inflict the penalty of forfeiture upon the vessel employed in this pursuit. The avowed object of the Act was to prevent the destruction of the oysters by the use of particular instruments in taking them. "It does not touch," said the court, "the subject of the common liberty of taking oysters save for the purpose of guarding it from injury to whom it may belong and by whomsoever it may be enjoyed." It was held that the right of forfeiture existed, even though the vessel was enrolled for the coasting trade under the Act of Congress. So in *Smith* v. *Levinus*, 8 N. Y. 472, a similar Act was held to be valid, although it vested certain legislative powers in boards of supervisors, authorizing them to make laws for the protection of shell and other fish. In *State* v. *Roberts*, 59 N. H. 256, which was an indictment for taking fish out of navigable waters out of the season prescribed by statute, it was said by the court: "At common law the right of fishing in navigable waters was common to all. The taking and selling of certain kinds of fish and game at certain seasons of the year tended to the destruction of the privilege or right by the destruction consequent upon the unrestrained exercise of the right. This is regarded as injurious to the community, and, therefore, it is within the authority of the legislature to impose restriction and limitation upon the time and manner of taking fish and game, considered valuable as articles of food or merchandise. For this purpose fish and game laws are enacted. The power to enact such laws has long been exercised, and so beneficially for the public that it ought not now to be called into question." *Commonwealth* v. *Chapin*, 5 Pick. 199; *McCready* v. *Virginia*, 94 U. S. 391; *Vinton* v. *Welsh*, 9 Pick. 92; *Commonwealth* v. *Essex Co.*, 13 Gray, 248; *Phelps* v. *Racey*, 60 N. Y. 10; *Holyoke Co.* v. *Lyman*, 15 Wall. 500; *Gentile* v. *State*, 29 Ind. 409; *State* v. *Lewis*, 33 N. E. R. 1024.

As the waters referred to in the Act are unquestionably within the jurisdiction of the State of New York, there can be no valid objection to a law regulating the manner in which fishing in these waters shall be carried on. *Hooker* v. *Cummings*, 20 Johns. 91. The duty of preserving the fisheries of a State from extinction, by prohibiting exhaustive methods of fishing, or the use of such destructive instruments as are likely to result in the extermination of the young as well as the mature fish, is as clear as its power to secure to its citizens, as far as possible, a supply of any other wholesome food.

The main, and only real difficulty connected with the Act in question is in its declaration that any net, &c., maintained in violation of any

law for the protection of fisheries, is to be treated as a public nuisance, "and may be abated and summarily destroyed by any person, and it shall be the duty of each and every protector aforesaid and every game constable to seize, remove, and forthwith destroy the same." The legislature, however, undoubtedly possessed the power not only to prohibit fishing by nets in these waters, but to make it a criminal offence, and to take such measures as were reasonable and necessary to prevent such offences in the future. It certainly could not do this more effectually than by destroying the means of the offence. If the nets were being used in a manner detrimental to the interests of the public, we think it was within the power of the legislature to declare them to be nuisances, and to authorize the officers of the State to abate them. *Hart* v. *The Mayor*, 9 Wend. 571; *Meeker* v. *Van Rensselaer*, 15 Wend. 397. An Act of the Legislature which has for its object the preservation of the public interests against the illegal depredations of private individuals ought to be sustained, unless it is plainly violative of the Constitution, or subversive of private rights. In this case there can be no doubt of the right of the legislature to authorize judicial proceedings to be taken for the condemnation of the nets in question, and their sale or destruction by process of law. Congress has assumed this power in a large number of cases, by authorizing the condemnation of property which has been made use of for the purpose of defrauding the revenue. Examples of this are vessels illegally registered or owned, or employed in smuggling or other illegal traffic; distilleries or breweries illegally carried on or operated, and buildings standing upon or near the boundary line between the United States and another country, and used as depots for smuggling goods. In all these cases, however, the forfeiture was decreed by judicial proceeding. But where the property is of little value, and its use for the illegal purpose is clear, the legislature may declare it to be a nuisance, and subject to summary abatement. Instances of this are the power to kill diseased cattle; to pull down houses in the path of conflagrations; the destruction of decayed fruit or fish or unwholesome meats, of infected clothing, obscene books or pictures, or instruments which can only be used for illegal purposes. While the legislature has no right arbitrarily to declare that to be a nuisance which is clearly not so, a good deal must be left to its discretion in that regard, and if the object to be accomplished is conducive to the public interests, it may exercise a large liberty of choice in the means employed. *Newark, &c. R'way Co.* v. *Hunt*, 50 N. J. Law, 308; *Blasier* v. *Miller*, 10 Hun, 435; *Mouse's Case*, 12 Coke, 62; *Stone* v. *The Mayor*, 25 Wend. 173; *Am. Print Works* v. *Lawrence*, 21 N. J. Law, 248; *Same* v. *Same*, 23 Id. 590.

It is not easy to draw the line between cases where property illegally used may be destroyed summarily and where judicial proceedings are necessary for its condemnation. If the property were of great value, as, for instance, if it were a vessel employed for smuggling or other illegal purposes, it would be putting a dangerous power in the hands of

a custom officer to permit him to sell or destroy it as a public nuisance, and the owner would have good reason to complain of such act as depriving him of his property without due process of law. But where the property is of trifling value, and its destruction is necessary to effect the object of a certain statute, we think it is within the power of the legislature to order its summary abatement. For instance, if the legislature should prohibit the killing of fish by explosive shells, and should order the cartridges so used to be destroyed, it would seem like belittling the dignity of the judiciary to require such destruction to be preceded by a solemn condemnation in a court of justice. The same remark might be made of the cards, chips, and dice of a gambling-room.

The value of the nets in question was but $15 apiece. The cost of condemning one (and the use of one is as illegal as the use of a dozen), by judicial proceedings, would largely exceed the value of the net, and doubtless the State would, in many cases, be deterred from executing the law by the expense. They could only be removed from the water with difficulty, and were liable to injury in the process of removal. The object of the law is undoubtedly a beneficent one, and the State ought not to be hampered in its enforcement by the application of constitutional provisions which are intended for the protection of substantial rights of property. It is evident that the efficacy of this statute would be very seriously impaired by requiring every net illegally used to be carefully taken from the water, carried before a court or magistrate, notice of the seizure to be given by publication, and regular judicial proceedings to be instituted for its condemnation.

There is not a State in the Union which has not a constitutional provision entitling persons charged with crime to a trial by jury, and yet from time immemorial the practice has been to try persons charged with petty offences before a police magistrate, who not only passes upon the question of guilt, but metes out the proper punishment. This has never been treated as an infraction of the Constitution, though technically a person may in this way be deprived of his liberty without the intervention of a jury. *Callan* v. *Wilson*, 127 U. S. 540, and cases cited. So the summary abatement of nuisances without judicial process or proceeding was well known to the common law long prior to the adoption of the Constitution, and it has never been supposed that the constitutional provision in question in this case was intended to interfere with the established principles in that regard.

Nor is a person whose property is seized under the Act in question without his legal remedy. If in fact his property has been used in violation of the Act, he has no just reason to complain; if not, he may replevy his nets from the officer seizing them, or, if they have been destroyed, may have his action for their value. In such cases the burden would be upon the defendant to prove a justification under the statute. As was said by the Supreme Court of New Jersey in a similar case (*Am. Print Works* v. *Lawrence*, 21 N. J. Law, 248, 259): "The party is not, in point of fact, deprived of a trial by jury. The

evidence necessary to sustain the defence is changed. Even if the party were deprived of a trial by jury, the statute is not, therefore, necessarily unconstitutional." Indeed, it is scarcely possible that any actual injustice could be done in the practical administration of the Act.

It is said, however, that the nets are not in themselves a nuisance, but are perfectly lawful acts of manufacture, and are ordinarily used for a lawful purpose. This is, however, by no means a conclusive answer. Many articles, such, for instance, as cards, dice, and other articles used for gambling purposes, are perfectly harmless in themselves, but may become nuisances by being put to an illegal use, and in such cases fall within the ban of the law and may be summarily destroyed. It is true that this rule does not always follow from the illegal use of a harmless article. A house may not be torn down because it is put to an illegal use, since it may be as readily used for a lawful purpose (*Ely* v. *Supervisors*, 36 N. Y. 297), but where minor articles of personal property are devoted to such use the fact that they may be used for a lawful purpose would not deprive the legislature of the power to destroy them. The power of the legislature to declare that which is perfectly innocent in itself to be unlawful is beyond question (*People* v. *West*, 106 N. Y. 293), and in such case the legislature may annex to the prohibited act all the incidents of a criminal offence, including the destruction of property denounced by it as a public nuisance.

In *Weller* v. *Snover*, 42 N. J. Law, 341, it was held that a fish warden for a county, appointed by the Governor, had the right, under an Act of the Legislature, to enter upon land and destroy a fish basket constructed in violation of the statute, together with the materials of which it was composed, so that it might not again be used. It was stated in that case that "after a statute has declared an invasion of a public right to be a nuisance it may be abated by the destruction of the object used to effect it. The person who, with actual or constructive notice of the law, sets up such nuisance cannot sue the officer whose duty it has been made by the statute to execute its provisions." So in *Williams* v. *Blackwall*, 2 H. & C. 33, the right to take possession of or destroy any engine placed or used for catching salmon in contravention of law was held to extend to all persons, and was not limited to conservators or officers appointed under the Act.

It is true there are several cases of a contrary purport. Some of these cases, however, may be explained upon the ground that the property seized was of considerable value (*Ieck* v. *Anderson*, 57 Cal. 251, boats as well as nets; *Dunn* v. *Burleigh*, 62 Me. 24, teams and supplies in lumbering; *King* v. *Hayes*, 80 Me. 206, a horse) — in others the court seems to have taken a more technical view of the law than the necessities of the case or an adequate protection of the owner required. *Lowry* v. *Rainwater*, 70 Mo. 152; *State* v. *Robbins*, 124 Ind. 308; *Ridgeway* v. *West*, 60 Ind. 371.

Upon the whole, we agree with the Court of Appeals in holding this

Act to be constitutional, and the judgment of the Supreme Court is, therefore *Affirmed.*

MR. CHIEF JUSTICE FULLER (with whom concurred MR. JUSTICE FIELD and MR. JUSTICE BREWER) dissenting.

In my opinion the legislation in question, so far as it authorizes the summary destruction of fishing-nets and prohibits any action for damages on account of such destruction, is unconstitutional.

Fishing-nets are in themselves articles of property entitled to the protection of the law, and I am unwilling to concede to the legislature of a State the power to declare them public nuisances, even when put to use in a manner forbidden by statute, and on that ground to justify their abatement by seizure and destruction without process, notice, or the observance of any judicial form.

The police power rests upon necessity and the right of self-protection but private property cannot be arbitrarily invaded under the mere guise of police regulation, nor forfeited for the alleged violation of law by its owner, nor destroyed by way of penalty inflicted upon him, without opportunity to be heard.

It is not doubted that the abatement of a nuisance must be limited to the necessity of the occasion, and, as the illegal use of fishing-nets would be terminated by their withdrawal from the water and the public be fully protected by their detention, the lack of necessity for the arbitrary proceedings prescribed seems to me too obvious to be ignored. Nor do I perceive that the difficulty which may attend their removal, the liability to injury in the process, and their comparatively small value ordinarily, affect the principle, or tend to show their summary destruction to be reasonably essential to the suppression of the illegal use. Indeed, I think that that argument is to be deprecated as weakening the importance of the preservation, without impairment in ever so slight a degree, of constitutional guarantees.

I am, therefore, constrained to withhold my assent to the judgment just announced, and am authorized to say that Mr. Justice Field and Mr. Justice Brewer concur in this dissent.[1]

[1] See *State* v. *Lewis*, 33 N. E. Rep. 1024 (Ind., April, 1893), holding valid a statute making it criminal to have in one's possession a gill net or seine, with certain exceptions. And so as to gaming implements, *Hastings* v. *Haug*, 85 Mich. 87 (1891). — ED.

GODDARD, PETITIONER.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1835.

[16 *Pick.* 504.]

PETITION for a *certiorari* to the Municipal Court for the city of Boston.

In January 1835, the city marshal of Boston made a complaint to the Police Court, in the name of the Commonwealth, against Goddard, as the occupant of a house and lot of land situate on Kingston Street, in the city of Boston, and not in that part of the city called South Boston, for neglecting and refusing to remove the snow from the sidewalk in Kingston Street, adjacent to his land. The defendant was sentenced to pay a fine and costs, and he appealed to the Municipal Court.

At the trial in that court it was admitted, that the facts alleged in the complaint were true. *S. D. Parker*, County Attorney, and *B. R. Curtis*, in support of the complaint, read the 17th section of the city ordinance passed on August 22, 1833, *viz.*, that "the tenant, occupant, and in case there shall be no tenant, the owner of any building or lot of land bordering on any street, lane, court, or public place within the city (excepting that part of the city called South Boston), where there is any footway or sidewalk, shall after the ceasing to fall of any snow, if in the day time, within six hours, and if in the night time, before two of the clock in the afternoon succeeding, cause the same to be removed therefrom; and in default thereof shall forfeit and pay a sum not less than one dollar, and not more than four dollars, for each and every day that the same shall afterwards remain on such footway or sidewalk;" also, the clause from the 15th section of the city charter (St. 1821, c. 110,) which declares, "that the mayor and aldermen and common council of the said city shall have power to make all such needful and salutary by-laws, as towns, by the laws of this Commonwealth, have power to make and establish; and to annex penalties, not exceeding twenty dollars, for the breach thereof;" also the clause in St. 1785, c. 75, § 7, which empowers the inhabitants of any town "to make and agree upon such necessary rules, orders, and by-laws for the directing, managing, and ordering the prudential affairs of such towns, as they shall judge most conducive to the peace, welfare and good order thereof." . . .

The defendant's counsel moved the court to instruct the jury, that the by-law in question was inoperative and void. . . . But the judge instructed the jury that the by-law was valid and effectual. . . .

The jury found a verdict against the defendant, and he was sentenced to pay a fine of four dollars and costs of suit.

The defendant filed exceptions to the instructions of the judge, and now petitioned for a *certiorari* in order that the sentence might be reversed.

Bartlett insisted on the exceptions.

C. P. Curtis, in behalf of the city of Boston.

SHAW, C. J., delivered the opinion of the court. No question is made of the facts in this case, but it is conceded, that the petitioner did not clear the sidewalk in front of his land, in the manner required by the by-law of the city, and he justifies this on the ground that the law itself is invalid and of no binding force. For the purpose of having this question deliberately considered, and for the purpose of taking several exceptions to the course of proceedings, the petitioner has prayed for a writ of *certiorari* to the Municipal Court. . . .

3. Another, and perhaps the most important objection, is, that the by-law is one imposing a tax or duty upon the citizens, and it is a violation of the Constitution in this, that it is partial, and unequal, and contravenes that fundamental maxim of our social system, that all burdens and taxes laid on the people for the public good shall be equal.

But the court are all of opinion, that the by-law in question is not obnoxious to this objection.

It is not speaking strictly, to characterize this city ordinance as a law levying a tax, the direct or principal object of which is, the raising of revenue. It imposes a duty upon a large class of persons, the performance of which requires some labor and expense, and therefore indirectly operates as a law creating a burden. But we think it is rather to be regarded as a police regulation, requiring a duty to be performed, highly salutary and advantageous to the citizens of a populous and closely built city, and which is imposed upon them because they are so situated as that they can most promptly and conveniently perform it, and it is laid, not upon a few, but upon a numerous class, all those who are so situated, and equally upon all who are within the description composing the class.

It is said to be unequal, because it singles out a particular class of citizens, to wit, the owners and occupiers of real estate, and imposes the duty exclusively upon them.

If this were an arbitrary selection of a class of citizens, without reference to their peculiar fitness and ability to perform the duty, the objection would have great weight, as for instance, if the expense of clearing the streets of snow were imposed upon the mechanics, or merchants, or any other distinct class of citizens, between whose convenience and accommodation, and the labor to be done, there is no natural relation. But suppose there is a class of citizens who will themselves commonly derive a benefit from the performance of some public duty, we can see no inequality in requiring that all those who will derive such benefit, shall by a general and equal law be required to do it. Supposing a by-law should require every inhabitant, who keeps a cart, truck or other team, or a coach or other carriage, to turn out himself or send a man, with one or more horses, after each heavy fall of snow, to assist in levelling it. Although other citizens would derive a benefit,

yet as these derive some peculiar benefit, accompanied with the ability, I can at present perceive no valid objection to a by-law requiring it, on the ground of inequality. Supposing a general regulation, that at certain seasons of the year, every shopkeeper should sprinkle the sidewalk in front of his own shop, or sweep it, inasmuch as he has a peculiar benefit, and as the duty is equal upon all who come within the description, it seems to us to be equal, in the sense in which the law requires all such burdens to be equal. And it appears to us that the case before us is similar. Although the sidewalk is part of the public street, and the public have an easement in it, yet the adjacent occupant often is the owner of the fee, and generally has some peculiar interest in it, and benefit from it, distinct from that which he enjoys in common with the rest of the community. He has this interest and benefit, often in accommodating his cellar-door and steps, a passage for fuel, and the passage to and from his own house to the street. To some purposes, therefore, it is denominated his sidewalk. For his own accommodation, he would have an interest in clearing the snow from his own door. The owners and occupiers of house-lots and other real-estate, therefore, have an interest in the performance of this duty, peculiar and somewhat distinct from that of the rest of the community.

Besides, from their situation, they have the power and ability to perform this duty, with the promptness which the benefit of the community requires, and the duty is divided, distributed and apportioned upon so large a number, that it can be done promptly and effectually, and without imposing a very severe burden upon any one. Supposing a by-law should require, what is often done, in practice, that upon an alarm of fire in the night, all householders, on streets leading to and near the fire, should exhibit a light. This would seem to be reasonable. Or that all the owners or occupiers of dwelling-houses, having a well and pump, should keep them in repair at their own expense, to be used in case of fire. It would operate partially, but it seems to us not unequal, in the sense in which we are using that term. The city might keep persons ready in every street, to light torches and flambeaux in case of fire, and the expense be paid from the treasury; still, it appears to me, that as householders would derive a benefit from the operation of this general regulation, as their local situation puts it peculiarly within their power and ability to perform it without great expense, and as it is equal in its terms, it would not be obnoxious to the charge of being invalid for partiality and inequality.

In all these cases the answer to the objection of partiality and inequality is, that the duty required is a duty upon the person in respect to the property which he holds, occupies and enjoys, under the protection and benefit of the laws, that it operates upon each and all in their turns, as they become owners or occupiers of such estates, and it ceases to be required of them, when they cease to be thus holders and occupiers of the estate, in respect to which the duty is required. In this respect it is like a land tax, or house tax, it does not bear upon owners of per-

sonal property, and therefore does not bear upon all citizens alike, but is not on that account unequal or partial, in the sense contemplated by the Declaration of Rights, requiring all taxes and burdens to be equal and impartial.

The court are all of opinion, that as a by-law, the regulation in question was a reasonable one, that it was not repugnant to the Constitution or laws of the Commonwealth, and that the conviction was right.

Petition dismissed.

GRIDLEY v. BLOOMINGTON.

SUPREME COURT OF ILLINOIS. 1878.

[88 *Ill.* 554.]

APPEAL from the Circuit Court of McLean County.

Complaint, under oath, was made, charging that defendant permitted snow to remain upon the sidewalk abutting on premises occupied by him as a "wood and stable lot," contrary to an ordinance of the city which provides, that "whoever, being the occupant of any occupied premises, or the owner of any vacant premises, shall suffer any snow to remain on any sidewalk or footway adjacent thereto longer than six hours from the time it ceases falling, or if the cessation be in the night time, then longer than six hours after sunrise on the next morning, shall be fined five dollars, and be subject to a like penalty for each day such snow so remains after the first penalty has been incurred."

Proof was made that defendant, on the 16th day of February, 1875, owned and occupied Lot 3, in White's addition to Bloomington, as a wood and stable lot; that there was a sidewalk on the south side of the lot, which abutted on Grove Street; that defendant did not remove the snow that had fallen on the sidewalk, two or three days before, to the depth of several inches, within six hours after sunrise on the day mentioned in the complaint, and that the sidewalk in question was within the corporate limits of the city.

It was admitted for the defence, that White's addition to Bloomington was laid out by James White on the 7th day of April, 1836.

On the trial, defendant was found guilty, and fined in the sum of three dollars, and from the judgment rendered against him defendant prosecutes his appeal to this court.

Mr. E. M. Prince, and *Messrs. Karr & Karr*, for the appellant.

MR. JUSTICE SCOTT delivered the opinion of the court: —

The ordinance under which defendant was prosecuted, imposes a fine upon any one who shall permit snow to remain upon the sidewalk abutting premises occupied or owned by him, longer than a period of six hours after it ceases to fall, or if the cessation is in the night time, then longer than six hours after sunrise on the next morning. The validity

of that ordinance is the only question made on the argument. It was admitted the lot occupied by defendant was one of an addition to Bloomington that was laid out in 1836, and hence it follows, under the decisions of this court, the fee of the street in front of the premises was either in the original proprietor or in the corporation. *Indianapolis, Bloomington & Western R. R. Co.* v. *Hartley*, 67 Ill. 439; *Gebhardt* v. *Reeves*, 75 Id. 301.

The public had an easement over the street in front of the lot occupied and owned by defendant, and it makes no difference, so far as this decision is concerned, whether the fee of the street passed by the plat and dedication to the corporation, or whether it remained in the original proprietor. It is plain defendant has no other interest in the street in front of his property than any other citizen of the municipality. The same is true of the sidewalk. It is a part of the street set apart for the exclusive use of persons travelling on foot, and is as much under the control of the municipal government as the street itself. The owner of the adjacent lot is under no more obligation to keep the sidewalk free from obstructions, than he is the street in front of his premises. He may not himself obstruct either so as to impede travel on foot or in carriages. It will be conceded the citizen is not bound to keep the street in front of his premises free from snow or anything else that might impede travel; then, upon what principle can he be fined for not removing snow or other obstruction from the sidewalk in which he has no interest other than what he has in common with all other persons resident in the city? It is certainly not upon the principle under which assessments are made against the owner for building sidewalks in front of his property. The cases are not analogous. Such assessments are maintained on the ground the sidewalk enhances the value of the property, and to the extent of the special benefits conferred they are held to be valid.

It would be absurd to suppose that assessments for benefits for local improvements could be enforced by fines or penalties, as in the ordinance under which defendant was fined. Nor do we think this ordinance can be upheld as an exercise of the police power inherent in all municipal governments. It was expressly decided by this court, in *City of Ottawa* v. *Spencer*, 40 Ill. 211, that local improvements of either sidewalks or streets cannot be compelled, under the general police power. The legislature must afford the necessary power for constructing all needful improvements, subject to constitutional limitations; and when one mode of making such improvements is sanctioned by the Constitution, no other can be adopted.

Keeping streets and sidewalks in repair, and free from obstructions that impede travel or render it dangerous, is referable to the same power as for constructing new improvements. The sidewalk, as was declared in the case cited, is as much a public highway, free to the use of all, as the street itself, and, upon principle, it follows, the citizen cannot be laid under obligations, under our laws, to keep it free from obstructions

in front of his property at his own expense, any more than the street itself, either by the exercise of the police power or by fines and penalties imposed by ordinance, or by direct legislative action.

Our conclusion is, the ordinance in question is invalid, and the judgment must be reversed and the cause remanded.

Judgment reversed.[1]

[1] The doctrine of this case was affirmed in *Chicago* v. *O'Brien*, 111 Ill. 532 (1884). The court (SCHOLFIELD, C. J.) said: "It is conceded by counsel for appellant that this court, in *Gridley* v. *City of Bloomington*, 88 Ill. 554, decided the only question involved in this case (namely, the validity of the ordinance under which the suit is prosecuted) against appellant; but they contend that decision is based upon incorrect grounds, and should therefore be overruled. They contend that the ordinance is but a proper police regulation, and that, as such, it should be sustained. In support of this position they cite *Bonsall et ux.* v. *Mayor, etc.*, 19 Ohio, 418; *Parton* v. *Sweet*, 13 N. J. (1 Green) 196; *Mayor, etc.* v. *Maberry*, 6 Humph. 368; *Washington* v. *Mayor, etc.*, 1 Swan (Tenn.), 177; *Woodbridge* v. *City of Detroit*, 8 Mich. 274; and other cases.

"In *City of Chicago* v. *Larned*, 34 Ill. 203, — a case very elaborately argued by able counsel, — the principle involved in the decisions of these cases was carefully considered, and it was held they could not apply here, — that they were decided under constitutions so materially different from ours, that the same line of reasoning is not applicable to both. And in *City of Ottawa* v. *Spencer*, 40 Ill. 211, which was a proceeding to charge the adjacent lot-owner with the cost of building a sidewalk, the same question was again before the court, and it was then insisted, as it is now, that the charges may be sustained as within the police power, but the position was held untenable. In passing upon this point, it was there said: 'It is also urged that this may be referred to the police power of the State, which has been delegated to the city, and may therefore be properly exercised; and in support of the proposition we are referred to the decisions of the Supreme Court of Tennessee: *Mayor, etc.* v. *Maberry*, 6 Humph. 368; *Washington* v. *The Mayor and Aldermen of Nashville*, 1 Swan, 177; *White* v. *The Mayor and Aldermen of Nashville*, 2 Id. 364. These cases go to the length of sustaining the doctrine contended for by plaintiffs in error. They announce the doctrine that such improvements may be compelled under the general police power. If this be so, by an exercise of the same power we presume that the owner could be compelled to construct and keep in repair public roads, bridges, and culverts fronting upon or running through his lands, or the owner of a city or village lot could be compelled to make and repair the street in front of his property. A sidewalk is a portion of a public highway, appropriated, it is true, to pedestrians alone, but still open and free to all persons desiring to use and enjoy it as a public highway. It is as much a public highway in the mode of its use as the street itself. The difference in the manner of their use does not render one public more than the other. They are both free to be properly used and enjoyed by the entire public, and are constructed alike for their use. That the legislature may afford the necessary power of constructing such improvements so essentially necessary to the comfort and convenience of the community is apparent; but under our Constitution we think the mode authorized in this case is not sanctioned, and that the principles announced in the case of *Larned* v. *The City of Chicago* fully govern and control this case.'

"Even the police power, comprehensive as it is, has some limitations. It cannot be held to sanction the taking of private property for public use without making just compensation therefor, however essential this might be, for the time, to the public health, safety, etc. And upon like principle, a purely public burden cannot be laid upon a private individual, except as authorized in cases to exercise the right of eminent domain, or by virtue of proper proceedings to enforce special assessments or special taxation. The drainage of malarial swamps would surely largely contribute to promote the public health; but could it be contended that therefore the burden of such

IN *Carthage* v. *Frederick*, 122 N. Y. 268, 277 (1890), in sustaining the constitutionality of a local ordinance of the same sort as that in the case of *Goddard*, Petitioner, the Court of Appeals (Second Division), VANN, J., said: "If this power of local legislation can be conferred upon the largest city in the State, it can also be conferred upon the smallest village that the legislature sees fit to incorporate. In this latitude the accumulation of snow upon sidewalks in large quantities is a matter of course. Its presence retards travel, interrupts business, and interferes with the safety and convenience of all classes. It is a frequent cause of accidents and thus affects the property of every person who is liable to assessment to pay the damages caused by a failure to remove it. But how is it possible for the authorities of a large city, with many hundred miles of streets, to remove the snow in time to prevent injury to those who have the right to travel upon the sidewalks unless they can require the owners and occupants of adjacent property to remove it? Every man can conveniently and promptly attend to that which is in front of his own door, and it is both reasonable and necessary that he should be compelled to do so. We think that the ordinance under consideration is valid; that it conflicts with no provision of the Constitution, and that it is the duty of the courts to enforce it.

"In reaching this conclusion, we have not overlooked the case of *Gridley* v. *City of Bloomington*, 88 Ill. 554, but have given it the

drainage may be laid upon some single person to be arbitrarily selected, or upon those who happen to own the adjacent dry land, in disregard of the principles applicable to special assessments and special taxation? Undoubtedly, the allowing of ice or snow to remain upon a sidewalk may be declared a nuisance, but it must be a public nuisance, and one, too, not caused by the act of the adjacent property holder, but solely by the action of the elements. No one questions the right of the municipality to prevent such use of property and such action of the citizen as may be injurious to the public; but the adjacent lot-owner has no ownership or control of the adjacent street, and this ordinance seeks to control the action of no one while on the street. The lot-owner is held responsible solely and simply for the accident of owning property near the nuisance. He may have no more actual control of the street, or necessity to use it, than if his property were miles away; still, he is held responsible for a result he could not control, and to the production of which he did not even theoretically contribute. The *gist* of the whole argument is merely that it is convenient to hold him responsible. It is not perceived why it would not be equally convenient to hold him responsible for the entire police government of so much of the street

"Counsel seem to wish to draw a distinction between the present case and the cases of *City of Chicago* v. *Larned*, and *City of Ottawa* v. *Spencer*, *supra*, upon the ground that it is here neither sought to construct nor repair a sidewalk, but simply to keep it in a passable condition. But the difference is in the extent and not in the character of the burden sought to be imposed. The principle is precisely the same in each case. The object is to fit the streets, or so much as is occupied by sidewalks, for travel; and if the power to compel the private person to accomplish this result exists at all, it must extend to the necessary means in each case. It is impossible to point out why the removal of a snow-bank should rest on a different principle from that applicable to filling a hole, or nailing down a board.

"We are satisfied with the entire correctness of the ruling in *Gridley* v. *City of Bloomington*, *supra*, and being so satisfied, the judgment below must be affirmed."

Judgment affirmed.

DICKEY, SHELDON, and CRAIG, JJ., dissenting. — ED.

attention to which it is entitled by the high standing of the court that decided it. The argument upon which the opinion in that case rests is that, as the fee of the street was in the corporation, and the sidewalk was a part of the street, the lot-owner had no more interest in the sidewalk in front of his premises than any other citizen of the municipality, because it was set apart for the exclusive use of persons travelling on foot and was as much under the control of the municipal government as the street itself.

"We are unable to yield to this reasoning, because it overlooks not only the public safety and general convenience, but also the peculiar interest that every owner or occupant of real property has in a clean sidewalk in front of his own premises. Whatever adds to the usefulness of a sidewalk adds both to the rental and permanent value of the adjacent lot.

"After carefully examining all of the questions presented by counsel, we think the judgment should be affirmed."

All concur except FOLLETT, Ch. J., not sitting.

Judgment affirmed.

REINKEN v. FUEHRING.

SUPREME COURT OF INDIANA. 1891.

[130 *Ind.* 382.]

APPEAL from Circuit Court, Marion County; E. A. BROWN, JUDGE.

Action by Fred. Fuehring and others against Henry Reinken, Sr., to foreclose a lien on defendant's real estate. Defendant appeals from a judgment overruling his demurrer to the complaint. Affirmed.

Denny & Elliott, for appellant.

Augustus L. Mason, for appellees.

COFFEY, J. The appellees brought this suit in the Marion County Circuit Court to foreclose a lien for the amount assessed against the appellant's real estate for sweeping the street in front of his property in the city of Indianapolis, under a contract made between the city and the appellees pursuant to the provisions of the city charter. A demurrer to the complaint was overruled, and the appellees had judgment, from which this appeal is prosecuted. The charter of the city of Indianapolis is found in Acts Gen. Assem. 1891, p. 137. It provides for the mode of improving the streets, and the payment for such improvements; and confers on the city, through its proper officers, the power to make contracts for sprinkling and sweeping such streets in the city as it may deem proper, and to assess against the property holders abutting on such streets the cost of such sprinkling and sweeping. The only question before us for decision relates to the constitutionality of so much of the Act as authorizes the city to contract for sprinkling and sweeping the streets at the cost of the property holders along the line of such

streets, it being contended by the appellant that these provisions are unconstitutional for the reasons: *First.* That it violates the provision of our State Constitution requiring an equal and uniform rate of taxation. *Second.* Because, even if the city has power to compel abutting property owners to pay for sweeping the streets in front of their property, it has no power to compel them to do so, and at the same time compel them to pay into the general fund a part of the costs of cleaning other streets, as provided for in the Act. *Third.* Because the proceeding which the Act attempts to authorize amounts to a taking of private property without due compensation and due process of law.

To support his contention as to the first proposition presented, the appellant relies to some extent upon the case of *Gridley* v. *City of Bloomington*, 88 Ill. 554, and the case of *City of Chicago* v. *O'Brien*, 111 Ill. 532. These cases hold that an ordinance making it the duty of the owner or person occupying premises abutting upon a street to keep the sidewalks free from snow and ice, and providing for the enforcement of such ordinance by the infliction of penalties, is void. The cases seem to rest principally upon the peculiarity of the laws of the State of Illinois, under which the lot-owner does not own the fee in the street. The last case, however, was decided by a divided court, three of the judges refusing to concur in the conclusion reached. The authorities make a clear distinction between the word "taxation" and the word "assessment." "'Taxes' are impositions for purposes of general revenue. 'Assessments' are special and local impositions upon property in the immediate vicinity of an improvement for the public welfare, which are necessary to pay for the improvement, and laid with reference to the special benefit which such property derives from the expenditure." *Palmer* v. *Stumph*, 29 Ind. 329. This distinction is recognized in nearly all the States of the Union. For a collection of the authorities upon this subject see the case above cited. The assessment, therefore, made against the owners of property along the streets required to be swept under the Act in question, to pay the expense of such sweeping, is not a tax, but a local assessment.

The question is then presented as to whether a local assessment for this purpose can be sustained under our Constitution. If it can be sustained at all, it must be upon the grounds that it is the proper exercise of the police power of the State, and a special benefit to the abutting property owner. The power of a municipal corporation to order sidewalks of a particular kind, and to assess against the abutting property owner an amount necessary to pay for the same, and to pay for keeping the same in repair and proper condition for the use of the public, is generally upheld upon the ground that it is proper exercise of the police power of the State. *Goddard*, Petitioner, 16 Pick. 504; *Palmer* v. *Way*, 6 Colo. 106; Cooley, Tax'n, pp. 396, 397; *State* v. *Mayor*, 37 N. J. Law, 423; *Kirby* v. *Boylston*, 14 Gray, 252; *Pedrick* v. *Bailey*, 12 Gray, 163; *Moore* v. *Gadsden*, 93 N. Y. 12; *Hartford* v. *Talcott*, 48 Conn. 525. Judge Cooley says: "The cases for assessments for the

construction of walks by the side of streets in cities and other populous places are more distinctly referable to the police power. These footwalks are not only required, as a rule, to be put and kept in proper condition for use by the adjacent proprietors, but it is quite customary to confer by the municipal charters full authority upon the municipalities to order walks of a kind and quality by them prescribed to be constructed by the owners of adjacent lots, at their own expense, within a time limited by the order for the purpose; and that, in case of their failure so to construct them, it shall be done by the public authorities, and the cost collected from such owners, or made a lien upon their property. When this is done, the duty must be looked upon as a regulation of police, made because of the peculiar interest such owners have in the walks, and because their situation gives them peculiar fitness and ability for the performing with promptness and convenience the duty of putting them in a proper state, and afterwards keeping them in a condition suitable for use." Cooley, Tax'n, *supra*.

Assuming, as held by these authorities, that the power to make local assessments to pay for local improvements or benefits is to be referred to the police power of the State, we are naturally led to inquire whether the assessments provided for in the charter now under consideration amounts to a taking of private property without compensation, and without due process of law, as contended by the appellant. Mr. Sedgwick, in his valuable work on Statutory and Constitutional Law, 435, says: "The clause prohibiting the taking of private property without compensation is not intended as a limitation of the exercise of those police powers which are necessary to the tranquillity of every well-ordered community, nor of that general power over private property which is necessary for the orderly existence of all governments. It has always been held that the legislature may make police regulations, although they may interfere with the full enjoyment of private property, and though no compensation is given." . . . [Here follows a citation from 1 Dillon, Munic. Corp. 212, and a statement of the cases of *Goddard*, Petitioner, and *Carthage* v. *Frederick*.]

The principles which rule the cases above cited cannot, in our opinion, be distinguished from the principles which rule the case at bar. Of course, it is not claimed that in the exercise of the police power such assessments could be made and collected from the abutting property owner unless he had a special interest and derived a special benefit therefrom, not enjoyed by the public in general; but if he has a special interest in the improvement of the street and sidewalk, and in keeping them free from snow and ice, so he has a special interest in keeping them free from accumulating filth. It is matter of common observation, of which we must take notice, that property located upon well-improved streets, kept clean, is more desirable than property on unimproved streets where mud and filth are permitted to accumulate and obstruct their use. It is safe to assert, we think, that keeping a street clean adds to the rental, if not to the permanent value, of property located

thereon; and for this reason, among others, the abutting property owner has a special interest in such cleaning, not enjoyed by the general community. For the reason that the public in general has an interest in keeping the streets free from filth, the city may, in exercising the police power conferred upon it by the State, order them swept; and for the further reason that the abutting property owner derives a benefit from such sweeping not enjoyed by the general public, he may be required by assessments to pay the expenses incident to such sweeping. It follows from what we have said that the assessments provided for by the Act under consideration do not amount to a taking of private property without compensation and without due process of law.

Assessments of the kind we are now considering are made upon the principle that the person assessed is benefited in the increased value of his property, either rental or permanent, over and above the benefits received by the public, in a sum equal to the amount he is required to pay. It is upon this theory alone that they can be sustained. If the property owner is fully compensated for his outlay in the enhanced value of his property, we see no reason why he may not be taxed generally, also, with the balance of the public, for cleaning other streets in which the public alone have an interest, and which are not, and, indeed, cannot be, swept as the streets upon which his property abuts. We are not able to perceive how such a tax would be unjust or inequitable, inasmuch as he receives as much benefit therefrom, in contemplation of law, as any other member of the community. As he has been fully compensated for his outlay in sweeping the street upon which his property is situated, he should not be heard to complain of such payment when called upon to bear his portion of other public burdens. Nor do we think the fact that the statute contemplates the sweeping of the crossings renders it invalid. It cannot be said that the property owners do not receive a special benefit from keeping them clean. Sweeping the street in front of the property would be of little benefit if filth and rubbish were permitted to accumulate upon the crossings, so as to render them unfit for use. If the property does in fact receive a special benefit from sweeping the crossings, there is no reason why those who are thus benefited should not pay the expenses. Having carefully examined all the objections urged against the validity of so much of the statute as is here called in question, we have reached the conclusion that it is not unconstitutional, and that the court did not, therefore, err in overruling a demurrer to the complaint before us. *Judgment affirmed.*

ELLIOTT, C. J., took no part in the decision of this cause.

COMMONWEALTH *v.* CARTER.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1882.

[132 *Mass.* 12.]

INDICTMENT for an assault, on September 28, 1880, upon Martin Griffin, an inspector of milk, while said Griffin was in the discharge of his duty as such inspector. . . .

The jury returned a verdict of guilty; and the defendant alleged exceptions.

J. D. Thomson, for the defendant.

C. H. Barrows, Assistant Attorney-General (*G. Marston*, Attorney-General, with him), for the Commonwealth.

FIELD, J. The only question argued in this case is the constitutionality of the St. of 1864, c. 122. § 2, so far as it authorizes inspectors of milk to "enter any place where milk is stored or kept for sale, and all carriages used in the conveyance of milk; and whenever they have reason to believe any milk found therein is adulterated, they shall take specimens thereof and cause the same to be analyzed, or otherwise satisfactorily tested, the result of which they shall record and preserve as evidence."

It is contended that this provision is unconstitutional, because it authorizes the taking of property without consent or compensation; warrants unreasonable searches and seizures; compels one to furnish evidence against himself; and is not within the police power of the Commonwealth. An analysis of a specimen of milk offered for sale is an appropriate means of carrying into effect the various provisions of the statutes regulating the sale of milk in this Commonwealth. In the case at bar, the can of milk was taken from a carriage used in the conveyance of milk, and it is unnecessary to consider whether the words of the section "place where milk is stored or kept for sale" may or may not include a dwelling-house, and whether, if construed to include a dwelling-house, they do not purport to give a power which the legislature could not give, because the clause authorizing an entry into any place where milk is stored or kept for sale is separable from that which authorizes an entry into all carriages used in the conveyance of milk. Neither is the power granted in violation of the provision of art. 12 of the Declaration of Rights, that no subject shall be compelled to accuse, or furnish evidence against himself. If the seizure is such as is authorized by the Constitution and a law passed in pursuance thereof, the fact that the thing seized may be used in evidence in a criminal charge against the person from whose possession it is taken, does not render the seizure itself a violation of the Declaration of Rights. *Commonwealth* v. *Dana*, 2 Met. 329, 337. If the statute had required that all milk offered for sale should first be inspected, it would hardly be contended that the trifling injury to property occa-

sioned by taking samples for inspection would be such a taking of private property for public use as to require that compensation be made therefor. Such an injury to property is a necessary incident to the enforcement of reasonable regulations affecting trade in food. Private property is held subject to the exercise of such public rights, for the common benefit; and in the case of licensed dealers in merchandise, the injury suffered by inspection is accompanied by advantages which must be regarded as a sufficient compensation. *Bancroft* v. *Cambridge*, 126 Mass. 438, 441. Instead of requiring all milk offered for sale to be first inspected, the legislature for obvious reasons has permitted licensed dealers to sell milk without inspection, has imposed penalties for selling adulterated milk, has defined what shall be deemed adulterated milk, and has provided that when the inspector of milk has reason to believe that any milk has been adulterated he may take specimens thereof in order that by analysis or otherwise he may determine whether the milk has been adulterated. Such a seizure of milk for the purposes of examination is a reasonable method of inspection, and does not require a warrant. It is a supervision under the laws by a public officer of a trade which concerns the public health, and is within the police power of the Commonwealth. *Commonwealth* v. *Ducey*, 126 Mass. 269. *Jones* v. *Root*, 6 Gray, 435.

There is nothing in this case which requires us to determine the rights of the defendant, if the inspector had attempted to take a larger quantity of milk for analysis than was reasonably necessary for the performance of his duties. We have not found it necessary to consider whether the defendant, by voluntarily accepting a license to sell milk, has not assented to the conditions and regulations which the legislature has seen fit to impose upon the exercise of the trade licensed. See *Pitkin* v. *Springfield*, 112 Mass. 509; *Bertholf* v. *O'Reilly*, 74 N. Y. 509, 517. *Exceptions overruled.*

PEOPLE *v.* EWER.

NEW YORK COURT OF APPEALS. 1894.

[36 *Northeastern Reporter*, 4.]

APPEAL from Supreme Court, General Term, first department. . . .

Charlotte Ewer was arrested upon a police magistrate's warrant, charged with a misdemeanor in violating section 292 of the Penal Code by exhibiting her child, Mildred Ewer, as a dancer at the Broadway Theatre in New York City. The examination before the magistrate sustained the charge, and showed that she was of the age of seven years, and went by the stage name of "La Regaloncita;" that she was clad in the usual style of the ballet-dancer, in a low-necked, sleeveless, and short dress, and wore purple tights; that she danced upon the

stage to the music of an orchestra, elevating her legs, moving upon her toes, and posturing with her figure. Her mother, being held upon the charge, sued out writs of *habeas corpus* and *certiorari*, to which the magistrate made return of his proceedings, etc. The prisoner demurred to the return; alleging that there were no sufficient grounds for holding her, and that the statute under which she was arrested was unconstitutional. The provisions of the Code under which this arrest was made read that "a person who . . . exhibits . . . a female child apparently or actually under the age of fourteen years, . . . or who, having the care, etc., of such a child as parent, etc., . . . in any way consents to the employment or exhibition of such a child either as . . . a dancer . . . or in a theatrical exhibition . . . or in any . . . exhibition dangerous or injurious to the life, limb, health or morals of the child . . . is guilty of a misdemeanor." At the Special Term the writs were dismissed, and the prisoner was remanded. The order of that court was affirmed at the General Term, and the defendant has appealed to this court.

A. J. Dittenhoefer and *David Gerber*, for appellant. *De Lancey Nicoll*, Dist. Atty. (*Elbridge T. Gerry*, of counsel), for the people.

GRAY, J. The question we shall determine upon this appeal is whether the statute under which the appellant was arrested violates any just and personal rights secured to her by the Constitution of the State. If it is such an interference with the legal relation of parent and child as exceeds the limits within which the legislature, exercising the sovereign power of the State, may regulate and control that relation, then it is the duty of the courts to declare its unconstitutionality; but, if it is within a proper and legitimate exercise of legislative functions, the courts may not interfere. This question falls within those which are classified under the head of the police power of the State. The extent of the exercise of that power, with which the legislature is invested, and which it has so freely exerted in many directions, within constitutional limits, is a matter resting in discretion, to be guided by the wisdom of the people's representatives. It is difficult, if not impossible, to define the police power of a State, or, under recent judicial decisions, to say where the constitutional boundaries limiting its exercise are to be fixed. It is a power essential to be conceded to the State, in the interest, and for the welfare, of its citizens. We may say of it that when its operation is in the direction of so regulating a use of private property, or of so restraining personal action, as manifestly to secure or to tend to the comfort, prosperity or protection of the community, no constitutional guarantee is violated, and the legislative authority is not transcended. But the legislation must have some relation to these ends; for, to quote the expressions of Mr. Justice Field in the *Slaughter-House Cases*, 16 Wall. 36, "under the mere guise of police regulations, personal rights and private property cannot be arbitrarily invaded." In *People* v. *King*, 110 N. Y. 418, 18 N. E. 245, it was well observed by Judge Andrews: "By means of this power the legislature exercises a supervision over matters affecting the

common weal. . . . It may be exerted whenever necessary to secure the peace, good order, health, morals, and general welfare of the community, and the propriety of its exercise, within constitutional limits, is purely a matter of legislative discretion, with which courts cannot interfere." The assumption of the exercise of this extraordinary and very necessary power has been the subject of severe criticism in the opinions of judges, when it has been sought thereby to regulate and control in the interest of the public the conduct of corporate or individual business transactions. *Munn* v. *State of Illinois*, 94 U. S. 113, may be referred to as starting a current of authority in this country. But no such criticism can find just grounds for cavilling at legislation whose ends clearly tend to promote the health or moral well-being of the members of society. To that class of legislation this statute belongs. By preventing the exhibition of children of tender and immature age upon the theatrical or other public stage, the legislature is exercising that right of supervision and control over the child which in every civilized State inheres in the government, and which nothing in the legal relations of parent and child should be deemed to forbid. The proposition is indisputable that the custody of the child by the parent is within legislative regulation. The parent, by natural law, is entitled to the custody and care of the child, and, as its natural guardian, is held to the performance of certain duties. To society, organized as a State, it is a matter of paramount interest that the child shall be cared for, and that the duties of support and education be performed by the parent or guardian, in order that the child shall become a healthful and useful member of the community. It has been well remarked that, the better organized and trained the race, the better it is prepared for holding its own. Hence it is that laws are enacted looking to the compulsory education by parents of their children, and to their punishment for cruel treatment, and which limit and regulate the employment of children in the factory and the workshop, to prevent injury from excessive labor. It is not, and cannot be, disputed that the interest which the State has in the physical, moral, and intellectual well-being of its members warrants the implication and the exercise of every just power which will result in preparing the child, in future life, to support itself, to serve the State, and, in all the relations and duties of adult life, to perform well and capably its part. . . .

The learned counsel for the appellant does not, in the main, contest the right and the duty of the State to protect, and to promote by adequate legislation, the health and morals of its citizens, but bases his arguments here upon the proposition, substantially, that the legislature cannot take from parents the right to employ their children in any lawful occupation, not indecent or immoral, or dangerous to life, limb, health, or morals. That proposition may be readily conceded. It is true enough that if the court could say that this legislation was an arbitrary exercise of the legislative power, depriving the parent of a right to a legitimate use of his child's services, — that, while ostensibly

for the promotion of the well-being of children, in reality it strikes at an inalienable right or at the personal liberty of the citizen, and but remotely concerned the interests of the community, — it would be its duty to so pronounce, and to declare its invalidity. But this legislation has no such destructive effect or tendency. It does not deprive the parent of the child's custody, nor does it abridge any just rights. It interferes to prevent the public exhibition of children, under a certain age, in spectacles or performances which, by reason of the place or hour, of the nature of the acts demanded of the child performer, and of the surroundings and circumstances of the exhibition, are deemed by the legislature prejudicial to the physical, mental, or moral well-being of the child, and hence to the interests of the State itself. Take the facts of this case, and they seem sufficiently to warrant the interference of the law. It is not necessary to reason upon them. The scanty dress of the ballet-dancer, the pirouetting and the various other described movements with the limbs, and the vocal efforts cannot be said to be without possible prejudice to the physical condition of the child, while in the glare of the footlights, the tinsel surroundings, and the incense of popular applause, it is not impossible that the immature mind should contract such unreal views of existence as to unfit it for the stern realities and exactions of later life. The statute is not to be construed as applying only when the exhibition offends against morals or decency, or endangers life or limb, by what is required of the child actor. Its application is to all public exhibitions or shows. That any and all such shall be deemed prejudicial to the interests of the child, and contrary to the policy of the State to permit, was for the legislature to consider and say.

The right to personal liberty is not infringed upon because the law imposes limitations or restraints upon the exercise of the faculties with which the child may be more or less exceptionally endowed. The inalienable right of the child or adult to pursue a trade is indisputable; but it must be not only one which is lawful, but which, as to the child of immature years, the State or sovereign, as *parens patriæ*, recognizes as proper and safe. It is not the strict moralist's view, dictated by prejudice, but the view from the standpoint of a member of the body politic, which ranges the judgment in support of legislative interference to restrain the parent from permitting an employment of the child under circumstances deemed unsuited to its proper mental, moral, or physical development. In the judgment of the legislature it was deemed as unsuitable for the youth of the community, under a certain age, to dance or to perform in public exhibitions in the ways mentioned as it was deemed unsuitable for them to work in the factory, except under certain limitations as to age, hours, etc.

We have not overlooked certain cases referred to by the appellant's counsel to show the invalidity of this legislation as an exercise of the police power of the State, or to show a violation of constitutional rights. They establish that the legislature has no right, under the

guise of protecting health or morals, to enact laws which, bearing but remotely, if at all, upon these matters of public concern, deprive the citizen of the right to pursue a lawful occupation. Such were *In re Jacobs*, 98 N. Y. 98; *People* v. *Marx*, 99 N. Y. 377, 2 N. E. 29; *People* v. *Gillson*, 109 N. Y. 389 17 N. E. 343; *People* v. *Rosenberg*, 138 N. Y. 410, 34 N. E. 285. We are referred to some cases in Illinois, but they are neither applicable nor authoritative upon the question before us.

Further discussion is unnecessary. We might have remained satisfied with the able and clear exposition of his views by the learned justice at the special term had not the range taken by the arguments of counsel seemed to call for a brief expression by us of our view of the principle of State interference. The order should be affirmed. All concur. *Order affirmed.*

PEOPLE *v.* CANNON.

NEW YORK COURT OF APPEALS. 1893.

[139 *N. Y.* 32]

APPEALS from judgments of the General Term of the Supreme Court in the first judicial department, entered upon orders which affirmed judgments convicting the defendants of violation of the "Bottling Act" (Chap. 377, Laws of 1887, as amended by chap. 181, Laws of 1888), entered upon verdicts of the Court of General Sessions of the Peace of the city and county of New York.

Each defendant was convicted upon a separate indictment and trial of a violation of what is described in the various records as the "Bottling Act," and known as chapter 377 of the Laws of 1887, as amended by chapter 181 of the Laws of 1888.

The first three sections of the Act are here alone material. The title of the Act and the sections spoken of read as follows:

"An Act to protect the owners of bottles, boxes, siphons and kegs used in the sale of soda waters, mineral and aerated waters, porter, ale, cider, ginger ale, milk, cream, small beer, lager beer, weiss beer, beer, white beer or other beverages."[1] . . .

[1] Section 1 enables dealers in soda water and many other things, who furnish the goods in stamped bottles, kegs, etc., to register the name or device so stamped. Section 2 makes criminal the filling of such registered bottles, etc., with the substance for which it is intended, or the selling, giving, or otherwise disposing of them without the written consent of, or unless purchased from, the party so making them. Section 3 makes such forbidden use of the vessels, etc., by any other party than the one whose device they bear, for the sale of certain specified contents, or the buying, selling, using or trafficking in such vessels, without such written consent, or the having them, by any junk dealer, or second-hand dealer, in his possession, without such written consent, — presumptive evidence of said unlawful use, etc. — ED.

There were three counts in each indictment, one for unlawfully buying from a person to the grand jury unknown, one for unlawfully taking from a person to the grand jury unknown, and one for unlawfully trafficking in and disposing of in a manner and by means to the grand jury unknown certain bottles (describing them as having marks on them, etc., as provided for in the first section of the above Act). The defendants are dealers in, among other articles, second-hand bottles of all descriptions They are among the largest dealers in those articles in the city of New York, have been engaged in that business for a number of years, and their stock on hand at the time when the occurrences herein spoken of took place, reached in each case to the number of several hundred thousand bottles. Neither of the defendants was able to tell of whom or where he purchased the bottles which are the subject of complaint in his case. They purchase all kind of bottles from whoever comes with them, if satisfied they have not been stolen. Their purchases come from all over the country by rail and in vessels, and packed in boxes and barrels, and they are ignorant of the kinds of bottles that thus come until they have been taken from the various railroad stations or vessels and brought to their stores and sorted out. The defendants claimed to be ignorant of the possession of any of the classes of bottles described in the indictments until their places were visited by the police under a search-warrant sworn out by a detective employed by an association of manufacturers of soda waters, beer, etc., and who were the owners of bottles registered as provided for by the law.

Among all the bottles that were in the possession of the defendants, there are involved in this proceeding but very few, as the evidence shows there were only found an insignificant quantity of registered bottles as compared with the immense numbers of others which were on hand and dealt in by the defendants.

Everett P. Wheeler, for appellants.

Wm. J. Gaynor, for Barthelf, appellant.

Wm. Travers Jerome, for respondents.

PECKHAM, J. These prosecutions have been instituted for the purpose of obtaining a decision in regard to the validity of the law under which the convictions have been secured. Counsel for both parties have so stated, and the courts below have distinctly ruled upon the various propositions raised, so that the constitutionality of the statute might be fairly tested.

It is claimed that the Act deprives all persons other than the manufacturers of the right to traffic in or give away sparkling or aerated liquors or beer which have ever been placed in a trade-mark bottle. It is said that if the manufacturer refuses to sell the bottle, he in effect prohibits the sale or gift of that which is contained in it, except over the counter, and it is urged that the legislature cannot grant to the manufacturer such a monopoly.

It is needless to speculate as to the powers of the legislature upon

this subject, because we are of the opinion the statute is not susceptible of any such construction.

It is made unlawful for any one to fill up with soda waters, etc., any bottle marked and distinguished as in the first section of the Act is provided, or to deface, erase or obliterate any such mark on such bottle, or to sell, etc., or to otherwise dispose of, or traffic in the same, without the written consent of, or unless the same have been purchased from the person whose mark is on the bottle. This provision of the Act refers to the use of these empty bottles by some one other than the owner of the marks thereon, and after the original contents of such bottles have been taken out, and then unlawfully using or trafficking in the empty bottles.

After the retail dealer or any one else has purchased the soda water or beer from the manufacturer, and the same has been delivered to him packed in the bottles thus marked, he is not prevented by anything in the statute from himself selling such soda water or beer and delivering the same to the purchaser packed in the same bottles in which it was delivered to him from the manufacturers. This process may be continued indefinitely. The Act is not aimed at the sale and delivery of the water or beer packed in the original bottles as it came from the manufacturer, but it is aimed at an unlawful dealing in empty bottles that have been marked, and after their original contents have been used. If otherwise, it is clear that an enormous amount of the business of the manufacturers would be curtailed. It is a fact which every one knows, that large amounts of the liquors originally put up in these bottles are sold by the manufacturers to the retail dealers, who sell them to the customers, who take them away in the original bottles in which the manufacturers delivered them to the retail dealers, and it cannot be contended with any degree of plausibility, as it seems to us, that there is anything in the language of the statute, properly construed, which prohibits such a dealing in and delivery of the liquors by any one into whose possession and ownership they have lawfully come.

Nor is there any just foundation for the assertion that the Act necessarily destroys or unlawfully decreases the trade in empty bottles, which is a fair trade and one entitled to the equal protection of the law. The Act contains no provision in regard to empty bottles in general. It forbids the use or traffic in certain kinds of bottles without the written consent of the owners of the marks on them, or unless they have themselves once sold the bottles. It is not necessary that they should have sold to the person using them. A sale of the bottles to any one thereafter precludes the application of the provisions of the statute. A bottle that has been marked as described in the first section, and has thereafter been used by the owner of the marks for the purpose of identifying in the market the particular goods manufactured by him and put up in such bottles, ought not to be used for other purposes against the will of the manufacturer, so long as he has not sold

the bottles to any one, nor authorized any one to use or traffic in them; in other language, so long as he continues the owner of the bottles.

And this kind of use or traffic the law is intended to prevent.

Under the broadest definition of the term liberty, as used in the Constitution, it is not probable that any one would contend that it covers, or ought to cover, the liberty of dealing in property which the original owner has not sold to any one or authorized any one else to deal in. And yet the claim that the Act destroys the trade in second-hand bottles would lead to this result if it were allowed. Because the Act prohibits the dealing in the property of a third person without his consent, it may be that the business of the second-hand bottle-dealer is affected so far as to necessitate further precautions in regard to making purchases, than would otherwise be necessary. Before purchasing second-hand bottles he must be assured that the person selling has the right to sell them, and that he, the dealer, has the right to buy them. This may require more of an inspection of the kinds of bottles purchased than the dealer has heretofore been accustomed to give, but there is nothing improper in such obligation, and if he fail to perform it he must omit it at his peril. The Act in question has a tendency to prevent frauds upon the public in the way of filling these bottles with articles of the same nature as originally put in them, but not manufactured by the owners of the marks. Even though there may already be a section or sections of the Penal Code which cover such a subject, that does not render the further enactment of the legislature upon the same subject void. If naturally there may be trouble in showing that the person of whom the second-hand dealer purchased had himself obtained the bottles of some one who had purchased them from the manufacturers, or who had their written consent to deal in, use or traffic in them, such fact is only an additional reason for not purchasing such bottles until it is clear that they may be lawfully purchased. The Act does, undoubtedly, in this respect seriously hamper any one dealing in these kinds of empty bottles. I can, however, see no constitutional objection to the enactment based on that ground. A mere possessor of one of these empty bottles may wish to fill it without using the trade-mark. It is true he is prohibited from effacing the trade-mark, or erasing it, and this, it is said, destroys all property in the bottle, because the person who possesses it can make no earthly use of it. But in the case to which the Act is applicable, the person who has the bottle in his possession has no property right in it, and never did have. The consequence may be that he has no right to use the bottle himself, and that he does not stand in a position with regard to the person from whom he procured the bottle and contents, to require such person to take it back and give him its value, or an agreed sum, after the contents have been used. This may be his misfortune, but it does not create any right. As he never owned the bottle, or had any property right in it of that nature, that fact does not and cannot affect him.

I fail to find any constitutional defect in this statute so far as its general features under review in these cases are concerned.

There is a ground of invalidity now to be noticed that has been urged in regard to that portion of the Act which relates to matters of evidence. That portion of section three of the Act which provides that the having by any junk dealer or dealers in second-hand articles, possession of these kinds of marked bottles, or kegs, without the written consent of the owner of such marks, shall be presumptive evidence of the unlawful use, purchase and traffic in such bottles, is asserted to be unconstitutional as an invasion by the legislature of the domain of the judicial branch of the government.

It is said the legislature can create and define a crime, but it cannot declare what shall be *prima facie* evidence of its commission. Whether the crime as defined by the legislature has been committed by an accused is a question for the court and jury, and it is claimed that no direction to the court or jury as to what shall be considered *prima facie* proof can be given by the legislature. It may be remarked at the outset that this question does not arise in the case of Cannon. The defendant in that case agreed upon a state of facts upon which the judgment of the court and jury was requested, and in the statement it was agreed that the corporation which owned the marks and bottles in question had never granted any written or oral consent that the bottles should be used or trafficked in and had never sold or given away any such bottle.

In the other two cases the question is fairly up, and must be decided.

The legislature of this State possesses the whole legislative power of the people, except so far as such power may be limited by our Constitution. *Bank of Chenango* v. *Brown*, 26 N. Y. 467. The power to enact such a provision as that under discussion is founded upon the jurisdiction of the legislature over rules of evidence, both in civil and criminal cases. This court has lately had the question before it. *Board of Excise Commrs.* v. *Merchant*, 103 N. Y. 143. The Act in that case provided that whenever any person was seen to drink in a shop, etc., spirituous liquors which were forbidden to be drank therein, it should be *prima facie* evidence that such liquors were sold by the occupant of the premises or his agent with the intent that the same should be drank therein. The defendant was an occupant of premises where liquor could not be legally sold to be drank there, and he was prosecuted for selling the same in violation of the Act. The only evidence of a sale by the accused occupant was the fact that a person was seen to drink liquor upon the premises, and a conviction was asked for under the provisions of the Act quoted. The defendant was convicted, and his counsel urged that the Act was unconstitutional on the ground that it violated the constitutional guarantees of due process of law and trial by jury. It was held the claim was unfounded and that the general power of the legislature to prescribe rules of evidence and methods

of proof was undoubted, and had not been illegally exercised in that case. It is true it was a case for the recovery of a penalty and was brought by the commissioners of excise, and a civil judgment for damages was recovered. It was, however, treated as a *quasi* criminal case and criminal prosecutions were cited in support of the principle decided in it.

It cannot be disputed that the courts of this and other States are committed to the general principle that even in criminal prosecutions the legislature may with some limitations enact that when certain facts have been proved they shall be *prima facie* evidence of the existence of the main fact in question. (See cases cited in 103 N. Y. 143, *supra.*) The limitations are that the fact upon which the presumption is to rest must have some fair relation to, or natural connection with the main fact. The inference of the existence of the main fact because of the existence of the fact actually proved, must not be merely and purely arbitrary, or wholly unreasonable, unnatural or extraordinary, and the accused must have in each case a fair opportunity to make his defence, and to submit the whole case to the jury, to be decided by it after it has weighed all the evidence and given such weight to the presumption as to it shall seem proper. A provision of this kind does not take away or impair the right of trial by jury. It does not in reality and finally change the burden of proof. The people must at all times sustain the burden of proving the guilt of the accused beyond a reasonable doubt. It, in substance, enacts that, certain facts being proved, the jury may regard them, if believed, as sufficient to convict, in the absence of explanation or contradiction. Even in that case, the court could not legally direct a conviction. It cannot do so in any criminal case. That is solely for the jury, and it could have the right, after a survey of the whole case, to refuse to convict unless satisfied beyond a reasonable doubt of the guilt of the accused, even though the statutory *prima facie* evidence were uncontradicted. The case of *Commonwealth* v. *Williams*, 6 Gray, 1, supports this view.

Without the aid of the statute, the presumption provided for therein might not arise from the facts proved, although the statute says they shall be sufficient to authorize such presumption. The legislature has the power to make these facts sufficient to authorize the presumption (*State* v. *Mellor*, 13 R. I. at 669), and the jury has the power, in the absence of all other evidence, to base its verdict thereon, if satisfied that the defendant is guilty. But the jury must in all cases be satisfied of guilt beyond a reasonable doubt, and the enactment in regard to the presumption merely permits, but cannot in effect direct the jury to convict under any circumstances. The dissenting opinion of Mr. Justice Thomas, delivered in *Commonwealth* v. *Williams*, 6 Gray, *supra*, contains all that can be said against the validity of this kind of legislation.

It is argued, however, that assuming the validity of the provision in cases of excise sales and kindred cases, such as having in possession

game out of season (*Phelps* v. *Racey*, 60 N. Y. 10), and in civil cases, such as providing that the comptroller's deed upon a sale of land for taxes affords a presumption of the regularity of all prior proceedings (*Howard* v. *Moot*, 64 N. Y. 262; *Colman* v. *Shattuck*, 62 Id. 348), yet the principle does not apply to a case like this. The reason alleged is that the fact which is to be regarded as *prima facie* evidence of guilt, *viz.*, the possession of the bottles by a dealer in second-hand bottles without the written consent of the owner, was not one sufficiently identified in ordinary circumstances with guilt to make it the foundation of such a presumption.

The case of *People* v. *Lyon*, 27 Hun, 180, was a prosecution under the same section of the statute as that in *Commissioners of Excise* v. *Merchant*, 103 N. Y., *supra*. One of the judges at the General Term in illustration of his meaning that the fact from which the inference of guilt may be drawn should have some kind of natural reference to, or bearing upon the main fact, said that if the legislature could provide for such a presumption, it could enact that the drinking of liquors a mile distant from such premises should be *prima facie* evidence of a sale on the premises with intent that the liquors should be drank there. Or it might enact that if a dead body were found in any house, it should be *prima facie* evidence that the occupier of the house had murdered the deceased. The learned judge thought the Act in question was entirely arbitrary and had no regard to the connection or want of connection between the fact from which the presumption was to flow and the guilt of the accused. Yet this particular enactment, thus condemned by the Supreme Court, was upheld by this court in *Commissioners* v. *Merchant*, *supra*, 103 N. Y. The cases cited by way of illustration by the learned judge in his opinion in the Supreme Court are, in our view, far beyond the mark and contain nothing in common with the enactment here under review. In the cases supposed there would be, as the learned judge said, no kind of connection between the fact proved and the main fact in controversy. Such an enactment would be purely arbitrary. In this case, however, we think such connection exists. Of course the fact from which the presumption is to be drawn may exist without the existence of the main fact. That is true in all cases. In other words, the two facts are not necessarily inseparable. But in this case the fact of the possession of these kinds of bottles by a dealer in second-hand articles without the written consent of the owner, while it may be innocent, yet the presumption of an unlawful use or traffic in them is not so forced or so extraordinary as to be regarded by sensible and unprejudiced men as unreasonable or unnatural. It is some evidence of the main fact and the strength of it is properly a matter for legislative enactment in the first instance, subject to its submission to the jury for its deliberation and determination. So the presumption from the possession of certain birds out of season, that they were unlawfully killed or taken in the State, is not a certain presumption in any sense. A person might of course have the birds and have procured them in another State, and, therefore, not be guilty of a violation of

the game law. Yet the presumption of a violation of the statute is not such a forced and unnatural one that the legislature may not enact that it shall be made and thus leave the defendant to explain it. *Commonwealth* v. *Williams*, 6 Gray, *supra*, at page 6 in opinion of Shaw, Ch. J.

Nor can it be successfully maintained that this species of legislation is to be confined to those cases where the explanation of the fact from which the presumption is to arise is peculiarly within the knowledge of the party who is accused. There are many cases in the books (and they are cited in the cases already alluded to), where the principle is held that the burden of proving the existence of a fact peculiarly within the knowledge of the accused, is at common law placed upon him. *Potter* v. *Deyo*, 19 Wend. 361; *People* v. *Nyce*, 34 Hun, 298. If legislation were confined to such cases, it is plain that it would be entirely unnecessary and would accomplish nothing, as the law would place the burden of explanation upon the defendant without the aid of the statute. Within the limitations already alluded to and described, the statute may provide for the presumption and call upon the defendant to explain the fact. In prosecutions for the sale of liquor without a license the Supreme Court of Massachusetts held that under the old Act the prosecution must prove by proper evidence that the accused had no license, and no presumption that he had none could arise from the fact of selling. *Commonwealth* v. *Thurlow*, 24 Pick. 374. Thereupon the legislature passed an Act that in all prosecutions for selling liquors, the legal presumption should be that the defendant had not been licensed, thus reversing what had been held to be the common-law rule in *Commonwealth* v. *Thurlow*, *supra*. This was held to be within the power of the legislature. *Commonwealth* v. *Kelly*, 10 Cush. 69, 70; *Same* v. *Williams*, *supra*. It is true, the fact of having a license is one peculiarly within the knowledge of the party licensed. Yet the validity of legislation is recognized in these cases, although it enacts that a presumption shall be made from certain facts which at common law would not give rise to any such presumption. I do not know of any constitutional principle which, while permitting the legislature to enact that the legal presumption arising from the sale of liquor shall be that the person selling had no license, yet, at the same time, prevents the enactment of a provision like the one in the statute under discussion. If the legislature have the power in the first instance, I think it follows that it must have the power in the other. I can see no solid ground for distinction between the two cases. That it has the power in the first case is substantially conceded by all. The inference of guilt, under the provision in question here, is quite as strong as in many other cases that arise under statutory enactments, and we think it is sufficiently reasonable and natural to warrant a legislature in passing such an Act. The opinion of this court upon the question of the policy of this kind of legislation is not at all material, and will not, therefore, be stated.

The effect of the presumption is to call upon the accused for some explanation. If none be given, the jury may, as I have said, still

refuse to convict; but if they convict, the verdict may be upheld as founded upon sufficient evidence. The provision fills all the requirements of an Act of this nature, for it leaves an accused a fair opportunity to relieve himself from the presumption, to explain the circumstances under which the bottles came into his possession, and that they were of such a nature as to show him innocent of an unlawful use, purchase or traffic therein.

A dealer in second-hand bottles intending to obey the law would fairly be open to no danger of unjust conviction. While not giving personal supervision to the receipt of bottles coming by railroad or vessel, or brought to him for sale, he may direct his agents to receive none of the kind mentioned, and when they come from abroad he may so far conditionally receive them as to open their coverings and see what they are, and reject those which he cannot lawfully buy or deal in. Such a momentary or conditional possession, fairly explained and believed by the jury, or in regard to which they were doubtful, would rebut the statutory presumption and call for an acquittal. Proof that the bottles in question had been sold, or written authority to deal in them had been given by the owners to some one else, would also be a defence. It might be difficult of proof, it is said, and this may sometimes be true. If difficult of proof, the defendant should think of that before he purchases or deals in them, and decides to run the risk.

The Rhode Island Supreme Court has held an Act unconstitutional which in substance provided that the notorious character of the premises or the notoriously bad or intemperate character of the persons frequenting the same, or the keeping of implements or appurtenances usually appertaining to a grog shop where liquors are sold, should be *prima facie* evidence that the liquors were kept on the premises for the purpose of sale within the State. *State* v. *Beswick*, 13 R. I. 211; *State* v. *Kartz*, Id. 528. The same court, and in the same volume of its reports, held that a statute providing that evidence of the sale or keeping of intoxicating liquors for sale in any building should be *prima facie* evidence that the sale or keeping was illegal, and that the premises were nuisances, was constitutional. *State* v. *Higgins*, 13 R. I. 330; *State* v. *Mellor*, Id. 666.

In the *Kartz* case (*supra*) the court said that the introduction in the law of the principle that a person could be punished for what other people said about him was to render all constitutional provisions unavailing for his protection. The distinction is plain, I think, between the two classes of cases, and the statute under review here does not come within the principle which the Rhode Island court held to be a violation of constitutional rights.

We conclude that the provision in question cannot be assailed upon any constitutional ground. . . .

Judgment affirmed in Cannon case and reversed in the others.[1]

[1] Compare *State* v. *Buck*, 25 S. W. Rep. 573 (Mo. 1894); *Holmes* v. *Hunt*, 122 Mass. 505, 516–521. — Ed.

In *Birmingham Min. R. R. Co.* v. *Parsons*, 13 So. Rep. 602 (Ala. July, 1893), the court (HARALSON, J.) said: "In *Zeigler* v. *Railroad Co.*, 58 Ala. 594, we had occasion to pass upon the validity of an Act which provided: 'That from and after the passage of this Act, all corporations, person or persons, owning or controlling any railroad in this State, shall be liable for all damages to live stock, or cattle of any kind, caused by locomotive or railroad cars.' It was there said of that statute, that it dispenses with all proof of the wrong it seeks to redress. 'It declares that the railroad corporation shall make reparation for an injury inflicted in the authorized prosecution of its lawful business, without a semblance of fault, negligence, or want of skill in its employees, — an injury which no human prudence or foresight could prevent: and yet the statute will not allow the railroad to exculpate itself by proof of the highest qualifications and most watchful vigilance. This falls short of due process of law. . . . We can perceive of no reason, in law or morals, for holding them [railroad companies] to a stricter measure of accountability for inevitable misfortunes than would be exacted from natural persons for injuries which result from unavoidable accident, or accidents which no human prudence can foresee or avert.' This case, in these utterances, has been many times approved by us, and other courts. *Wilburn* v. *McCalley*, 63 Ala. 443; *Mead* v. *Larkin*, 66 Ala. 88; *Davis* v. *State*, 68 Ala. 63; *Green* v. *State*, 73 Ala. 32; *Railroad Co.* v. *Hembree*, 85 Ala. 485, 5 South. Rep. 173. Under the influence of these decisions, we are constrained to hold that the second section of said Act, in that it imposes an absolute liability on railroad companies, irrespective of compliance on their part with the duties prescribed in its first section, and without any fault on their part, is in violation of constitutional right. The first section, however, without reference to the second, and independently of it, prescribes the duty on these companies 'to put in cattle or stock guards upon their respective lines of roads, and keep the same in order,' and for a failure to do so they are liable to the party injured by their neglect. To prescribe the duties imposed by this section, we have seen, is a valid exercise of the power of the State. It may be maintained as such, separate from the second section. 3 Brick. Dig. p. 128, § 28; *Ex parte Cowert*, 92 Ala. 97, 9 South. Rep. 225. And 'every person, while violating an express statute, is a wrongdoer, and as such is, *ex necessitate*, negligent in the eye of the law, and every innocent party injured thereby is entitled to a civil remedy therefor;' and when a duty is required, and no remedy provided for its breach, the remedy is by common-law procedure. *Grey* v. *Trade Co.*, 55 Ala. 403; *Lowndes Co.* v. *Hunter*, 49 Ala. 507; *Autauga Co.* v. *Davis*, 32 Ala. 703."[1]

[1] But see *McCandless* v. *Richmond, &c. R. Co.*, 16 S. E. Rep. 429 (So. Ca. Dec., 1892). — ED.

STATE v. DIVINE.

SUPREME COURT OF NORTH CAROLINA. 1887.

[98 *N. C.* 778.]

THIS was a criminal action, tried before CLARK, JUDGE, at January Term, 1887, of Robeson Superior Court.

The prosecution of the defendant, commenced by warrant, issued by a justice of the peace of Columbus County, and tried by him, charges the defendant, as superintendent of the Wilmington, Columbia, and Augusta Railroad Company, with a personal criminal responsibility, for the running over and killing two cows, the property of J. C. Powell, the prosecutor, by a train moving over its track, on May 19th, 1886. The proceeding is instituted under the Act of 1880, ch. 13, which is brought forward, and constitutes the four last sections, 2327, 2328, 2329, 2330, of chapter 10 of vol. II. of *The Code*. [These sections are placed in a note.[1]]

[1] The enactment is in these words: —

"When any cattle, horses, mules, sheep or other live stock shall be killed or injured by any car or engine running on any railroad in the counties of Columbus, New Hanover, Brunswick, Bladen, Robeson, Richmond, Anson, Union, Gaston, Lincoln, Cleveland, and Burke, it shall be a misdemeanor; and the president, receiver, and superintendent of such road, and also the engineer and conductor in charge of the train or engine by which such killing or injury is done, may be indicted for such killing or injury: *Provided*, if the parties indictable under this section shall, within six months after the killing as aforesaid of any stock mentioned in this section, and before any indictment is preferred or warrant issued, pay the owner of such stock as may be killed his charges for said stock, or in the event the charges are too high, or thought to be so, such sum or sums as may be assessed by three commissioners, — one to be chosen by the party whose stock is killed or injured, a second by the party accused of killing the same, and the third by the two commissioners chosen as above indicated, who shall meet at some place in the county where the stock is killed or injured, to be selected by the parties interested, — within thirty days after they are chosen and accepted, such payment shall be a bar to any prosecution under this section; and the decision of two of said commissioners shall be final for the purposes of this section: *Provided further*, if any person or persons liable to indictment under this section, shall within the time prescribed, propose to the party endamaged to refer the matter of damages in the manner hereinbefore indicated to three commissioners, and the party endamaged shall refuse or decline such proposition, such refusing or declining shall be a bar to any prosecution under this section: *Provided also*, if the party endamaged shall, at any time before the indictment is preferred, or warrant issued, directly or indirectly, receive any sum in full compensation of his damages, such compensation shall be a bar to any prosecution under this section; and if any compensation be so received after indictment is preferred or warrant issued, or if after said time the party accused shall pay or tender to the owner of the stock killed the value of the same, as decided by the commissioners, as above provided, — in either case the prosecution shall go no further, and the accused shall be charged only with accrued cost."

The second section prescribes the punishment by "fine not exceeding fifty dollars, or imprisonment not longer than thirty days."

The third provides that, "when stock is killed or injured by a running engine or

Upon an appeal to the Superior Court from the judgment rendered against the defendant by the justice of the peace, a special verdict was found by the jury in these words: "The cattle were killed by the cars of the Wilmington, Columbia, and Augusta Railroad Company as alleged, under the following circumstances, to wit: That at the time of the killing it was a bright moonlight night, about 10 P. M.; that the train was on schedule time, running at the rate of forty miles per hour; that the cattle could have been seen at least one hundred yards ahead of the train; that the cattle were not seen by the engineer until struck by the train; that the cattle were the property of J. C. Powell; that the corporation owning the road is the same which was chartered by the Act of March 1st, 1870, as the Wilmington and Carolina Railroad Company; that the defendant is the superintendent of the said Wilmington, Columbia, and Augusta Railroad Company; that the said company refused to refer the matter to arbitration; that the defendant, J. F. Devine, was not on the train that did the killing, and was in no way connected with said killing."

The court being of opinion that the defendant was not guilty, adjudged that he go without day, and the Solicitor appealed.

The Attorney-General, for the State. *Mr. Geo. Davis* (by brief), for the defendant. . . .

SMITH, C. J. . . . The objections to the validity of the legislation are pointed out and forcibly presented in the brief of defendant's counsel, with an array of numerous rulings in their support, as follows: —

1. In its whole structure and manifest purpose it creates out of a private civil injury a public prosecution, to subserve the interests of the injured party, and to be put in operation or arrested at his instance and election. 2. It assumes a criminal liability to have been incurred by an officer of a railroad corporation, without his concurrence in the act of the subordinate, and, assuming negligence and guilt, puts him on the defensive, and requires him to repel the presumption, when he in no manner participated in what was done. 3. It undertakes to drive the accused to an adjustment of the claim for damages by assenting to a reference to arbitration, and to deprive him of his constitutional right to be tried in the courts of the State — tribunals provided under the Constitution — and by a properly constituted jury, acting under a judge. 4. It places at the election of the claimant the institution of the prosecution, which otherwise is suspended, by making a proposition for a reference. 5. It discriminates, without apparent difference, between counties and railroads, giving partial operation to a law, general in its provisions and equally applicable to all, by which the same act is rendered criminal in one locality which is not so in another, and raising

car in the counties enumerated, it shall be *prima facie* evidence of negligence on the trial of the indictment."

The fourth section declares that the indictment against the officers of railroad companies shall not lie "until a proposition to refer the matter has been proposed by the party claiming that he has been damaged."

out of an act done by one employee a presumption of guilt against another employee, who did not, in any way, participate in it.

We do not perceive any difficulty in the Act of 1856–57 (*The Code*, § 2326) raising a presumption of negligence on the part of the company from the fact of killing or injuring stock, in a civil suit for reparation, brought within six months thereafter, as is explained in the opinion in *Doggett* v. *Railroad*, 81 N. C. 459, and whose validity has not been questioned in the numerous cases which have been before the court. But the present case passes far beyond the limits of that enactment, in fastening a criminal responsibility, not upon the principal whose agent does the injury, but upon a co-employee in the same general service, and this not upon all, but specially upon railroads that run through or in particular counties.

We do not say that there may not be local legislation, for it is very common in our statute-books, but that an act divested of any peculiar circumstances, and *per se* made indictable, should be so throughout the State, as essential to that equality and uniformity which are fundamental conditions of all just and constitutional legislation.

Looking at the indictment, it will be seen that the only material allegations are, that the prosecutor's cattle were killed by a moving train on the road of the company of which the defendant is superintendent, without connecting him with the act; and scarcely more definite is the special verdict.

Do these words impute crime, and upon mere proof of these facts is the charge established, and must the defendant be convicted unless he repels the negligence which the statute presumes in the subordinate employed in managing the train? The very question involves an answer, unless all the safeguards thrown around one accused of crime are disregarded, and he left without their protection. The defendant was not on the train when the accident occurred, and has no personal relation to it, except such as results from his position as a higher officer of the road, — making the offence one by construction. Judge Cooley, in his work on Constitutional Limitations, at page 309, referring to a trial for criminal offences of different grades, uses this impressive language: "The mode of investigating the facts, however, is the same in all, and this is through a trial by jury, surrounded by certain safeguards, which are a well-understood part of the system, and which the government cannot dispense with," meaning, as we understand, that the charge must go before the jury, and the guilt of the accused proved to them, with the presumption of innocence until this is done.

In *Cummings* v. *Missouri*, 4 Wall. 328, Mr. Justice Field, referring to certain enactments in that State, says: "The clauses in question subvert the presumption of innocence, and alter the rules of evidence which, heretofore, under the universally recognized principles of the common law, have been supposed to be fundamental and unchangeable." "But I have no hesitation in saying," remarks Selden, J., in *Wynehamer* v. *The People*, 13 N. Y. 446, "That they (the legislature)

cannot subvert that fundamental rule of justice which holds that every one shall be presumed innocent until he is proved guilty."

The case is not analogous to that wherein for civil purposes negligence is inferred from the fact of killing stock, and requiring matters in excuse to be shown, which lie peculiarly within the knowledge of the agent who perpetrated the act, or controls the running of the engine when it is done; nor to the statute (*The Code*, § 1005) which makes the having about the person one of the deadly weapons forbidden to be carried, or worn, *prima facie* evidence of concealment; for this is the sole personal act of the party, of the consequences of which he is aware, and because a small weapon, if concealed, would be almost impossible of proof direct, while the possession of such is intimately and naturally connected with the secret carrying, and furnishes strong evidence of the fact.

In *San Manteo* v. *Railroad*, 8 Am. & Eng. R. R. Cases, 10, in construing the Fourteenth Amendment to the Constitution of the United States, it is said: "Whatever the State may do, it cannot deprive any one within its jurisdiction of the equal protection of the laws. And by equal protection of the laws is meant equal security under them, by every one on similar terms in his life, his liberty, his property, and in the pursuit of happiness."

Substantially the same doctrine is announced, and by the same eminent judge (Mr. Justice Field), in *Barbier* v. *Connolly*, 113 U. S. 31, in which he adds, "that no greater burdens should be laid upon one than are laid upon others in the same calling and condition."

From what has been said, it results that the legislation in question has not the sanction of the Constitution, and cannot be upheld as within the competency of the law-making power to enact.

We have gone into this inquiry in order to settle the question of the validity of the statute in the application to the case before us, and because it will practically put an end to the litigation. But for the defect in the special verdict we are compelled to direct that it be set aside for further proceedings in the court below.

Reversed and special verdict set aside.

OHIO AND MISSISSIPPI RAILWAY COMPANY *v.* LACKEY.

SUPREME COURT OF ILLINOIS. 1875.

[78 *Ill.* 55.]

APPEAL from the Circuit Court of Marion County; the HON. SILAS L. BRYAN, JUDGE, presiding. *Mr. H. P. Buxton*, for the appellant.

MR. JUSTICE BREESE delivered the opinion of the court:

This is an appeal from the judgment of the Marion Circuit Court,

rendered at the October term, 1870, upon the following agreed state of facts:

"It was agreed in this case that, during the year 1869, three persons were run over and killed by trains on the railroad of appellant, in Marion County, and the appellee, being coroner of said county at the time, held an inquest in each case, the expenses of which, together with the costs of burial, amount, in the aggregate, to $91.15; that if appellant was, in law, liable to appellee, upon the facts stated, for the above amount, then judgment should be rendered in favor of appellee therefor, and if not so liable, then judgment should be for appellant, with the right to either party to appeal."

In 1855, the General Assembly of this State passed an Act entitled "An Act to provide for the burial of the dead occurring on railroads, and in or by vehicles carrying passengers," in the second section of which Act it is provided that "every railroad company running cars within this State shall be liable for all the expense of the coroner and his inquest, and the burial of all persons who may die on the cars, or who may be killed by collision, or other accident occurring to such cars, or otherwise; and any coroner, city, town, or person who shall take charge of and decently inter any such body or corpse, or cause an inquest to be held over such corpse, shall have cause of action against such company, before any court having competent jurisdiction." Sess. Laws, 1855, p. 170; Scates' Comp. 423.

It is insisted by appellant that this statute is not within the constitutional competency of the General Assembly to enact, as it places the burden of these expenses upon the railroad companies, which, in other cases of like nature, is placed upon the estate of the deceased, or upon the county in which the accident may occur. This is the general law. R. S. 1845, ch. 99, title, "Sheriffs and Coroners," sec. 23; R. S. 1874, sec. 21, title, "Coroners."

It may, very pertinently, be asked, Why this distinction? On what principle is it that railroad corporations, without any fault on their part, shall be compelled to pay charges which, in other cases, are borne by the property of the deceased, or, in default thereof, by the county in which the accident occurred?

An examination of the section will show that no default, or negligence of any kind, need be established against the railroad company, but they are mulcted in heavy charges if, notwithstanding all their care and caution, a death should occur on one of their cars, no matter how caused, even if by the party's own hand. Running of trains by these corporations is lawful, and of great public benefit. It is not claimed that the liability attaches for a violation of any law, the omission of any duty, or the want of proper care and skill in running their trains. The penalty is not aimed at anything of this kind. We say penalty, for it is in the nature of a penalty, and there is a constitutional inhibition against imposing penalties where no law has been violated or duty neglected. Neither is pretended in this case, nor are they in the contemplation of

the statute. A passenger on the train dies from sickness. He is a man of wealth. Why should his burial expenses be charged to the railroad company? There is neither reason nor justice in it; and if he be poor, having not the means for a decent burial, the general law makes ample provision for such cases. As argued by the counsel for appellant, the law attempts to place what is properly a public burden upon these corporations, which should be borne by all alike, and discharged out of public funds raised by equal and uniform taxation.

This may be considered in the light of a special tax, for which there is no sanction in the Constitution. We have not been furnished with any brief, points, or argument for the appellee. The views presented by appellant satisfy us the law in question cannot be sustained as a constitutional enactment.

In 1874, the General Assembly repealed this statute, by chap. 131, title, "Statutes," R. S. 1022, but, at the same session, re-enacted it substantially, giving the power to sue, not to the coroner, as here, but to the county. Ib., title, "Coroners," 283, sec. 22.

For the reasons given, the judgment is reversed.

Judgment reversed.

TOLEDO, ETC. RAILWAY COMPANY *v.* JACKSONVILLE.

SUPREME COURT OF ILLINOIS. 1873.

[67 *Ill.* 37.]

APPEAL from the Circuit Court of Morgan County; the HON. CHARLES D. HODGES, JUDGE, presiding.

This was a suit brought by the city of Jacksonville against the Toledo, Wabash, and Western Railroad Company, before a justice of the peace, to recover a penalty for a violation of the ordinance of the city referred to in the opinion of the court. The cause was taken to the Circuit Court by appeal, where a trial was had before court, without a jury. The court found the defendant guilty, and rendered judgment in favor of the plaintiff for $50. The defendant appealed. *Mr. William H. Barnes*, for the appellant. *Mr. Edward Dunn*, for the appellee.

MR. JUSTICE SCOTT delivered the opinion of the court:

This action was brought to recover a penalty for a failure to comply with an ordinance of the city which required the railroad company to keep a flagman by day and a red lantern by night at the point where its track crosses the street or State road just west of the bridge known as "Rock Bridge."

It is stipulated that the company did not keep a flagman at the crossing indicated; that it is within the bounds of the city; that it is an important crossing, and much used; that it has been so used by the railroad and the inhabitants for the last twenty-five years, and that, by resolution of the city council, the company is not required, at this point,

to run its trains at a rate of speed not greater than eight miles per hour, as required by general ordinance.

The charter of the city contains the usual grants of power to pass such ordinances as may be deemed necessary for the good government of the city, to control streets and alleys, to declare what shall be deemed a nuisance and abate the same, and to control the laying of railroad tracks in the streets and alleys. It contains no express grant of power to pass the ordinance in question. The right to do so is claimed under the police power of the municipality.

Waiving the question of the power of the city to pass the ordinance without being expressly authorized by the General Assembly, we shall treat the case as though the city had the right, by the grants in its charter, to exercise all the power in the regulation of its domestic affairs that the State could do for the general welfare of the people.

There can be no question that railway corporations are subject to police regulations as well as private citizens. The General Assembly, when the public exigencies require it, has power to regulate corporations in their franchises so as to provide for the public safety. The exercise of this right in no manner interferes with or impairs the powers conferred by their Acts of Incorporation. *The G. and C. U. R. R. Co.* v. *Loomis*, 13 Ill. 548; *Thorpe* v. *Rutland and Burlington R. R.*, 27 Ver. 140.

Under this power, it has been held that the legislature may require railroad corporations, notwithstanding no such right has been reserved in the charters, to fence their tracks, to put in cattle guards, to place upon their engines a bell, and to do many other things for the protection of life and property. This power is inherent in the State, and it cannot part irrevocably with its control over that which is for the health, safety, and welfare of society.

But such regulations must be what they purport to be, police regulations, and must be reasonable when applied to corporations or individuals. What are reasonable regulations, and what are subjects of police powers, must necessarily be judicial questions. The law-making power is the sole judge when the necessity exists, and when, if at all, it will exercise the right to enact such laws.

Like other powers of government, there are constitutional limitations to its exercise. It is not within the power of the General Assembly, under the pretence of exercising the police power of the State, to enact laws not necessary to the preservation of the health and safety of the community that will be oppressive and burdensome upon the citizen. If it should prohibit that which is harmless in itself, or command that to be done which does not tend to promote the health, safety, or welfare of society, it would be an unauthorized exercise of power, and it would be the duty of the courts to declare such legislation void.

It seems to us that the ordinance in this case imposes an unreasonable burden upon the railroad company. There is but a single track, so far as the record discloses, at the point where it requires the services of a

flagman, and only the usual trains of the company pass over it. It is totally unlike a place where a number of tracks cross a public street upon which there is a great amount of travel, where trains are made up, and where the trains and locomotives doing the work pass and repass each other at short intervals. The frequency with which trains pass and repass at such places renders the dangers to be apprehended constantly imminent, and the legislature may so declare and make it obligatory on the company to adopt measures to secure the public safety. The rights of the company and the public to the use of the crossing are mutual, but it is the duty of the company to provide the proper safeguards, and the degree of diligence must be in proportion to the hazard. A regulation that would require the company to place a flagman at such a place, or at any place where danger to the public safety, in the judgment of prudent persons, might be apprehended at any time, would be a reasonable one, and could, unquestionably, be enforced. There can be no necessity, however, for the services of a flagman at a crossing of a public highway in the country, where there is but little travel. There, it will be a sufficient protection if the company shall be required to erect signs that will notify persons that they are approaching a railroad crossing, and to give the usual signals. It is then the duty of the citizen to exercise a reasonable precaution for the safety of himself and his property.

It would hardly be insisted a regulation that would compel a railway company to maintain a flagman at every crossing of a public road or street on its entire line would be demanded by the public exigencies, or be within the constitutional exercise of the police power of the State. It is a matter of which we may take judicial notice, there does not now exist a necessity to enforce in this State many of those rigid regulations that have been adopted on some of the English railways, and in some of the densely populated countries on the continent of Europe. Doubtless, as the population increases and the dangers multiply, it will become necessary, in this country, to increase precautionary measures for the public safety, and the companies will be compelled to bear the additional burden made necessary by the hazardous business in which they are engaged. It is their work that renders public crossings dangerous, and hence it is they may be compelled to bear the expenses of such measures as may be adopted to secure the lives and property of those who have an equal right with them to the use of the crossing on the highway.

There is nothing at the crossing where the company is required, by the provisions of the ordinance in the case at bar, to keep a flagman, that makes it unusually dangerous. So far as we know, it is an ordinary crossing. There is but a single track, on which only the usual trains pass at regular and irregular intervals and distance apart. The city has not even deemed it advisable to require the company to slacken the speed of its trains when passing this point, as it is compelled to do by ordinance when crossing other streets in the city. If the company can

be compelled to maintain a flagman at this point, there is no reason why it could not be compelled to keep one at every road and street crossing on its entire line. That there are places where the danger to be apprehended is so constant and imminent, by reason of the construction of the passage-way over the track, the company may be required to employ a flagman to warn persons of the danger and conduct them across, we entertain no doubt, but the point designated in this ordinance is not such a one, at least it does not appear to be so from the ordinance itself, or from anything in the record.

The conclusion that we have reached is, that the ordinance under which it was sought to compel the railroad company to maintain a flagman at the point designated is not a reasonable requirement, and is therefore within the constitutional limitations on the exercise of the police.

The judgment of the court below finding appellant guilty is contrary to law, and must be reversed.

Judgment reversed.

EX PARTE HODGES.

SUPREME COURT OF CALIFORNIA. 1890.

[87 *Cal.* 162.]

APPLICATION to the Supreme Court for a discharge on a writ of *habeas corpus*. The facts are stated in the opinion of the court.

Latimer & Brown, for petitioner. *W. S. Tinning*, for respondent.

WORKS, J. This is an application for a writ of *habeas corpus*. The Board of Supervisors of Contra Costa County enacted in the following ordinance. [It is found below in the note.[1]]

The petitioner was convicted of a violation of this ordinance, sentenced to pay a fine, and in default of payment, was committed to the county jail. He now prosecutes this proceeding, and asks that he be discharged.

The question as to the constitutionality of the ordinance is gravely

[1] "An ordinance to provide for the extermination and destruction of ground-squirrels in the county of Contra Costa.

"The Board of Supervisors of the county of Contra Costa do ordain as follows:—

"Sec. 1. Ground-squirrels infesting lands in the county of Contra Costa are hereby declared to be a public nuisance.

"Sec. 2. All owners and occupants of lands within the county of Contra Costa are hereby required, within ninety days after the taking effect of this ordinance, to exterminate and destroy the ground-squirrels on their respective lands, and thereafter to keep said lands free and clear therefrom.

"Sec. 3. Any person violating any of the provisions of this ordinance shall be deemed guilty of a misdemeanor.

"Sec. 4. This ordinance shall take effect and be in force on the thirtieth day of November, 1889."

and learnedly discussed by counsel on both sides, and Cooley's Constitutional Limitations, Potter's Dwarris on Construction of Statutes, Sedgwick on Constitutional Law, and other constitutional authorities, and decided cases innumerable, are cited in aid of and against its validity. It is certainly a most effective means of abating a nuisance, *viz.*, the squirrels, and bringing about a very desirable end. We regret exceedingly that we cannot see our way clear to uphold and enforce such an important and original piece of legislation. Indeed, it would give us great pleasure to see the power here assumed applied to snakes, tarantulas, ants, flies, fleas, and other reptiles, insects, and pests, which tend to make man's life a burden, and to have it exercised and enforced in every county in the State. But we are unable to see by what right or authority of law a board of supervisors can impose upon a land-owner the burden and expense of exterminating animals *ferœ naturæ* on his own land, or elsewhere. It is true, the County Government Act, section 25, subdivision 28, gives boards of supervisors power to "provide for the destruction of gophers, squirrels, other wild animals, noxious weeds, and insects injurious to fruit-trees or vines, or vegetable or plant life," and this is a power that should be upheld in all cases, where the means employed are reasonable and not otherwise objectionable. But certainly this authority cannot be so far extended as to require a land-owner, under a penalty, to exterminate wild animals of which he is not the owner, and over which he cannot, in the nature of things, have any control or dominion. From our limited knowledge of the nature of the squirrel-tribe in this State, such a task would seem to us to be almost, if not quite, impossible.

The ordinance requires that all occupants of lands, within ninety days, exterminate and destroy the ground-squirrels on their respective lands, and thereafter keep said lands free and clear therefrom. This might be successfully done by the free and judicious use of poison, and perhaps by some other means, on very small tracts of land, but on large tracts it would certainly require eternal vigilance, if it could be accomplished at all, and if, after the extermination of the intruders on his own lands, one, only one, should come over from the land of his neighbor, the ordinance would be violated. The occupant of lands bordering on another county, where no such regulation prevailed, and the pesky squirrel was allowed to propagate and grow unmolested, would be in a most unfortunate condition. Such an ordinance differs materially from laws requiring an occupant of lands to keep them free from noxious weeds, or such as make it the duty of an owner of diseased domestic animals to kill them, in order to prevent the spread of the disease. These are matters over which the property-owner has control, and the requirements are reasonable and just.

The respondent attempts to sustain the ordinance by and under section 11 of article XI. of the Constitution of this State, which provides that "any county, city, town, or township may make and enforce, within its limits, all such local, police, sanitary, and other regulations

as are not in conflict with the general laws." But the ordinance is not intended to preserve the peace and quiet of the county, or to prevent the use of one's property to the injury of another, or for the protection of the lives, limbs, or comfort of all persons, or to prevent the propagation or spread of disease, nor is it in any proper sense a police or sanitary regulation. What is meant by "other regulations," in the section cited, may be a question, but it must certainly be limited to objects similar to those denominated police and sanitary. If the Board of Supervisors had no authority to pass such an ordinance, then no offence was committed by the petitioner, the act or omission on his part was not a crime, the court had no jurisdiction to try or convict him, and he is entitled to his discharge.

We know of no law which can be held to authorize a board of supervisors to enact such an ordinance, and we are quite clear that it cannot be enforced, for the reason that it is unreasonable and burdensome in the extreme. Let the petitioner be discharged.

FOX, J., SHARPSTEIN, J., and THORNTON, J., concurred. PATERSON, J., and MCFARLAND, J., concurred in the judgment.

IN RE LEE SING ET AL.

CIRCUIT COURT OF THE UNITED STATES, N. D. CALIFORNIA. 1890.

[43 *Fed. Rep.* 359.]

AT LAW.

The ordinance under which the arrest was made is as follows. [See the note.[1]]

Thos. D. Riordan, for petitioners. *John I. Humphreys*, for the City.

SAWYER, J. The petitioners are under arrest for the violation of Or-

[1] "Order No. 2190 designating the location and the district in which Chinese shall reside and carry on business in this city and county.

"The people of the city and county of San Francisco do hereby ordain as follows:

"Section 1. It is hereby declared to be unlawful for any Chinese to locate, reside, or carry on business within the limits of the city and county of San Francisco, except in that district of said city and county hereinafter prescribed for their location.

"Sec. 2. [This section defines the limits of the district appropriated to the residence of the Chinese.]

"Sec. 3. Within sixty days after the passage of this ordinance all Chinese now located, residing in or carrying on business within the limits of said city and county of San Francisco shall either remove without the limits of said city and county of San Francisco or remove and locate within the district of said city and county of San Francisco herein provided for their location.

"Sec. 4. Any Chinese, residing, locating, or carrying on business within the limits of the city and county of San Francisco contrary to the provisions of this order shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by imprisonment in the county jail for a term not exceeding six months.

"Sec. 5. It is hereby made the duty of the chief of police and of every member of

der No. 2190, commonly called the "Bingham Ordinance," requiring all Chinese inhabitants to remove from the portion of the city heretofore occupied by them, outside the city and county, or to another designated part of the city and county. . . . [Then follows section 1 of the Fourteenth Amendment.]

Article 6 of the Burlingame Treaty with China, provides, that "Chinese subjects, visiting or residing in the United States, shall enjoy the same privileges, immunities, and exemptions, in respect to travel or residence, as may there be enjoyed by the citizens or subjects of the most favored nation." 16 St. 740.

Section 1977 of the Revised Statutes of the United States provides as follows: —

"All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other." . . . [Then follows Art. 6, cl. 2, of the Constitution of the United States.]

The discrimination against Chinese, and the gross inequality of the operation of this ordinance upon Chinese, as compared with others, in violation of the constitutional, treaty, and statutory provisions cited, are so manifest upon its face, that I am unable to comprehend how this discrimination and inequality of operation, and the consequent violation of the express provisions of the Constitution, treaties, and statutes of the United States, can fail to be apparent to the mind of every intelligent person, be he lawyer or layman.

The ordinance is not aimed at any particular vice, or any particular unwholesome or immoral occupation, or practice, but it declares it "to be unlawful for any Chinese to locate, reside, or carry on business within the limits of the city and county of San Francisco, except in that district of said city and county hereinafter provided for their location."

It further provides that "within sixty days after the passage of this ordinance all Chinese now located, residing or carrying on business within the limits of said city and county of San Francisco, shall either remove without the limits of said city and county of San Francisco, or remove and locate within the district of the city and county of San Francisco, herein provided for their location." And again, section 4 provides that "any Chinese residing, locating, or carrying on business

the police department of said city and county of San Francisco to strictly enforce the provisions of this order.

"And the clerk is hereby directed to advertise this order as required by law.

"In Board of Supervisors, San Francisco, February 17, 1890.

"Passed for printing by the following vote: Ayes — Supervisors Bingham, Wright, Boyd, Pescia, Bush, Ellert, Wheelan, Becker, Pilster, Kingwell, Barry, Noble."

within the limits of the city and county, contrary to the provisions of this order, shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be punished by imprisonment in the county jail for a term not exceeding six months. Upon what other people are these requirements, disabilities, and punishments imposed? Upon none.

The obvious purpose of this order, is, to forcibly drive out a whole community of twenty-odd thousand people, old and young, male and female, citizens of the United States, born on the soil, and foreigners of the Chinese race, moral and immoral, good, bad, and indifferent, and without respect to circumstances or conditions, from a whole section of the city which they have inhabited, and in which they have carried on all kinds of business appropriate to a city, mercantile, manufacturing, and otherwise, for more than forty years. Many of them were born there, in their own houses, and are citizens of the United States, entitled to all the rights and privileges under the Constitution and laws of the United States, that are lawfully enjoyed by any other citizen of the United States. They all, without distinction or exception, are to leave their homes and property, occupied for nearly half a century, and go, either out of the city and county, or to a section with prescribed limits, within the city and county, not owned by them, or by the city. This, besides being discriminating, against the Chinese, and unequal in its operation as between them and all others, is simply an arbitrary confiscation of their homes and property, a depriving them of it, without due process or any process of law. And what little there would be left after abandoning their homes, and various places of business would again be confiscated in compulsorily buying lands in the only place assigned to them, and which they do not own, upon such exorbitant terms as the present owners with the advantage given them would certainly impose. It must be that or nothing. There would be no room for freedom of action, in buying again. They would be compelled to take any lands, upon any terms, arbitrarily imposed, or get outside the city and county of San Francisco.

That this ordinance is a direct violation of not only the express provisions of the Constitution of the United States, in several particulars, but also of the express provisions of our several treaties with China, and of the statutes of the United States, is so obvious, that I shall not waste more time, or words in discussing the matter. To any reasonably intelligent and well-balanced mind, discussion or argument would be wholly unnecessary and superfluous. To those minds, which are so constituted, that the invalidity of this ordinance is not apparent upon inspection, and comparison with the provisions of the Constitution, treaties, and laws cited, discussion or argument would be useless. The authority to pass this order is not within any legitimate police power of the State. See *In re Tie Loy*, 11 Sawy. 472, 26 Fed. Rep. 611; *In re Ah Fong*, 3 Sawy. 144; *Chy Lung* v. *Freeman*, 92 U. S. 275; *In re Quong Woo*, 7 Sawy. 531, 13 Fed. Rep. 229; *Yick Wo* v. *Hopkins*, 118 U. S. 356, 6 Sup. Ct. Rep. 1064; *Ho Ah Kow* v. *Numan*, 5 Sawy. 552.

Let the order be adjudged to be void, as being in direct conflict with the Constitution, treaties, and statutes, of the United States, and let the petitioners be discharged.[1]

MAYOR, ETC., OF BALTIMORE *v.* RADECKE.

MARYLAND COURT OF APPEALS. 1878.

[49 *Md.* 217.]

APPEAL from the Circuit Court of Baltimore City. The case is stated in the opinion of the court.

The cause was argued before BARTOL, C. J., BOWIE, MILLER, and ALVEY, JJ. *Thomas W. Hall* and *James L. McLane*, for the appellant. *E. Duffy* and *S. Teackle Wallis*, for the appellee.

MILLER, J., delivered the opinion of the court. The appellee is tenant and occupant of certain premises situated on McClellan's Alley, in a central business locality in the city of Baltimore, where he and his father before him had carried on the business of carpentering and box-making since the year 1853. In 1866 he applied to the Mayor and City Council for permission, which was granted, to erect and use on these premises and in the carrying on of his business, a steam-engine. The resolution granting this permit contained a provision, in conformity to a city ordinance on the subject, that the engine was "to be removed after six months' notice to that effect from the Mayor." Upon the passage of this resolution he erected and has ever since used a steam-engine in his said business, but some time in the year 1873 the Mayor gave him notice to remove it, which he refused to do. The city, then, after the expiration of the six months instituted a suit before a justice of the peace, for the penalty of non-removal provided in the ordinance, and the appellee thereupon filed the bill in this case for an injunction to restrain the prosecution of that action and others which the city threatened to bring from day to day in order to enforce the removal of this engine. The court below on final hearing ordered the injunction to be issued as prayed and made it perpetual. From this order the Mayor and City Council have appealed.

The city legislation on the subject, in force at the time this permit was granted to the appellee, was *first*, the 56th section of Ordinance No. 33, approved June 5, 1858, by which it was provided under prescribed penalties that no person should "erect, build, or have put up any steam saw-mill or machinery, or any steam-engine for any purpose whatever, or planing machine, or machinery within the limits of the city, without first obtaining the sanction of the Mayor and City Council," and *secondly*, part of the 5th section of Ordinance No. 78, approved June 9, 1864, which provided that "all permits granted for steam-

[1] Compare *Ex parte Sing Lee*, 96 Cal. 354 (1892). — ED.

boilers and steam engines and boilers may be revoked, and the same shall be removed, after six months' notice from the Mayor, and any one receiving such notice, who shall refuse or neglect to conform to the requirements of the same shall pay a fine not exceeding one hundred dollars, and a further fine not exceeding fifty dollars, for every day such refusal or neglect shall continue after the first." It is this last provision which the present case requires us more especially to consider, not only because the bill assails its legality and validity, but because the injunction complained of restrains the prosecution of suits for the penalties which it imposes for non-compliance with the notice and order to remove given by the Mayor. It is obvious that those who enacted this provision did not suppose it was an exercise of the power "to prevent and remove nuisance," for it would be a curious anomaly in municipal legislation on that subject, as well as a novel mode of removing a nuisance, to pass an ordinance allowing a nuisance to remain for six months after the Mayor had determined it to be such, before any steps could be taken to enforce its removal. But further than this, a stationary steam-engine is not in itself a nuisance even if erected and used in the midst of a populous city, unless it interferes with the safety or convenience of the public in the use of the streets. There is no proof in this record of any such interference, or even that this was the ground of the Mayor's action in giving the notice. Nor was this engine used in connection with any trade or occupation which the law pronounces offensive or noxious. The business of carpentering and box-making is neither offensive to the senses nor deleterious to health. In fact, the only complaints made against the engine are its liability, in common with all other steam boilers, to explode, and that it is used in a business in which combustible materials are necessarily brought in dangerous proximity to the fire of its boiler, and it therefore subjects buildings and merchandise in that vicinity to increased danger from fire, raises the premiums of insurance thereon, and excites the fears of neighboring owners for the safety and security of their property, but neither one nor all of these circumstances combined, make it a nuisance. *Rhodes* v. *Dunbar*, 57 Penn. State Rep. 274.

But the legislature has granted ample power of legislation upon the subject of the erection and use of steam-engines within the city limits, to the Mayor and City Council of Baltimore, independent of the power "to prevent and remove nuisances." They are clothed with the power to pass ordinances "for the prevention and extinguishment of fires," for "securing persons and property from danger or destruction, and for promoting the great interests and insuring the good government of the city," and "to pass all ordinances necessary to give effect and operation to all the powers vested in the corporation of the city." It has been well said in reference to such general grants of power that as to the degree of necessity for municipal legislation on the subjects thus committed to their charge, the Mayor and City Council are the exclusive judges, while the selection of the means and manner (contributory to

the end) of exercising the powers which they may deem requisite to the accomplishment of the objects of which they are made the guardians, is committed to their sound discretion. *Harrison* v. *Mayor, &c.*, 1 Gill, 264. This discretion is very broad, but it is not absolutely and in all cases beyond judicial control. Modern decisions in other States have in some instances extended the control of the courts over municipal ordinances upon the ground of their unreasonableness, further perhaps than the adjudications in this State would justify us in going. The cases on this subject and the conclusions to be drawn from them are well stated by Judge Dillon in his admirable work on Municipal Corporations, in sections 253 to 260. They will also be found collected in Wood on Nuisances, 774, note 1. While we may not be willing to adopt and follow many of those cases, and while we hold that this power of control by the courts is one to be most cautiously exercised, we are yet of opinion there may be a case in which an ordinance passed under grants of power like those we have cited, is so clearly unreasonable, so arbitrary, oppressive or partial, as to raise the presumption that the legislature never intended to confer the power to pass it, and to justify the courts in interfering and setting it aside as a plain abuse of authority. In applying the doctrine of judicial control to this extent, we contravene no decisions in our own State and impose no unnecessary restraints upon the action of municipal bodies. The inquiry then arises is the ordinance in question such as we have described? To answer this question it is necessary to consider briefly upon what it operates and what mischiefs or wrongs it is capable of inflicting. It is matter of common knowledge as well as of proof in this case, that the use of steam-engines is absolutely necessary for the successful prosecution of nearly all the various manufacturing, commercial, industrial, and business enterprises which are essential to the prosperity of large cities. Great numbers of them are in constant use in the city of Baltimore for purposes so varied and numerous as to embarrass description, and they are to be found in every business locality and in all sections of the town. In fact, it may be safely affirmed that their use could not be prohibited or discontinued without the most serious impairment, if not destruction, of the prosperity and growth of the city. Now it is with these powerful and dangerous but most important and valuable aids to human industry, that this ordinance deals, and what does it do? It does not profess to prescribe regulations for their construction, location, or use, nor require such precautions and safeguards to be provided by those who own and use them as are best calculated to render them less dangerous to life and property, nor does it restrain their use in box-factories and other similar establishments within certain defined limits, nor in any other way attempt to promote their safety and security without destroying their usefulness. But it commits to the unrestrained will of a single public officer the power to notify every person who now employs a steam-engine in the prosecution of any business in the city of Baltimore to cease to do so, and by providing compulsory fines for every day's disobedience of such notice and

order of removal, renders his power over the use of steam in that city practically absolute, so that he may prohibit its use altogether. But if he should not choose to do this, but only to act in particular cases, there is nothing in the ordinance to guide or control his action. It lays down no rules by which its impartial execution can be secured or partiality and oppression prevented. It is clear that giving and enforcing these notices may, and quite likely will, bring ruin to the business of those against whom they are directed, while others from whom they are withheld may be actually benefited by what is thus done to their neighbors, and when we remember that this action or non-action may proceed from enmity or prejudice, from partisan zeal or animosity, from favoritism and other improper influences and motives, easy of concealment and difficult to be detected and exposed, it becomes unnecessary to suggest or to comment upon the injustice capable of being wrought under cover of such a power, for that becomes apparent to every one who gives to the subject a moment's consideration. In fact, an ordinance which clothes a single individual with such power hardly falls within the domain of law, and we are constrained to pronounce it inoperative and void. Resting our decision as to the invalidity of this ordinance on this ground, we shall not consider the question whether it is also void as an unauthorized delegation of a public power or trust. In the view we have taken of the case, it becomes unnecessary to express any opinion upon that question. It must also be observed that what we have declared void is only that part of the ordinance of 1864, which gives to the Mayor the power to revoke permits for steam engines and boilers, and we are not to be understood as expressing any disapproval of the section of the ordinance of 1858, which requires a permit from the Mayor and City Council for the erection of all such engines within the city limits. The Act of 1872, ch. 153, which was referred to by the appellant's counsel as containing a ratification and approval by the legislature of both these ordinances, contains no reference to the ordinance of 1864. The section of that Act which is relied on for this ratification and approval simply provides that "nothing in this Act shall conflict with the ordinance of the Mayor and City Council of Baltimore, which requires their permission for the erection of steam-boilers in that city." This in plain terms refers exclusively to the ordinance of 1858, and we by no means affirm that it constitutes a legislative ratification and approval even of that ordinance.

As to the question of jurisdiction we have no doubt. . . . It follows that the decree appealed from must be affirmed.

Decree affirmed.[1]

[1] See note at pp. 672–673.

In *State* v. *Yopp*, 97 N. C. 477, 481 (1887), the court (MERRIMON, J.) said: "In the case before us, the statute (Pr. Acts, 1885, ch. 14) forbids every person 'to use upon the road of said company a bicycle, or tricycle, or other non-horse vehicle, without the express permission of the superintendent of said road,' &c. The purpose of this statutory provision is not to destroy the defendant's property, — his bicycle, — or to deprive

him of the use of it, in a way not injurious to others, but to prevent him from using it on a particular road — that mentioned — at a particular time or season, when it would, by reason of its peculiar shape, and the unusual manner of using it as a means of locomotion, prove injurious to others, — particularly women and children, constantly passing and repassing in great numbers over the particular road mentioned, in carriages and other ordinary vehicles drawn by horses. The evidence tended strongly to show, that the use of the bicycle on the road materially interfered with the exercise of the rights and safety of others in the lawful use of their carriages and horses in passing over the road. In repeated instances the horses became frightened at them, and carriages were thrown into the ditches along the side of the road. It was not uncommon for horses to become frightened at them, and become unruly, if the evidence is to be believed.

"The statute did not deprive the defendant of the use of his property, — he might have gone another way, — he might have gone at an opportune time, with the express permission of the superintendent of the road. In any case, he had no right to go, using his bicycle, at the peril of other people, he giving rise to such peril. The statute did not, therefore, in any just sense, destroy his property, as contended, or deprive him of the proper and reasonable use of it; nor was such its purpose. Its purpose was lawful, and in our judgment, it does not provide an unreasonable police regulation, — certainly not one so unreasonable as to warrant us in declaring it void. Such statutes are valid, unless the purpose, or necessary effect is, not to regulate the use of property, but to destroy it. . . .

"It is further objected, that the statute leaves it to the arbitrary discretion of the superintendent of the road named to allow or disallow persons to use 'a bicycle, or tricycle, or other non-horse vehicle' on it. This is a misapprehension of the true import of the provision cited. The discretion vested in the superintendent is not arbitrary. He is made the agent of the law, as well as superintendent, and he is bound to exercise the discretion vested in him honestly, fairly, reasonably, and without prejudice or partiality, for the just purpose of effectuating the intention of the statute. If there be times, or seasons, or occasions, when persons wishing to use bicycles or other like vehicles embraced by the prohibitory clause of the statute in question, it is his plain duty to allow them to do so at such times The authority is not his; he is simply made the agent of the law for a lawful purpose, and he is amenable as such for any prostitution of the power so vested in him, and the creation of the discretion implies that there may be occasions, or times, or seasons, when bicycles may be used on the road.

"'It not infrequently happens, that statutes require particular things to be done, or not to be done, that must be made to depend upon the judgment — discretion — of a designated agent or commissioner, or officer, and the discretion in such cases is not arbitrary, — it is lawful, and must be lawfully exercised.' . . .

"The learned counsel for the appellant directed our attention to the case of *Yick Wo* v. *Hopkins*, 118 U. S. 356. That case, in our judgment, has no application here. The court declared a *city ordinance* void, upon the ground that its manifest purpose was not a just and reasonable regulation, but unlawful, and the discretionary powers conferred upon certain authorities of the city were purely arbitrary — intentionally so — and therefore unlawful and void. And the same may be said of *Mayor and C. of Baltimore* v. *Radecke*, 49 Md. 217, cited in the case above mentioned. In our case, the purpose of the statute is obviously a lawful one, — a proper regulation of the use of property, — and the designation of the agent, and the discretionary power conferred upon him, is for the lawful purpose of effectuating the just intent of the statute, and he is amenable, as we have indicated above." Compare *Twilley* v. *Perkins*, 26 Atl. Rep 286 (Md. 1893). — ED.

STATE *v.* DERING.

SUPREME COURT OF WISCONSIN. 1893.

[84 *Wis.* 585.]

CERTIORARI to a court commissioner of Columbia County.

This is a proceeding by *certiorari* to review the decision of C. L. Dering, court commissioner of Columbia County, in the matter of his refusal to discharge the petitioner, Joseph Garrabad, from custody, and remanding him to the imprisonment of which he complains. It appears from the return of the sheriff of Columbia County to the writ of *habeas corpus* issued by the commissioner, that on the 27th day of February, 1893, the petitioner was placed in his custody, and was held therein, under and by virtue of an execution or so-called "commitment," issued by V. Helman, a justice of the peace of the city of Portage in said county, reciting that the city of Portage had recovered a judgment before said justice against the petitioner for the sum of $5, together with $13.85 costs of suit, for the violation of an ordinance of said city, to wit, No. 124, entitled "An Ordinance to regulate Street Parades and insure Public Safety," and commanding the sheriff or any constable of the county to levy the same on the goods and chattels of the said petitioner except such as the law exempts, and in default thereof to take his body and him convey and deliver to the keeper of the common jail of Columbia County, to be there kept in custody for the term of twenty days, unless said judgment with costs was sooner paid or he should be discharged by due course of law.

The ordinance in question provides that "it shall be unlawful for any person or persons, society, association, or organization, under whatsoever name, to march or parade over or upon" certain streets (therein named) in the city of Portage, "shouting, singing, or beating drums or tambourines, or playing upon any other musical instrument or instruments, for the purpose of advertising or attracting the attention of the public, or to the disturbance of the public peace or quiet, without first having obtained a permission to so march or parade, signed by the mayor of said city. In case of illness or absence of the mayor or other officer hereby designated of the city, such permission may be granted and signed by the president of the council, city clerk, or marshal, in the order named: provided, that this section shall not apply to funerals, fire companies, nor regularly organized companies of the State militia: and provided, further, that permission to march or parade shall at no time be refused to any political party having a regular State organization. Any person violating any of the provisions of this ordinance shall, upon conviction thereof, be fined in a sum not less than two dollars or more than ten dollars." The second section provided that the marshal should accompany such person or persons receiving permission while upon the portion of the streets described, to preserve order, warn the owners of

horses upon said portions of said streets, and to carefully preserve the public safety; and when such permission is given by any officer other than the marshal, that he should forthwith notify the marshal of the granting of the same.

The sheriff further returned that "the central part of the business portion of the city of Portage is contained within the limits defined in the ordinance, and the streets therein referred to were narrow, and cross and enter each other at various angles, and there was a great deal of traffic over the same, and that the petitioner had been duly and lawfully convicted of a wilful violation of said ordinance upon trial duly and legally had."

The petitioner demurred to the return, and the commissioner overruled the demurrer and ordered that he be remanded to the custody of the sheriff, to be confined in the county jail of said county according to the terms of said execution.

For the relator there was a brief by *Rogers & Hall*, and oral argument by *F. W. Hall*.

W. S. Stroud, for the respondent.

PINNEY, J. . . . It is objected that the ordinance is void on its face, by reason of its operating unequally and creating an unjust and illegal discrimination, not only (1) by the express terms of the ordinance itself, but (2) it is so framed as to punish the petitioner for what is permitted to others as lawful, without any distinction of circumstances, whereby an unjust and illegal discrimination occurs in its execution, and which, though not made by the ordinance in express terms, is made possible by it; (3) in that it vests in the mayor, or other officers of the city named in it, power to arbitrarily deny persons and other societies or organizations the right secured by it to others to march and parade on the streets named. The general subject and scope of the ordinance is marching or parading by "any person or persons, society, association, or organization" over the streets named, "shouting, singing, or beating drums or tambourines, or playing upon any musical instrument or instruments, for the purpose of advertising or attracting the attention of the public, or to the disturbance of the public peace or quiet," without having obtained permission as prescribed in the ordinance. It provides, among other things, that the ordinance shall not apply to fire companies, nor to regularly organized companies of the State militia, and that permission to march or parade shall at no time be refused to any political party having a regular State organization. The permission, it will be seen, is required absolutely to be granted to political parties having a regular State organization, so they are practically excepted out of the ordinance. Whether permission shall be granted to any other society, civic, religious, or otherwise, depends not upon the character of the organization, or upon the particular circumstances of the case, but upon the arbitrary discretion of the mayor or other officers named in the ordinance, acting in his absence. It is therefore argued that, as between different persons, societies, associations, or organiza-

tions, the ordinance operates unequally and creates unjust and illegal discriminations by its express terms, and makes such discriminations not only possible but necessary in its administration, and therefore that the ordinance is void upon common-law principles, as heretofore recognized and administered in the courts of the country.

The rights of persons, societies, and organizations to parade and have processions on the streets with music, banners, songs, and shouting, is a well-established right, and, indeed, the ordinance upon its face recognizes to a certain extent the legality of such processions and parades, and provides for permitting them, in the discretion of the mayor, in all cases except those named, and as to those the right is practically secured. The ordinance, as framed, and as it is to be executed under the arbitrary discretion of the mayor or other officer, is clearly an abridgment of the rights of the people; and in many cases it practically prevents those public demonstrations that are the most natural product of common aims and kindred purposes. "It discourages united effort to attract public attention and challenge public examination and criticism of the associated purposes." *Anderson* v. *Wellington*, 40 Kan. 173, contains a careful discussion and examination of a similar ordinance, which was there held to be void as contravening common right. In *In re Frazee*, 63 Mich. 396, after a full discussion by Campbell, C. J., a similar ordinance was also held void, and that it is not in the power of the legislature to deprive any of the people of the enjoyment of equal privileges under the law, or to give cities any tyrannical powers; that charters, laws, and regulations, to be valid, must be capable of construction, and must be construed, in conformity to constitutional principles and in harmony with the general laws of the land; and that any by-law which violates any of the recognized principles of lawful and equal rights is necessarily void so far as it does so, and void entirely if it cannot be reasonably applied according to its terms; and no grant of absolute discretion to suppress lawful action can be sustained at all; that it is a fundamental condition of all liberty, and necessary to civil society, that men must exercise their rights in harmony with and yield to such restrictions as are necessary to produce peace and good order; and it is not competent to make any exceptions for or against the so-called "Salvation Army" because of its theories concerning practical work; that in law it has the same right, and is subject to the same restrictions, in its public demonstrations, as any secular body or society which uses similar means for drawing attention or creating interest. Hence the by-law there in question, because it suppressed what was in general perfectly lawful, and left the power of permitting or restraining processions and their courses to an unlawful official discretion, was held void; and that any regulation, to be valid, must be by permanent legal provisions, operating generally and impartially.

The return of the sheriff utterly fails to show of what specific offence the petitioner was convicted; that is to say, in what particular respect he violated the ordinance. We may infer, however, for the purpose of

argument and illustration, from the fact that the petition for the writ addressed to this court states that the petitioner is a member of the Salvation Army, that he was convicted of parading the streets in that capacity. It cannot be maintained that any person or persons or society have any right for religious purposes or as religious bodies to use the streets for purposes of public parade because the purpose in view is purely religious and not secular, but they certainly have the same right to equal protection of the laws as secular organizations. The objections urged against this ordinance are, we think, fatal to any conviction which might take place under it, by reason of its unreasonable and unjust discriminations and of the arbitrary power conferred upon the mayor or other officer of the city to make others in its administration and execution; so that it is impossible to sustain the conviction in any aspect in which the question may be viewed.

A careful examination of the decisions in various States, and the considerations upon which they are founded, is not material to the determination of the case, for the whole subject is governed and controlled by the provisions of the Fourteenth Amendment to the Constitution of the United States, already referred to. In construing and applying this amendment, the Supreme Court of the United States have said in *Barbier* v. *Connolly*, 113 U. S. 27, that it "undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness, and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of any one except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition. . . . Class legislation discriminating against some and favoring others is prohibited, but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment." The entire subject underwent careful examination in the case of *Yick Wo* v. *Hopkins*, 118 U. S. 356, where the subject of city ordinances and the principles regulating their validity were considered. The objections to the validity of the ordinances in that case were, in substance, the same that are urged in this, and the ordinances in question were held void. The objections urged in the case of *Baltimore* v. *Radecke*, 49 Md. 217, were also in substance the same, for the ordinance in that case upon its face committed to the unrestrained will of a single public officer the power to determine the rights of parties under it, when there was nothing in the ordinance to guide or control his action, and it was held void because "it lays down no rules by which its impartial

execution can be secured, or partiality and oppression prevented," and that "when we remember that action or non-action may proceed from enmity or prejudice, from partisan zeal or animosity, from favoritism and other improper influences and motives easy of concealment and difficult to be detected and exposed, it becomes unnecessary to suggest or to comment upon the injustice capable of being wrought under cover of such a power, for that becomes apparent to every one who gives to the subject a moment's consideration. In fact, an ordinance which clothes a single individual with such power hardly falls within the domain of law, and we are constrained to pronounce it inoperative and void." The doctrine of this case was approved in *Yick Wo* v. *Hopkins*, 118 U. S. 356. . . .

Nearly all the processions, parades, etc., that ordinarily occur are excepted from the ordinance in question, followed by a provision that permission to march or parade shall at no time "be refused to any political party having a regular State organization." It is difficult to see how this can be considered municipal legislation, dictated by a fair and equal mind, which takes care to protect and provide for the parades and processions with trumpets, drums, banners, and all the accompaniments of political turn-outs and processions, and at the same time provides, in effect, that the Salvation Army, or a Sunday-school, or a temperance organization with music, banners, and devices, or a lodge of Odd Fellows or Masons, shall not in like manner parade or march in procession on the streets named without getting permission of the mayor, and that it shall rest within the arbitrary, uncontrolled discretion of this officer whether they shall have it at all. The ordinance resembles more nearly the means and instrumentalities frequently resorted to in practising against and upon persons, societies, and organizations a petty tyranny, the result of prejudice, bigotry, and intolerance, than any fair or legitimate provision in the exercise of the police power of the State to protect the public peace and safety. It is entirely un-American and in conflict with the principles of our institutions and all modern ideas of civil liberty. It is susceptible of being applied to offensive and improper uses, made subversive of the rights of private citizens, and it interferes with and abridges their privileges and immunities, and denies them the equal protection of the laws in the exercise and enjoyment of their undoubted rights. In the exercise of the police power the common council may, in its discretion, regulate the exercise of such rights in a reasonable manner, but cannot suppress them, directly or indirectly, by attempting to commit the power of doing so to the mayor or any other officer. The discretion with which the council is vested is a legal discretion, to be exercised within the limits of the law, and not a discretion to transcend it or to confer upon any city officer an arbitrary authority, making him in its exercise a petty tyrant. Such ordinances or regulations, to be valid, must have an equal and uniform application to all persons, societies, or organizations similarly circumstanced, and not be susceptible of unjust discriminations, which may be arbitrarily practised to the hurt,

prejudice, or annoyance of any. An ordinance which expressly secures to political parties having State organizations the absolute right to street parades and processions, with all their usual accompaniments, and denies it to the societies and other like organizations already mentioned, except by permission of the mayor, who may arbitrarily refuse it, is not valid, and offends against all well-established ideas of civil and religious liberty. The people do not hold rights as important and well settled as the right to assemble and have public parades and processions with music and banners and shouting and songs, in support of any laudable or lawful cause, subject to the power of any public officer to interdict or prevent them. Our government is "a government of laws and not of men," and these principles, well established by the courts, by the Fourteenth Amendment to the Constitution of the United States, have become a part of the supreme law of the land, so that no officer, body, or lawful authority, can "deny to any person the equal protection of the laws." It is plain that the ordinance in question is illegal and void, and for this reason the order of the commissioner must be reversed.

By the Court. — The order of the court commissioner is reversed, and the petitioner ordered discharged.[1]

SINGER *v.* MARYLAND.

MARYLAND COURT OF APPEALS. 1890.

[72 *Md.* 464.]

APPEAL as upon writ of error from the Criminal Court of Baltimore. The case is stated in the opinion of the court.

The cause was argued before ALVEY, C. J., MILLER, ROBINSON, BRYAN, FOWLER, MCSHERRY, and BRISCOE, JJ. *David Stewart*, for the appellant; *Edgar H. Gans* and *William Pinkney Whyte*, Attorney-General, for the appellee.

ROBINSON, J., delivered the opinion of the court.

The traverser is a plumber by trade, and was indicted for refusing to comply with the requirements of the Act of 1886, c. 439, which provides that no person shall engage in the business of plumbing in the city of Baltimore unless such person shall have received from the State Board of Commissioners of Practical Plumbing a certificate as to his competency and qualification. This Act the traverser contends is in violation of his constitutional rights under the Fourteenth Amendment of the Constitution of the United States and of the Constitution of this State, both of which declare that no person shall be deprived of his life, liberty, or property without due process of law. These constitutional safeguards have been so fully considered and discussed by the Supreme

[1] See *Youngblood* v. *Birm. Co.*, 95 Ala. 521; see also *ante*, p. 673, note. — ED.

Court, especially since the adoption of the Fourteenth Amendment, by which the restraint upon the power of the States to pass laws affecting personal and private rights was made a part of the Federal Constitution, that it can only be necessary to refer to the conclusions reached by that court as affecting the question before us. *Dent* v. *West Virginia*, 129 U. S. 114; *Barbier* v. *Connolly*, 113 U. S. 27; *Mugler* v. *Kansas*, 123 U. S. 623; *Soon Hing* v. *Crowley*, 113 U. S. 703; *Powell* v. *Pennsylvania*, 127 U. S. 678. No one questions the right of every person in this country to follow any legitimate business or occupation he may see fit. This is a privilege open alike to every one. His own labor, and the right to use it as a means of livelihood, is a right as sacred and as fully protected by the law as any other personal or private right. But broad and comprehensive as this right may be, it is subject to the paramount right, inherent in every government, to impose such restraint and to provide such regulations in regard to the pursuits of life as the public welfare may require. This paramount right rests upon the well-recognized maxim, *Salus populi est suprema lex;* and, whatever difficulty there may be in defining the precise limits and boundaries by which the exercise of this power is to be governed, all agree that laws and regulations necessary for the protection of the health, morals, and safety of society are strictly within the legitimate exercise of the police power. *Powell* v. *Pennsylvania*, 127 U. S. 678; *Mugler* v. *Kansas*, 123 U. S. 623; *Railway Co.* v. *Beckwith*, 129 U. S. 26. As to the common and ordinary occupations of life, little or no regulation may be necessary; but if the occupation or calling be of such a character as to require a special course of study or training or experience to qualify one to pursue such occupation or calling with safety to the public interests, no one questions the power of the legislature to impose such restraints, and prescribe such requirements, as it may deem proper for the protection of the public against the evils resulting from incapacity and ignorance; and neither section one of the Fourteenth Amendment of the Federal Constitution, nor article 23 of the Bill of Rights of the Constitution of this State, was designed to limit or restrain the exercise of this power. It is in the exercise of this power that no one is allowed to practise law or medicine or engage in the business of a druggist unless he shall have been found competent, and qualified in the mode and in the manner prescribed by the statute; and, although the business and trade of a plumber may not require the same training and experience as some other pursuits in life, yet a certain degree of training is absolutely necessary to qualify one as a competent and skilful workman. We all know that in a large city like Baltimore, with its extensive system of drainage and sewerage, the public health largely depends upon the proper and efficient manner in which the plumbing work is executed, and, this being so, the legislature not only has the power, but it is eminently wise and proper that it should, provide some mode by which the qualifications of persons engaged in that business shall be determined.

In considering the power of the legislature to impose restraints upon all persons engaged in certain pursuits, the Supreme Court say: "The nature and extent of the qualifications required must depend primarily upon the judgment of the State as to their necessity. If they are appropriate to the calling or profession, and attainable by reasonable application, no objection to their validity can be raised." *Dent* v. *West Virginia*, 129 U. S. 114. The Act of 1886 now before us provides in the first place that no one shall engage in the business of plumbing except those qualified to work as registered plumbers; and, further, that no one shall be qualified to work as a registered plumber unless he shall have made application to and received from the State Board of Practical Plumbers appointed by the government a certificate as to his competency. These requirements are appropriate, and relate to the business of plumbing, and are such as the legislature deemed necessary and proper for the protection of the health of the people of Baltimore against the consequences resulting from the work of incompetent and inexperienced plumbers. They are in themselves fair and reasonable, and impose no restraint or qualification which may not be complied with by reasonable training and experience. Such an Act is but the ordinary exercise of the police power of the State, and does not violate in any sense the constitutional rights of the traverser.

Judgment affirmed.[1]

[1] And so *State* v. *Heinemann*, 80 Wis. 253, as to pharmacists; and *People* v. *Phippin*, 70 Mich. 6 (1888), as to medical men and surgeons, CAMPBELL and MORSE, JJ., dissenting. Compare *State* v. *Pennoyer*, 65 N. H. 113 (1889), which holds unconstitutional, as being unequal, an exemption from the requirements of such a statute in favor of medical men who have resided and practised their profession in the place of their present residence for the last four years. A similar clause was sustained in *People* v. *Phippin*, *ubi supra*, the court (LONG, J., at p. 24) saying: "This Act . . . makes a medical qualification the test of the right to practise. The real test of the right to practise is that he shall be a 'graduate of any legally authorized medical college in this State, or in any one of the United States, or in any other country.' And in this there is no discrimination. Now, the legislature saw fit in establishing this test, to except from its provisions a certain class of physicians and surgeons. In so doing it in effect declared that the physician or surgeon who had actually practised medicine continuously for at least five years in this State, and who is practising when this Act shall take effect, was as well qualified, in its judgment, to continue the practice of his profession as the student coming fresh from the halls of college with his diploma was to commence it. The reasons which induced the legislature to insert the exception may have been as varied as the different minds of its members. It certainly had power to insert it, and whether the power was reasonably or unreasonably exercised, or whether it was expedient to enact the law, are questions exclusively within the province of the legislative branch of the State government, and their judgment must necessarily be decisive upon these questions. *State* v. *Dent*, 25 W. Va. 1; *Ex parte Spinney*, 10 Nev. 328; *Wert* v. *Clutter*, 37 Ohio St. 347."

In *Trageser* v. *Gray*, 73 Maryland, 250 (1890), a non-naturalized Prussian applied for a writ of *mandamus* to compel certain commissioners to issue to him a license for the sale of intoxicating liquors. His petition was dismissed; and by a proceeding in the nature of a writ of error, he now raised the question whether the Maryland statute of 1890, c. 343, for regulating the sale of intoxicating liquors, was valid. The court (BRYAN, J.) in affirming the order of the court below, said "In the law which we are now considering, the legislature hedged around this traffic with such safeguards

as were deemed advisable for the purpose of protecting the public interest. It was an effort to restrict the licenses to such persons as would not abuse the privilege conferred; to this end the applicant was required to establish his fitness for the privilege by abundant testimony, and to promise, under oath, that he would not permit on his premises certain violations of the law, which have frequently been associated with the traffic, and which have caused great scandal, immorality, and disorder. And by section 653 *j*, it was enacted that the license should be refused in all cases, whenever, in the opinion of the said board, such license is not necessary for the accommodation of the public, or the petitioner or petitioners is or are not fit persons to whom such license should be granted; and if sufficient cause shall at any time be shown, or proof be made to the said board, that the party licensed was guilty of any fraud in procuring such license, or has violated any law of the State relating to the sales of intoxicating liquor, the said board shall, after giving notice to the person so licensed, revoke said license; and the criminal court of the city may in like manner revoke said license, if the party should be convicted before it, of any such violation. It was thought proper to confine the license to citizens of the United States, of temperate habits and good moral character. The privilege is very liable to be abused, and abuses would produce great public detriment. It therefore seemed wise to the legislature to confer it only on those who, being natives of the country, might reasonably be supposed to have a regard for its welfare; or who, not being natives, had, as required by the naturalization law, proven by credible testimony before a court of justice, that they were attached to the principles of the Constitution of the United States, and were well disposed to their good order and happiness. It was certainly the function of the law-making department to exercise its judgment on this question, and this court has no right to criticise its conclusion. We do not think that this law is, in any manner, in conflict with the Constitution of this State.

"We regard it as included 'in that immense mass of legislation which embraces everything within the territory of a State, not surrendered to the general government.' *Gibbons* v. *Ogden*, 9 Wheaton, 203. It has been uniformly held in all courts that no clause in the Federal Constitution interferes with the power of the States to promote and protect the public health, peace, morals, and good order within their respective limits. . . . It is, however, maintained by the appellant that although this statute was passed apparently for the purpose of exercising this power, yet it is in conflict with the Fourteenth Amendment, because it denies to persons not citizens of the United States the right to obtain licenses to retail liquor, and thereby makes an unconstitutional discrimination against them. The section of the amendment supposed to be involved is in these words: 'No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.' It cannot be said that any man, alien or citizen, has a natural right to retail intoxicating liquor. According to *Bartemeyer* v. *Iowa*, 18 Wallace, 129, it is not one of the privileges and immunities of citizens of the United States. In *Mugler* v. *Kansas*, 123 U. S. 623, it was said that 'such a right did not inhere in citizenship,' and that it could not be said that government interfered with or impaired any one's constitutional rights of liberty or property, when it prohibited the manufacture and sale of intoxicating drinks. And it was held that this prohibition might be made although it would destroy or greatly diminish the value of manufactories, which had been erected when it was lawful to engage in such business. In *Kidd* v. *Pearson*, 128 U. S. 1, a statute of Iowa prohibited the manufacture or sale of intoxicating liquors except for mechanical, medicinal, culinary, and sacramental purposes; but any citizen of the State was permitted to manufacture or buy and sell for these purposes, except hotel-keepers, keepers of saloons eating-houses, grocery-keepers, and confectioners. The Supreme Court decided that the statute did not in any way contravene any provision of the Fourteenth Amendment. We see that the privilege granted was confined to citizens of the State, and that there was a discrimination against five classes of these citizens. But in truth, the valid exercise of the police power does not depend on any question of discrimination for or against particu-

lar persons or classes of persons. It is confided to the wisdom of the legislature to make such application of it as the public welfare may require. In the case of occupations which may become injurious to the community, they may prohibit them altogether, or they may permit them only in certain localities and on certain terms and under certain restrictions, or they may grant the privilege of pursuing them to some persons and deny it to others. Individual interests are not all considered in the exercise of this power. They must yield when they are in opposition to the public good. And the legislature is to determine what measures will best promote the public good in dealing with these matters. In *Mugler* v. *Kansas* it was said that it was not to be supposed that the Fourteenth Amendment was intended to impose restraints on the exercise of the police power by the States. It was also said that a State could not by any contract limit its exercise of this power where the public health and the public morals would be prejudiced; and a case was cited with approval (*Stone* v. *Mississippi*, 101 U. S. 814), where a charter to conduct a lottery had been granted to a private corporation for a large moneyed consideration, and was afterwards repealed, and the repeal was sustained as within the police power of the State And in the same case the court stated with great emphasis the necessity of upholding State police regulations which were enacted in good faith and which had appropriate and direct connection with that protection to life, health, and property which each State owes to its citizens. And in this case, and subsequently in *Powell* v. *Pennsylvania*, 127 U. S. 684, it was shown that a statute enacted in good faith for the exercise of the police power could not be regarded as repugnant to the Fourteenth Amendment, unless it had no real or substantial relation to the objects of such power. In the *Slaughter-House Cases* (16 Wallace, 36), it was held that in the exercise of the police power the State of Louisiana could lawfully grant to a single corporation, for twenty-five years, the exclusive privilege of maintaining slaughter-houses in a district of country containing more than eleven hundred square miles and including the city of New Orleans The trade of a butcher, though of great utility and necessity, is liable under some circumstances to injure the public health, and was, therefore, liable to this sort of legislation.

"There are cases, unquestionably, in which discriminations against particular persons or classes of persons would be unlawful. They are indicated in *Powell* v. *Pennsylvania* and in many other cases, especially in the cases affecting the legislation of California on the subject of the Chinese. It is held that every one has a right to pursue an ordinary calling on terms of equality with all other persons in similar circumstances; that is, a calling not in any way injurious to the community, or likely to become so. The court did not, in *Powell* v. *Pennsylvania*, regard the making of oleomargarine as an ordinary business; nor in *McGahey* v. *Virginia*, 135 U. S. 712, was the traffic in ardent spirits so regarded. In the *Chinese Cases*, *Re Parrott*, 6 Sawyer, 349; *Re Ah Chong*, 6 Sawyer, 451, and *Yick Wo.* v. *Hopkins*, 118 U S. 356, the legislation in question was directed against the Chinese, and was intended to prevent them from earning a livelihood by their own labor; or, at least, to impede and embarrass them as much as possible in their efforts to do so. This was most clearly evident, not only from the statutes and ordinances themselves, but from the article in the Constitution of California, under which they were framed. This article (19th) was entitled 'Chinese,' and it provided that no corporation should employ, directly or indirectly, in any capacity, any Chinese or Mongolian; that no Chinese should be employed on any State, county, municipal or other work, except in punishment for crime; it declared that the presence of foreigners ineligible to become citizens (meaning the Chinese) was dangerous to the well-being of the State; and the legislature were directed to discourage their immigration by all means within their power, and were also directed to delegate all necessary power to the incorporated cities and towns of the State for the removal of Chinese beyond their limits, or for their location within prescribed portions of those limits; and were also directed to provide the necessary legislation to prohibit the introduction of Chinese into the State. One of the judges in *Parrott's Case* said of this article, 'It is in open and seemingly contemptuous violation of the provisions of the treaty which give to the Chinese the right to reside here with all the privileges, immunities and exemptions of the most favored nation. It is, in fact, but one and the latest of a series of

enactments designed to accomplish the same end.' 6 Sawyer, 365. It was apparent to the courts which decided these cases that, although the statutes and ordinances in question were in the form and fashion of police regulations, yet in reality, in substance and in effect, they were enactments to take away from the Chinese the right to labor for a living.

"They struck at those inalienable rights which belong to human beings at all times and in all places. They denied them the equal protection of the laws in particulars essential to their means of existence. Their evident effect and purpose were to accomplish an unconstitutional result, and therefore they were necessarily declared to be void. The statute now before us oppresses no one, and was intended to oppress no one. It does not take from any man a solitary right, privilege or immunity. It subjects no one to penalties for its violations which are not imposed equally on all offenders. It does not, it is true, make an equal partition of the privilege of liquor selling among all classes of persons. But there is no warrant for supposing that legislative control over this traffic must conform to any such standard. It is not crippled by any such restraint. It overrides all private interests and embraces all means which are necessary and proper to protect the public from evils connected with the subject. Assuredly the Supreme Court did not consider this control as limited by the necessity of making an equal distribution of favors, when it said in speaking of the trade in liquor and its consequences: 'The police power which is exclusively in the States is alone competent to the correction of these great evils, and all measures of restraint or prohibition necessary to effect the purpose are within the scope of that authority.' *Mug'er* v. *Kansas*, 123 U. S. 659. Nor is any such limitation consistent with the decisions in *Stone* v. *Mississippi*, 101 United States, 814; *Beer Co.* v. *Massachusetts*, 97 United States, 25; and *Fertilizing Company* v. *Hyde Park*, 97 United States, 659. In one of these cases a franchise which had been purchased from the State was taken away from the purchaser without compensation to him, because it was considered by the legislature to be hurtful to the public morals. In the other two cases, by the exertion of the police power, property of vast amount was rendered valueless, although it had been acquired under the express sanction of the legislature. It is needless to refer again to the *Slaughter-House Cases*, where there was a severe discrimination in favor of a single corporation and against every one else, solely because the protection of the public health was involved.

"It has been maintained that the appellant (Trageser) has rights under existing treaties which have been infringed by the denial of licenses to aliens. Our opinion on this question has been sufficiently indicated. But a few words more may be added. If we assume, for the sake of argument, that Trageser has under treaties every right which a citizen could have, the answer is that no citizen of the United States can complain because a police regulation denies him the privilege of selling liquor, even if the privilege is granted to other citizens. We are unable to conceive that any one, citizen or alien, can acquire rights which could in any way control, impair, impede, limit or diminish the police power of a State. Such power is original, inherent and exclusive; it has never been surrendered to the general government, and never can be surrendered without imperilling the existence of civil society.

"The Act of Assembly involved in this controversy being in our opinion in all respects a valid law, it is perhaps unnecessary to say anything more; but we will observe that, even if the clause relating to aliens were unconstitutional, the other portions of the statute would not be affected. Aliens could not even, in that event, obtain licenses to sell liquor without the approval of the Board of Commissioners.

"The order refusing the *mandamus* must be affirmed. *Order affirmed.*"[1]

ALVEY, C. J., and MCSHERRY, J., concurred in the affirmance of the order appealed from, refusing the *mandamus*, but for reasons different from those assigned in the opinion of the majority of the court.

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[1] Compare *Perry* v. *City Gov.*, 7 Utah, 143. — ED.

RICE ET AL. v. PARKMAN.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1820.

[16 *Mass.* 326.][1]

A WRIT of entry. The demandants claim as heirs of their mother (who died in 1792), and entitled to the possession upon the death of their father, in 1815, tenant by the curtesy. The tenant set up title through one Homer, to whom the father had sold the demanded premises under a legislative resolve, purporting to authorize the father, on giving bond, to sell and convey and to invest the proceeds for the use of the said children. The demandants reply, protesting that there was no such resolve or sale, and traversing the giving of the bond. Issue was joined upon the traverse, and a verdict returned, that the bond was given according to the directions of the resolve.

The demandants objected at the trial, that no authority to sell the estate could be legally derived from the said resolve; but that the same was wholly void, as respected them; especially as it did not appear that any notice was given before the license was granted. This objection was overruled by the Chief Justice, before whom the trial was had, November Term, 1818. A new trial was to be granted, if, in the opinion of the court, the said resolve did not give authority to sell as aforesaid.

Ward, for the demandants.

Gallison, for the tenant.

PARKER, C. J., delivered the opinion of the court. If the power, by which the resolve, authorizing the sale in this case, was passed, were of a judicial nature, it would be very clear, that it could not have been exercised by the legislature, without violating an express provision of the Constitution. But it does not seem to us to be of this description of power; for it was not a case of controversy between party and party; nor is there any decree or judgment, affecting the title to property. The only object of the authority granted by the legislature was, to transmute real into personal estate, for purposes beneficial to all who were interested therein.

This is a power frequently exercised by the legislature of this State, since the adoption of the Constitution; and by the legislatures of the province, and of the colony, while under the sovereignty of Great Britain; analogous to the power exercised by the British Parliament, on similar subjects, time out of mind. Indeed it seems absolutely necessary for the interest of those, who, by the general rules of law, are incapacitated from disposing of their property, that a power should exist somewhere, to convert lands into money. For otherwise many minors might suffer, although having property; it not being in a con-

[1] The statement of facts is shortened. — ED.

dition to yield an income. This power must rest in the legislature in this Commonwealth; that body being alone competent to act as the general guardian and protector of those who are disabled to act for themselves.

It was undoubtedly wise to delegate this authority to other bodies, whose sessions are regular and constant, and whose structure may enable them more easily to understand the merits of the particular applications brought before them. But it does not follow that, because the power has been delegated by the legislature to courts of law, it is judicial in its character. For aught we see, the same authority might have been given to the selectmen of each town, or to the clerks or registers of the counties; it being a mere ministerial act, certainly requiring discretion, and sometimes knowledge of law, for its due exercise; but still partaking in no degree of the characteristics of judicial power.

It is doubtless included in the general authority, granted by the people to the legislature in the Constitution. For full power and authority is given, from time to time, to make, ordain, and establish all manner of wholesome and reasonable orders, laws, statutes and ordinances, directions and instructions (so as the same be not repugnant or contrary to the Constitution), as they shall judge to be for the good and welfare of the Commonwealth, and of the subjects thereof.

No one imagines that, under this general authority, the legislature could deprive a citizen of his estate, or impair any valuable contract in which he might be interested. But there seems to be no reason to doubt that, upon his application, or the application of those who properly represent him, if disabled from acting himself, a beneficial change of his estate, or a sale of it for purposes necessary and convenient for the lawful owner, is a just and proper subject for the exercise of that authority. It is, in fact, protecting him in his property, which the legislature is bound to do; and enabling him to derive subsistence, comfort, and education from property, which might otherwise be wholly useless during that period of life, when it might be most beneficially employed.

If this be not true, then the general laws, under which so many estates of minors, persons *non compos mentis*, and others, have been sold and converted into money, are unauthorized by the Constitution, and void. For the courts derive their authority from the legislature, and it not being of a judicial nature, if the legislature had it not, they could not communicate it to any other body. Thus, if there were no power to relieve those from actual distress, who had unproductive property, and were disabled from conveying it themselves, it would seem that one of the most essential objects of government, that of providing for the welfare of the citizens, would be lost.

But the argument, which has most weight on the part of the demandants, is that the legislature has exercised its power over this subject, in the only constitutional way, by establishing a general provision; and that, having done this, their authority has ceased, they having no right

to interfere in particular cases. And if the question were one of expediency only, we should perhaps be convinced by the argument, that it would be better for all such applications to be made to the courts empowered to sustain them.

But as a question of right, we think the argument fails. The constituent, when he has delegated an authority without an interest, may do the act himself, which he has authorized another to do; and especially when that constituent is the legislature, and is not prohibited by the Constitution from exercising the authority. Indeed the whole authority might be revoked, and the legislature resume the burden of this business to itself, if in its wisdom it should determine that the common welfare required it.

It is not legislation, which must be by general acts and rules, but the use of a parental or tutorial power, for purposes of kindness, without interfering with, or prejudice to the rights of any, but those who apply for specific relief. The title of strangers is not in any degree affected by such an interposition.

In the case before us, the object sought for could not have been obtained in the ordinary way of a license from a court of law; for by that nothing could have been sold but the reversion belonging to the heirs; and the proceeds of that alone would have been put at interest; whereas, by a sale of the whole, as was authorized by the legislature, there is no doubt a better price was obtained, and the proceeds finally coming to the heirs were greater than they would otherwise have been. It is true, that the same purpose might have been effected substantially by a license to sell the reversion, and a sale of the estate for life without license by the tenant of the freehold. But still the proceeds would not have been vested so beneficially, as they were under the actual sale.

We do not consider notice to have been essential, if the fact be that none was given. The father acted as guardian, and he had no interest adverse to that of his children. Notice is not required by law to be given, upon applications for the sale of the estates of minors.[1]

Judgment for the tenant on the verdict.

In *Brevoort* v. *Grace et al.*, 53 N. Y. 245, 250 (1873), the Court of Appeals (Grover, J.) said: "The real question in the case is whether the legislature has the power, by special Act, to authorize

[1] In *Holden* v. *James*, 11 Mass. 397, the court decided that the legislature could not suspend the operation of a general law to give a remedy in favor of an individual, although the Constitution provides that the power of suspending the laws, or the execution of the laws, may be exercised by the legislature, or by authority derived from the legislature, to be exercised in such particular cases only as the legislature shall expressly provide for; and although the practice, ever since the adoption of the Constitution, had been to enact remedial laws in like cases But the soundness of this decision has been questioned. — Ed. [of 11 Mass. Rep.]

See *Davison* v. *Johonnot*, 7 Met. 388; *Sohier* v. *Mass. Gen. Hospital*, 3 Cush. 483; *Sohier* v. *Trin. Ch.*, 109 Mass. 1. — Ed.

and provide for the sale of the interest of known parties who have attained their majority and who are competent to act for themselves in real estate, and convert the same into personal, and provide for the investment and management of the proceeds without their consent, upon the ground that such sale would, in their judgment, promote the interest of such parties and others who are infants or who are not in being, and cannot, therefore, provide for the management of the property. If the legislature possesses this power, the Act in question is valid in all respects, not only for the reason that in the present case it clearly appears that the life tenants would be greatly benefited by a sale, but also made highly probable that the interests of those in remainder would be promoted. It thus appears that if such power is possessed, this is a proper case for its exercise. But if the legislature possesses the power, it also has the power to determine whether the case presented is one proper for its exercise, and its determination is conclusive, as also of the mode and safeguards under which it shall be exercised. Henry Brevoort has, under the will, the remainder in fee in case he shall survive his mother, subject to open and let in any other children of Mrs. Brevoort who may hereafter be born, who shall survive her. We have seen that his title would pass under the deed of the referee, for the reason that he united in the petition and thereby assented to the proceedings under which the sale was made.

"Special Acts of the Legislature, authorizing the sale of the real estate of infants and others incapable of acting for themselves, have been held valid in this State, and that a valid title as to such persons is acquired under sales pursuant to such Acts. *Clarke* v. *Van Surlay*, 15 Wend. 436. The same case was before the Court of Errors in the name of *Cochrane and Wife* v. *Van Surlay*, 20 Wend. 365, when the same rule was held, based upon the same reason, that it was the legitimate exercise of that paternal power over the persons and property of infants, which under the common law was an inherent right of sovereign power, which might be exercised under general laws or under peculiar circumstances by special legislation. But in his opinion in this case, Verplanck, Senator, says, speaking of clauses in the Constitution of 1822 which are also contained in the present Constitution: 'Further protection is given to property by adding a prohibition against the taking of private property for public use without just compensation, and also another against the depriving any one of life or property without due process of law and by mere arbitrary legislation, under whatever pretext of public or private good.'

"In *Williamson* v. *Berry*, 8 How. 495, and in a subsequent case, the Supreme Court of the United States determined differently upon the same title, but the difference between that and the courts of this State was not as to the power of the legislature to authorize the sale, but as to whether the consent of the Chancellor, etc., which was required by the Act, had been properly given, so as to give validity to the sale.

"In *Suydam* v. *Williamson*, 24 How. 427, the United States Supreme

Court abandoned the decision made in *Williamson* v. *Berry, supra*, and adopted and followed the decisions of the courts of this State, under the salutary rule that when any principle of law establishing a rule of real property has been settled by the courts of a State, that rule will be applied by the Federal courts in cases where the latter acquire jurisdiction of cases within the State by reason of the character or residence of the parties.

"In *Towle* v. *Forney*, 4 Duer, 164, the doctrine of *Cochrane* v. *Surlay* was reaffirmed by this court. Other cases, to the same effect, might be cited, but from those, *supra*, it is clear that a special Act of the Legislature, authorizing the sale of the lands of infants, etc., is within the constitutional power of the legislature.

"Doubts were expressed in some of the cases, *supra*, whether this power extended to those not in being, who might thereafter be entitled to some estate in the premises. The reasons upon which the rule is based as to the former, apply with equal force as to the latter. In both there is a want of capacity to manage and preserve the property, so as to protect the interest of those who are or may become entitled thereto, and hence the necessity of devolving this duty upon the sovereign. For this purpose the legislature, under our system, represents and possesses the powers of the sovereign authority, and may discharge the duty either by general or special laws, as will best protect the rights of those interested, although it is obvious that the former should be preferred in all cases where practicable.

"*Mead* v. *Mitchell*, 17 N. Y. 210, was a case of partition, in which it was held that a valid sale of the future contingent interests of those not in being might be made pursuant to the judgment in the action. Although this is not an authority precisely in point, yet the judgment, as well as the opinions, show that such interests were equally within the control of the legislature as those of infants, etc.

"Having arrived at the conclusion that the legislature may, by special Act, authorize the sale of the lands of those not capable of acting for themselves, and also the contingent rights of those not *in esse*, it follows that a valid title would have passed by virtue of the deed of the referee, as to any future children of Mrs. Brevoort, or any issue of Henry Brevoort hereafter born. This would make the title valid as against everybody except Mrs. Lefferts, the widow of the testator, and the heirs of the children of his brother John. No point is made as to the right of the former; I shall therefore assume that as to her the title has been made satisfactory, as it very readily might be.

"The question then is as to the rights of the adult heirs of the children of the testator's brother John. In the event of the death of Mrs. Brevoort, leaving no issue surviving, an event which is possible, the title to the premises would vest in part in these adult heirs as tenants in common with the other heirs, who are now infants, unless these rights are barred by the sale under the statute. The question is thus presented, whether the legislature can, by a special statute, authorize the sale of

lands to which adults, competent to act for themselves, have a contingent right, and thus cut off such contingent interest therein, should such events occur as would give the title in whole or part to those having such interest.

"It is urged by the counsel for the appellants that such interest is not barred, for the reason that the adult heirs were not parties to and had no notice of the proceedings. To this the counsel for the respondent answers, that it was not necessary to make them parties or give them notice, as their interest was contingent, and represented by Henry Brevoort, who was a party, and who had a prior vested remainder in fee, subject to be defeated by his death during the life of his mother, Mrs. Brevoort, and cites *Clarke* v. *Cordis*, 4 Allen, 466, *Nodine* v. *Greenfield*, 7 Paige, 544, and *Mead* v. *Mitchell*, 17 N. Y. 210, in support of the position. In regard to this, I think that if the legislature possesses the power to authorize the sale, and thus cut off the rights of parties, the mode and manner of conducting it are questions for its determination. The questions whether the interest of all parties will be promoted by a sale, and whether a sale shall be made, when and how, may be determined in the statute; or power to hear and determine all or any of them may by the Act be conferred upon the courts, and in case the latter course is adopted, the Act may provide as to who shall be made parties, and have notice of the proceedings, as the legislature shall judge necessary and sufficient for the protection of all interests to be affected by the sale.

"The real question is whether the legislature has the power, by a sale under a special Act, to extinguish the rights of those of legal capacity to act for themselves in real estate, vested or contingent, upon the ground that in its judgment, or of that of any of the judicial tribunals of the State, the interests of all would be promoted thereby, without the consent of such parties. This precise question was decided in the negative by this court in *Powers* v. *Bergen*, 2 Selden, 358. The validity of the statute was, in that case, attempted to be upheld, upon the ground that a sale was necessary to provide for the payment of taxes and assessments; but the opinion shows that neither the Act nor the proceedings showed any such foundation therefor. In the present case the Act and proceedings show that the premises were largely incumbered by both; but the difficulty is, that the quantity of land authorized to be sold, and which, in fact, was sold, was not limited to the quantity necessary for that purpose. The Act authorized the sale of the entire premises, and, under its provisions, all have been sold, in the aggregate, for about eight hundred thousand dollars, a part of which were purchased by the appellants. Surely a sale of land, which was already subdivided into parcels and sold in that manner, cannot be upheld on the ground that it was necessary for the payment of taxes and assessments amounting only to a small part of that sum. The Act could only be sustained upon that ground by limiting the sale to a quantity necessary for those purposes. In the case last cited, the learned judge concedes the power

of the legislature, in acting as the guardian and protector of those incapable of acting for themselves by reason of infancy, lunacy, etc., to pass general or special laws under which an effectual disposition of their lands and other property may be made in order to promote their interests; and, after an allusion to the fact that, in England, private Acts of Parliament are a mode of assurance, proceeds to say that here the sovereign and absolute power resides in the people, and that the legislature can exercise such powers only as have been delegated to it. The right of eminent domain or inherent sovereign power gives the legislature control of private property for public uses, and only for such uses; in such cases, the interest of the public is deemed paramount to that of any individual, and yet, even here, the Constitution of the United States and the Constitution of this State have imposed a salutary check upon the exercise of legislative power for that purpose, by providing that private property shall not be taken for public use without just compensation. It follows that if the legislature should pass an Act to take private property for a purpose not of a public nature, or if it should provide, through certain forms to be observed, to take the property of one and give it or sell it, which is the same thing in principle, to another; or, if it should vacate a grant of property under the pretext of some public use, such cases would be gross abuses of the discretion of the legislature and fraudulent attacks on private rights, and the law would be clearly unconstitutional and void. 2 Kent's Com. 340. If the power exists to take the property of one without his consent and transfer it to another, it may as well be exercised without making compensation as with it, for there is no provision in the Constitution that just compensation shall be made to the owner when his property shall be taken for private use. The power of making contracts for the sale and disposition of private property for individual owners has not been delegated to the legislature, or to others, through or by any agency conferred on them for such purpose by it; and if the title of A. to the property can, without his fault, be transferred to B., it may as well be effected without as with a consideration. After citing and commenting upon some authorities, the judge concludes by holding the Act void, and that a good title was not acquired by a deed given pursuant to a sale made under its provisions. The court unanimously concurred in this conclusion. The only difference between that and the present case is, that in that the existing children of the testator's daughter Eliza, to whom the fee was given in case their mother died in their lifetime, were not required to be and were not made parties to the proceeding, while in the present, Henry Brevoort, the only child of Mrs. Brevoort, was so required by the Act, and was a party. This difference will be hereafter considered.

"The counsel for the respondents insists that the principle upon which *Powers* v. *Bergen* was decided was modified or restricted by the same court in *Leggett* v. *Hunter*, 19 N. Y. 446. In the latter the court held, first, that the trustee had power, under the will, to sell and convey the lands in question in the absence of any Act of the Legislature conferring

authority for that purpose upon him, and also that the Act by which such authority was conferred was constitutional and valid. It appears, from the report, that all the members of the court concurred in the result, and that the necessary number to decide concurred upon both points. The report shows that it was not designed in the latter to overrule the former upon the point last considered in the opinion, but to distinguish the case then under consideration from that. In *Leggett* v. *Hunter*, it appeared that Gerardus Post was owner in fee at the time of his death; that he left five children, three sons and two daughters, surviving; that, by his will, he devised one-fifth of his real estate to each of his sons in fee, and two-fifths thereof to trustees during the lives of his two daughters, one in trust for each daughter during her life, remainder in fee to her issue. The will made no devise over, in case the daughter died leaving no issue. It appeared that the daughter who was entitled to the income of the lands in question, for life, had children who were infants at the time of the passage of the Act and of the sale, the validity of which was the question involved in the questions submitted. Clearly as to these infants the statute and sale were valid by all the authorities, and valid, as we have seen, as to any after-born children of the daughter. The latter point is discussed in the opinion, and the conclusion adopted that the sale under the Act would be valid as to such children. But nothing is said in the opinion as to the rights of the adult heirs of the testator in case the daughter died without issue. This remainder was undisposed of by the will, and descended to the heirs of the testator. The case is entirely silent as to this; and whether at the time these heirs or any of them, except the daughter, were adults, does not appear. In the opinion the judge says: 'The court decided, in *Powers* v. *Bergen*, that the legislature (except in cases of necessity arising from infancy, insanity, or other incompetency of those in whose behalf it acts) has no power to authorize by special Act the sale of private property for other than public uses without the consent of the owner.' This is a correct statement of the point decided. He then proceeds to state that in that case no reason appeared, and then, as I think, losing sight of the only reasons upon which such legislation can be sustained, proceeds to distinguish that case from that he was considering, by showing the probably great pecuniary benefits to be derived from a sale in the one then in judgment. The power cannot be based upon such considerations. The great confusion of titles that would ensue by holding the sale valid if advantageous to the parties interested, but if otherwise invalid, must have escaped the attention of the learned judge. As already remarked, when power is given to the legislature to do an act, it includes the power of determining conclusively whether its exercise is expedient in the particular case. *Leggett* v. *Hunter* did not assume to determine that the legislature had power to authorize the sale of the private property of adults without the consent of the owner, other than for public use, however advantageous it might be.

"*In the Matter of the Petition of the Trustees P. E. School, &c.*,

31 N. Y. 574, it was held that the legislature had power to authorize the sale of land for the payment of taxes and assessments thereon, and *Powers* v. *Bergen* was referred to as correctly decided; referring to that case, Denio, C. J., says: It has been decided by this court that the legislature has no constitutional power to cause land to be sold for the purpose of disentangling an estate, where the parties entitled to future estates are under no disability to act for themselves, though it is fully admitted that it may be done when the rights of infants, lunatics, etc., are concerned. This must be regarded as the settled law of the State, although in conflict with *Sohier* v. *Mass. General Hospital*, 3 Cushing, 483.

"The cases cited, holding that the legislature have power to change existing joint tenancies into tenancies in common, and thereby destroy the right of survivorship, have no bearing upon the question under consideration. *Bombaugh* v. *Bombaugh*, 11 Sergeant & Rawle, 191; *Miller* v. *Miller*, 16 Mass. 61; *Holbrook* v. *Finney*, 4 Id. 586. *Jacobson* v. *Babcock*, 16 N. Y. 246, holds the Act (chap. 327, Laws of 1855), providing for the sale of land for the payment of taxes, etc., constitutional and valid. *Rockwell* v. *Nearing*, 35 N. Y. 302, *Campbell* v. *Evans*, 45 N. Y. 356, and *Happy* v. *Mosher*, relate to other questions, and afford no light upon the present case. *Striker* v. *Mott*, 28 N. Y. 82, is cited by counsel to show that the heirs of the children of the testator's brother, John, have no such interest in the lands as can be alienated by them. That case arose upon a will which took effect in 1819, before the passage of the Revised Statutes; sections 9, 10, 13, 14, 16, 25, and other sections of article 1, 1 Stat. at Large, 670, show that these heirs had an estate in expectancy, contingent upon the death of Mrs. Brevoort without issue surviving; section 35 makes such estate descendible, devisable, and alienable, in the same manner as estates in possession.

"It is insisted by the counsel for the respondent that the Act in question should be sustained, for the reason that some of the heirs are infants, and that the legislature has the power to authorize the sale of the interests of these infants. But this does not confer the power to authorize a sale of the interests of the adults without their consent.

"It is further insisted that although the legislature may not have the power to authorize the sale of an estate in possession, or a vested estate in expectancy of an adult without his consent, yet it can authorize the sale of a contingent estate in expectancy. I can see no reason for the distinction. An owner *sui juris* is equally competent to determine and manage for himself in the one case as in the other. The foundation of the power of the legislature to act in behalf of any owner is the want of capacity to act for himself, and this reason no more extends to the case of a contingent than to a vested expectant estate. The question as to whether the interests are vested or contingent is not material and will not be discussed.

"It is obvious that the fact that Henry Brevoort being a party can

have no bearing upon the power of the legislature to sell without their consent the interest of the heirs of the testator's brother John. For this purpose he no more represents, and has no more power to affect their rights than a stranger to the title. He may bind his own rights by his acts but not those of others. My conclusion is that the deed tendered would not have conveyed to the appellants an indefeasible title in fee to the premises purchased by them.

"The judgment must therefore be reversed and judgment given for the defendants upon the demurrer to the complaint."

All concur.

RAPALLO, J., expresses no opinion as to power of legislature to cut off contingent remainder-men or persons not in being.

Judgment accordingly.[1]

STARR *v.* PEASE.

CONNECTICUT SUPREME COURT OF ERRORS. 1831.

[8 *Conn.* 540.]

THIS was an action of ejectment; to which the general issue was pleaded.

The case was as follows. In the year 1799, the plaintiff became the wife of John L. Lewis. In 1820, George Starr, the father of the plaintiff, died, seised of the demanded premises; and immediately thereafter, the fee thereof was vested in the plaintiff, as his heir, and the right of possession in Lewis, her husband. In 1826, the premises were taken by execution, in favor of Pease, one of the defendants, against Lewis; and his right therein became vested in Pease, who, with the other defendants, on the 14th of May, 1820, ousted the plaintiff, and took possession. Lewis never had any child by this marriage, and is still living.

In May, 1827, the plaintiff preferred her petition to the General Assembly, for a divorce, which was granted; and the following Act or decree was passed: "Upon the petition of Martha M. Lewis, representing to this Assembly that she was lawfully married to John L. Lewis, on the 23rd day of September, 1799; and that, on or about the 15th day of January, 1826, the said John L. Lewis indulged such criminal intimacies with one Nancy B. Jones as amounted to adultery, as nearly as could be, without the actual perpetration of the crime; and praying for a divorce; as per petition on file: And the said allegation, after hearing of the petitioner and said John L. Lewis, with their witnesses and counsel, being found true:

"*Resolved* by this Assembly, that the said Martha L. Lewis be, and

[1] See Cooley, Const. Lim. (6th ed.) 115–128. As to express prohibitions in some constitutions, *Ib.*, 116, note 1. — ED.

she hereby is, divorced from her said husband, the said John L. Lewis; and is hereby released and absolved from all obligations, by virtue of said marriage."

The case was reserved for the advice of this court, upon the question, whether the plaintiff was entitled to a recovery; and if so, to what period the rents and profits should be computed, in the assessment of damages.

Sherman and *Barnes*, for the plaintiff.

N. Smith and *Storrs*, for the defendant.

DAGGETT, J. . . . It is said, however, that if a State legislature were authorized to make a law giving power to some tribunal to grant divorces, still they cannot, by a sovereign Act, dissolve this contract. This, I apprehend, applies only to the fitness of the exercise of the power in question, and not to the constitutional right. It will be exceedingly difficult to establish that Act to be a violation of the Constitution of the United States, when done by the legislature itself, which would not be so, if done by a court, in obedience to law. In the case of *Calder & ux.* v. *Bull & ux.*, 3 Dall. 386, the Supreme Court of the United States decided, that a resolution or law of the Legislature of Connecticut establishing a will, was not a violation of the Constitution of the United States.

A further objection is urged against this Act, *viz.*, that by the new Constitution of 1818, there is an entire separation of the legislative and judicial departments, and that the legislature can now pass no Act or resolution, not clearly warranted by that Constitution; that the Constitution is a grant of power, and not a limitation of powers already possessed; and in short, that there is no reserved power in the legislature since the adoption of this Constitution. Precisely the opposite of this is true. From the settlement of the State there have been certain fundamental rules, by which power has been exercised. These rules were embodied in an instrument, called, by some, a constitution, — by others, a charter. All agree, that it was the first Constitution ever made in Connecticut, and made too, by the people themselves.[1] It gave very extensive powers to the legislature, and left too much (for it left everything almost) to their will. The Constitution of 1818 professed to, and, in fact, did, limit that will. It adopted certain general principles, by a preamble, called *a declaration of rights*; provided for the election and appointment of certain organs of the government, such as the legislative, executive, and judicial departments; and imposed upon them certain restraints. It found the State sovereign and independent, with a legislative power capable of making all laws necessary for the good of the people, not forbidden by the Constitution of the United States, nor opposed to the sound maxims of legislation; and it

[1] There appears to be a confusing double reference here, — to the "Fundamental Orders" of 1638–1639 (1 Poore's Charters, 249), and to the Charter of Charles II. (*Ib.* 252). — ED.

left them in the same condition, except so far as limitations were provided.[1]

There is now, and has been, a law in force, on the subject of divorces. This law was passed one hundred and thirty years ago. It provides for divorces *a vinculo matrimonii*, in four cases, *viz.*, adultery, fraudulent contract, wilful desertion, and seven years' absence, unheard of. The law has remained in substance the same as it was, when enacted, in 1667. During all this period, the legislature has interfered, like the Parliament of Great Britain, and passed special Acts of divorce *a vinculo matrimonii;* and, at almost every session since the Constitution of the United States went into operation, now forty-two years, and for the thirteen years of the existence of the Constitution of Connecticut, such Acts have been, in multiplied cases, passed, and sanctioned, by the constituted authorities of our State.

We are not at liberty to inquire into the wisdom of our existing law on this subject; nor into the expediency of such frequent interference by the legislature. We can only inquire into the constitutionality of the Act under consideration. The power is not prohibited, either by the Constitution of the United States, or by that of this State. In view of the appalling consequences of declaring the general law of the State, or the repeated Acts of our Legislature, unconstitutional and void, — consequences easily conceived, but not easily expressed, — such as bastardizing the issue and subjecting the parties to punishment for adultery, — the court should come to the result only on a solemn conviction that their oaths of office and these Constitutions imperiously demand it. Feeling myself no such conviction, I cannot pronounce the Act void.

Another question was reserved, that is, shall damages be recovered to the date of the writ, or to the rendition of the judgment? It is understood, that different rules have prevailed on this point. I think it most consonant to principle, that damages should be given only to the date of the writ.

I would therefore advise the Superior Court, that judgment be entered up for the plaintiff, with damages to the date of the writ.

HOSMER, CH. J., and BISSELL, J., were of the same opinion.

PETERS, J., said he could not give an unqualified concurrence. Upon general principles, he had no doubt, that the Act of Divorce in this case, was repugnant to the Constitution of the United States, as impairing the obligation of a contract; and that it was void, under the Constitution of this State, as an assumption of judicial power by the legislature. But in view of the decisions in analogous cases and of the appalling consequences of nullifying all legislative Acts of Divorce, he should acquiesce in the opinion of the court. On the point of damages he concurred without hesitation.

[1] See *Pratt* v. *Allen*, 13 Conn. 124, where Williams, J., quotes and sanctions these doctrines; and see *Trustees of Bishops' Fund* v. *Rider*, 13 Conn. 87, for the general subject of laws impairing contracts.

WILLIAMS, J., having been retained as counsel for Lewis, on the plaintiff's application for the Act of Divorce, declined giving any opinion as to the validity of that Act. He concurred as to the damages. *Judgment to be given for the plaintiff.*[1]

WILKINS *v.* JEWETT.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1885.

[139 *Mass.* 29.]

MORTON, C. J. This is an action to recover one half the cost of a party wall. In 1873, the plaintiff made an agreement with one Matthews, who was then the owner of the equity of redemption of the defendant's land, that the plaintiff might place one half of the division wall of his house on the defendant's lot; and that Matthews would pay one half of the cost of the wall when he made use of it.

The defendant's title is under the foreclosure of a mortgage existing at the time this agreement was made. The mortgagee was not a party to the agreement, and it is not contended that the defendant is bound by it. But the plaintiff contends that the defendant is liable by virtue of the Prov. St. of 1692-93 (5 W. & M.) c. 13, entitled, "An Act for building with stone or brick in the town of Boston, and preventing fire." 1 Prov. Laws (State ed.) 42. This statute provided, in § 2, that "every person building as aforesaid with brick or stone shall have liberty to set half his partition wall in his neighbor's ground, so that he leave toothing in the corners of such walls for his neighbor to adjoin unto, who, when he shall build, such neighbor adjoining shall pay for one half of the said partition wall, so far as it shall be built against. And in case of any difference arising, the selectmen shall have power to appoint meet persons to value the same or lay out the line between such neighbors."

We are of opinion that this provision of the Provincial Statutes was never in force in the Commonwealth of Massachusetts. The Constitution continued in force all laws adopted, used, and approved in the Province, Colony, or State of Massachusetts Bay, and usually practised on in the courts of law, until altered or repealed by the legislature, "such parts only excepted as are repugnant to the rights and liberties contained in this Constitution." Const. Mass. c. 6, art. 6.

The provision in question undertakes to deal with private property, and to authorize one man to appropriate and use the property of another without his consent. It assumes to take private property with-

[1] See 1 Bish. Mar. & Div. (6th ed.) ss. 685, 686; Cooley, Const. Lim. (6th ed.) 128–133. The topic here considered is covered in several States by express constitutional provisions. — ED.

out due process of law, and without compensation. It is repugnant to the fundamental principles declared in the Declaration of Rights, that the property of the subject shall not be appropriated, even for public use, without paying him a reasonable compensation therefor, and that he shall not be deprived of his property but by the judgment of his peers, or the law of the land; and that, in all controversies concerning property, he shall have a right to trial by jury. Declaration of Rights, arts. 10, 12, 15. *Morse* v. *Stocker*, 1 Allen, 150. *Forster* v. *Forster*, 129 Mass. 559.

Undoubtedly, the authority of the legislature, in the exercise of the police power, is very broad. This power is founded upon the principle that any man may be reasonably restrained in the use of his property so as not to injure others. *Watertown* v. *Mayo*, 109 Mass. 315, 318. But it does not justify authorizing one man to appropriate and use the property of another without his consent and without adequate compensation.

It is a significant fact, that, since the adoption of the Constitution, no trace can be found of any legislative or judicial sanction of the provisions of the Provincial statute upon which the plaintiff relies. We think it has been regarded as repugnant to the principles of the Constitution, and as of no force. It follows that the plaintiff cannot maintain this action. *Exceptions overruled.*

J. D. Thomson, for the plaintiff, cited *Quinn* v. *Morse*, 130 Mass. 317, 321.

R. D. Smith and *G. W. Estabrook*, for the defendant.

TURNER *v.* NYE.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1891.

[154 *Mass.* 579.]

BILL in equity, filed in the Superior Court on September 5, 1889, to prevent the defendant from maintaining a dam across a creek flowing into Cataumet Harbor in Falmouth, in the county of Barnstable, and from flowing the plaintiffs' land. Hearing before MASON, J., who ordered the bill to be dismissed, and, after an appeal had been taken by the plaintiffs to this court, made the following report of the facts.

The plaintiffs were the owners of about three fourths of an acre of marsh land adjoining the creek above referred to; and the defendant had built the dam across the creek in question, under the provision of the St. of 1889, c. 383,[1] and by the license of the Board of Harbor and

[1] This statute, entitled "An Act to authorize the Flowage of Land for the Purposes of Fish Culture," was approved on May 28, 1889, and is as follows: "Any owner or lessee of lands or flats situated in the county of Barnstable, appropriated or which he desires to appropriate to the culture of useful fishes, may erect and maintain a dam

Land Commissioners, so as to flow about sixty acres of his own land and that of the plaintiffs, so that they were deprived of the use of it. The dam was partially constructed, and the plaintiffs' land appreciably flowed, but no substantial damage was done before the passage of that statute.

This dam was erected and is maintained for the purpose of creating and raising a pond for the culture of useful fishes, and the pond raised by the dam is well stocked with trout. The immediate purpose or intention of the defendant and those interested with him was not to perform a public service, but to engage in the culture of useful fishes for their own personal pleasure and profit, and the pleasure and profit of particular persons to whom they should sell rights to fish in the pond. It was not their purpose to supply the market with such fishes, nor to supply them to the public by any means, direct or indirect. The land of the plaintiffs had small market value for any use to which it could be applied other than that for which it is now used by means of the defendant's dam. There was at the time of the passage of the Act, and is now, much land in Barnstable County similarly situated, having small market value for any purpose to which it can be applied by its separate owners, which would be enhanced in value if it were shown by successful experiment that such land could be profitably used for the cultivation of useful fishes under the powers conferred by the Act.

The case was argued at the bar in March, 1891, and afterwards, in September, was submitted on the briefs to all the judges.

A. M. Goodspeed, for the plaintiffs.

J. M. Hall, for the defendant.

MORTON, J. The plaintiffs do not rely upon the fact that the dam was partially constructed by the defendant before the passage of the St. of 1889, c. 383. The plaintiffs could not avail themselves of that fact in this suit. If the dam is maintainable under that statute, the plaintiffs would not be entitled to its abatement although it was partly erected without right. *Ware* v. *Regent's Canal Co.*, 3 DeG. & J. 212. And if they are entitled to damages for the technical violation of their rights, their remedy is at law. *Washburn* v. *Miller*, 117 Mass. 376. Nor do they rely upon the point suggested by the defendant, that the operation of the Act is confined, as it clearly may be, to Barnstable County. Cooley, Const. Lim. 390.

The plaintiffs contend that the St. of 1889, c. 383, under which the court found that the dam was completed and is maintained by the defendant, is unconstitutional, because, first, it purports to authorize the

across any stream for the purpose of creating or raising a pond for such fish culture, upon the terms and conditions and subject to the regulations contained in chapter one hundred and ninety of the Public Statutes, so far as the same are properly applicable in such cases, provided, however, that nothing herein contained shall authorize the erection or maintenance of a dam across any navigable stream within said county without a license obtained therefor from the Board of Harbor and Land Commissioners, in accordance with and subject to the provisions of chapter nineteen of the Public Statutes."

taking of private property for a use which is not public in its nature, and secondly, if the statute is constitutional, the defendant has not brought himself within it.

But in regard to the first point we think the plaintiffs misapprehend the constitutional provision which applies to the Act in question. The statute was not an exercise on the part of the legislature of the right of eminent domain, but was enacted under the provision which gives it power to "make, ordain, and establish, all manner of wholesome and reasonable orders, laws, statutes, and ordinances, . . . so as the same be not repugnant or contrary to this Constitution, as they shall judge to be for the good and welfare of this Commonwealth, and for the government and ordering thereof, and of the subjects of the same." Const. Mass., Part 2, c. 1, art. 4. It is upon this provision that the Mill Acts have been placed finally in this State, after what appear at times to have been somewhat conflicting views. *Boston & Roxbury Mill Co.* v. *Newman*, 12 Pick. 467; *Murdock* v. *Stickney*, 8 Cush. 113; *Hazen* v. *Essex Co.*, 12 Cush. 475; *Talbot* v. *Hudson*, 16 Gray, 417; *Lowell* v. *Boston*, 111 Mass. 454. It may be doubted whether, as new legislation, they could be sustained as an exercise of the right of eminent domain. *Murdock* v. *Stickney*, 8 Cush. 113; *Lowell* v. *Boston*, 111 Mass. 454; Cooley, Const. Lim. 534; *Jordan* v. *Woodward*, 40 Maine, 317.

Upon this provision also stand the Cranberry Act, so called (St. 1866, c. 206); the Act in regard to draining meadows, swamps, marshes, beaches, and low lands, with its authority to commissioners to open the floodgates of a mill, or to erect a temporary dam on the lands of another person, and assess the damages upon the proprietors (Pub. Sts. c. 189; see *Wurts* v. *Hoagland*, 114 U. S. 606); the Act in regard to proprietors of wharves, general fields, and lands lying in common, with the control which it gives to a certain proportion in number and interest over the property of the rest (Pub. Sts. c. 111); and the Act in regard to partition, by which one co-tenant may be compelled to take money instead of land, or to give up for a time the occupation and enjoyment to another. Pub. Sts. c. 178. The Mill Acts, and these and other like statutes (of which various illustrations might be given), rest upon the principle that property may be so situated or of such a character that the absolute right of the individual owner to a certain extent must yield to or be modified by corresponding rights on the part of other owners, or by what is deemed on the whole to be for the public welfare. See *Commonwealth* v. *Tewksbury*, 11 Met. 55; *Commonwealth* v. *Alger*, 7 Cush. 53; *Denham* v. *County Commissioners*, 108 Mass. 202; *Wurts* v. *Hoagland*, 114 U. S. 606.

The provision above quoted does not authorize the legislature to take property from one person and give it to another, nor to take private property for public uses without compensation, nor wantonly to interfere with private rights. These are always to be carefully guarded and protected. But of necessity cases will arise where there will or

may be a conflict of interests in the use or disposition of property, and questions may and will come up affecting the public welfare in regard to the use which shall or shall not be permitted of certain property.

It is for the legislature in such instances, under the power thus conferred upon it, and with due regard to private rights, to enact the necessary laws. It is for the public good that swamps and waste lands should be reclaimed and made productive. It is also for the public good that streams should be used to operate mills, to raise cranberries, and to cultivate useful fishes. If private rights appear to some extent to be invaded, that is inseparable from the nature of the use authorized, without which the streams could not be advantageously or profitably used, and compensation is provided for any injury that may be done. The character of the property and the resulting general good are deemed sufficient to justify the action of the legislature.

It is doubtful, however, whether any property of the plaintiff is taken or any of his rights are invaded. The statute in question authorizes the erection and maintenance of a dam across any stream for the purpose of creating or raising a pond for the culture of useful fishes. It is to be erected "upon the terms and conditions and subject to the regulations contained in chapter one hundred and ninety of the Public Statutes so far as the same are properly applicable in such cases." The chapter referred to is what is known as the Mill Act. Under that it has been held that the right to erect and maintain a dam to raise water for working a mill does not give to the mill-owner any right in the land flowed, or take away any right from the land-owner. The latter may embank his land and thus stop any flowage of it, or, if he chooses, he may collect of the mill owner damages in gross or annually for the flowage. Until the land-owner manifests his election to claim damages, he cannot be compelled by the mill-owner to submit his land to be flowed, and until then the only right which the mill-owner has as between himself and the land-owner is to maintain his dam without liability to the land-owner for damages in an action at law. While the land-owner may protect his land from flowage, he cannot, of course, wantonly interfere with the right which the statute gives to the mill-owner to maintain his dam. *Williams* v. *Nelson*, 23 Pick. 141; *Murdock* v. *Stickney*, 8 Cush. 113; *Storm* v. *Manchaug Co.*, 13 Allen, 10; *Paine* v. *Woods*, 108 Mass. 160; *Lowell* v. *Boston*, 111 Mass. 454; *Head* v. *Amoskeag Manuf. Co.*, 113 U. S. 9.

There would seem to be nothing in the purpose for which the right is given to erect and maintain a dam to create a pond for the culture of useful fishes that should give to the party erecting or maintaining such a dam any greater rights over the lands flowed by it than a mill-owner would have over lands flowed by the dam maintained by him. Without anything more, we should be slow to infer from a power to maintain a dam to create a pond for the culture of useful fishes any greater rights over lands flowed than from a power to maintain a dam to raise water for working a mill.

It appears from the facts found in the present case that the defendant's dam flows about sixty acres, all of which, with the exception of about three-fourths of an acre belonging to the plaintiffs, is owned by the defendant. It is also found that the land of the plaintiffs was of small market value for any other use to which it could be applied, and that there is "much land in Barnstable County similarly situated, having small market value for any purpose to which it can be applied by its separate owners, which would be enhanced in value if it were shown by successful experiment that such land could be profitably used for the cultivation of useful fishes under the powers conferred by" the Act in question. In view of these facts, and for the reasons above stated, we think that the claim of the plaintiffs that the Act is unconstitutional cannot be maintained. We come to this conclusion the more readily, because a contrary result would oblige us, we fear, to hold, if the question were directly presented to us, that the Cranberry Act, under which a large and profitable industry has grown up, was also unconstitutional. Although several cases under that Act have been before this court, no doubt as to its constitutionality seems to have been suggested. *Bearse* v. *Perry*, 117 Mass. 211; *Hinckley* v. *Nickerson*, 117 Mass. 213; *Blackwell* v. *Phinney*, 126 Mass. 458; *Howes* v. *Grush*, 131 Mass. 207.

The plaintiffs further contend, that, if the Act is constitutional, the defendant has not brought himself within its scope, because it does not appear that any direct or positive benefit will be derived by the public from the defendant's acts, and because the dam has been erected and will be maintained by him wholly for his own personal pleasure, profit and advantage. But the court has found that "the dam was erected and is maintained for the purpose of creating and raising a pond for the culture of useful fishes, and the pond raised by the dam is well stocked with trout." This finding brings the case within the exact words of the statute. It is not necessary that it should also appear that the object of the defendant was to benefit the public. The legislature deemed the culture of useful fishes for any purpose beneficial, and passed this statute, as it did the Mill Acts, for the purpose of enabling a lessee or owner of lands or flats to raise a dam across a stream so as to engage in that occupation and use the stream without the liability to constant lawsuits from persons whose lands might be flowed. No doubt the defendant's object is his own personal pleasure, profit and advantage. But if the enterprise is successful, the public will be benefited by the introduction and building up of a new and profitable industry, and lands now of little value and not available for any other use will be made valuable. We think this contention must also be overruled.

The result is that, in the opinion of a majority of the court, the decree appealed from must be *Affirmed.*

FIELD, C. J. My objections to the constitutionality of the St. of

1889, c. 383, briefly stated, are as follows. The purpose of the statute is not public. Cultivating fish for one's private use no more concerns the public than cultivating corn or other articles of food. The taking for such a purpose of the land of another by overflowing it cannot be justified as an exercise of the right of eminent domain. Notwithstanding what has been said in some of our decisions, overflowing a person's land without his consent is a taking of property while the overflow continues, and is a tort which would be enjoined unless the statutes authorized it. The Mill Acts were originally sustained on the ground that the erection of water-mills was for the public benefit, and this was strictly true of grist-mills and saw-mills, if the public had the right to have their grain ground and their logs sawed at the mills. The Acts, however, extended to mills of all kinds, in most of which the interests of the public were less direct; still, the erection of water-mills, when water was the only available source of power, was always of public concern sufficient to justify the damming of streams, if compensation were paid to the persons whose lands were overflowed. Mill Acts were in force long before the adoption of the Constitution, and it could not properly be held that it was the intention of that instrument to render them void. But the damming of the waters of a running stream, so that the lands of the upper proprietors are overflowed, is something more than the reasonable use of the water, which every proprietor is entitled to make, as it runs through his land, without paying any compensation to the upper or lower proprietors. It has never been supposed that the Mill Acts would be sustained if they contained no provision for compensation to the persons whose lands were flowed. As was said in *Isele* v. *Arlington Five Cents Savings Bank*, 135 Mass. 142, 144. "The right to flow water back upon the land of another is not the less an easement in its nature because such other may lawfully wall or dike against it. Such right on his part diminishes the extent of the easement, but does not alter its character." *Kenison* v. *Arlington*, 144 Mass. 456.

The statute in question cannot be sustained on the ground that it authorizes the improvement of property of different owners for the common benefit of the owners or for the public benefit, or on the ground that it authorizes the improvement of property which otherwise would be practically useless. It is not confined to useless or swampy lands, or to lands of any particular description. The constitutionality of the statute must be determined by its meaning, and not by the special facts of the present case. It is possible under the statute that any owner or lessee of lands or flats situated in Barnstable County for the purpose of making a fish-pond for his own private use and pleasure, may overflow the greater part of the arable land in the county, with the buildings upon it. None of the precedents cited seem to me to go as far as the opinion of the court in this case, and I am compelled to think the statute unconstitutional.

COMMONWEALTH *v.* GILBERT.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1893.

[160 *Mass.* 157.]

REPORT from Superior Court, Plymouth County; EDGAR J. SHERMAN, JUDGE.

Walter L. Gilbert was convicted of unlawfully selling a trout, and the case was reported for the determination of the Supreme Judicial Court. Verdict ordered to stand.

The indictment charged that defendant, on the 29th day of March in the year 1893, did have in his possession, and did offer and expose for sale, and did sell, one trout, said trout having been taken in this Commonwealth, and not then and there being alive. To this indictment defendant pleaded not guilty. It was admitted, however, that the defendant did, on the day charged in the complaint, sell one dead trout, as therein alleged. The defendant claimed that said trout was one which had been artificially raised, propagated, and maintained by him, and offered to prove the facts as to the method of hatching, raising, and maintaining said trout, which also applied to all other trout owned by him, claiming that, if he did prove these facts to the satisfaction of the jury, he was entitled to an acquittal, on the ground that the statute against selling trout between certain dates applied only to wild trout, or trout that are hatched and grow in a state of nature, without artificial aid in propagating and maintaining them. The Commonwealth did not contest the truth of the facts offered to be proved by the defendant, but claimed that such evidence would furnish no defence against the indictment, and was inadmissible for that purpose. The presiding judge so ruled, and excluded the evidence. The defendant also asked the court to rule that the statutes of this Commonwealth provide no penalty against a person for having in his possession and offering and exposing for sale and selling dead brook trout artificially cultivated, propagated, and maintained by him in this Commonwealth. If the statutes of this Commonwealth impose any penalty upon the defendant for having in his possession and offering and exposing for sale and selling dead brook trout which were kept and confined in artificial ponds upon his own premises, and which were artificially cultivated, propagated, and maintained in the manner the defendant offered to prove that his were confined, cultivated, propagated, and maintained, then the statute, so far as it applies or relates to such trout, is unconstitutional. The court refused to give the rulings as requested.

Robert O. Harris, for the Commonwealth. *T. E. Grover*, for defendant.

ALLEN, J. There are two questions in this case, namely, whether the defendant's act was within the true meaning of the statute forbidding the sale of trout; and, if so, whether the statute is constitutional.

1. The defendant contends that the penalty imposed by Pub. St. c. 91, § 53, for selling trout, does not extend to the sale of trout which have been artificially propagated and maintained. Whatever force this contention might have if section 53 stood alone, a reference to other sections of the same chapter, and to the history of this legislation, makes it clear that such trout are not exempted. . . . The object of all these statutes was to protect and preserve the trout. The same statute which first forbade their sale also contained the provisions upon which the present statute is founded, to encourage their artificial propagation and maintenance. In order to make the protection of the trout more effectual, it was deemed necessary by the legislature to punish the sale, during the close season, of all trout except those which are alive. This was probably on account of the difficulty in distinguishing between trout which had been artificially propagated or maintained and other trout. On the construction contended for by the defendant, the law could not be so well enforced. In view of the provisions of section 26, it seems to us plain that the penalty imposed by section 53 extends to artificially propagated trout.

2. Nor have we any doubt that the statute is constitutional. The importance of preserving from extinction or undue depletion the trout and other useful fishes in the waters of the Commonwealth has been recognized and illustrated in many familiar statutes and decisions from an early time. Such protection has always been deemed to be for "the good and welfare of this Commonwealth," and the legislature may pass reasonable laws to promote it. Such laws are not to be held unreasonable because owners of property may thereby to some extent be restricted in its use. It has often been declared that all property is acquired and held under the tacit condition that it shall not be so used as to destroy or greatly impair the public rights and interests of the community. Many illustrations might be cited where such restrictions on the use of property have been held valid. But the cases are familiar. The limitation is that the restrictions must not be unreasonable. The legislature may "make, ordain and establish all manner of wholesome and reasonable orders, laws, statutes, and ordinances, directions and instructions, either with penalties or without; so as the same be not repugnant to this Constitution, as they shall judge to be for the good and welfare of this Commonwealth." Const. c. 1, § 1, art. 4. The legislature may forbid the catching or selling of useful fishes during reasonable close seasons established for them; and to extend the prohibition so as to include such as have been artificially propagated or maintained is not different in principle from legislation forbidding persons from catching fish in streams running through their own lands. The statute under consideration falls within this power. *Com.* v. *Look*, 108 Mass. 452; *Com.* v. *Alger*, 7 Cush. 53, 84, 85; *Com.* v. *Tewksbury*, 11 Metc. (Mass.) 55, 57; *Cole* v. *Eastham*, 133 Mass. 65; *Rideout* v. *Knox*, 148 Mass. 368, 19 N. E. 390; *Blair* v. *Forehand*, 100 Mass. 136; *Phelps* v. *Racey*, 60 N. Y. 10.

Verdict to stand.

OPINION OF THE JUSTICES

Of the Supreme Judicial Court of Massachusetts. 1890.

[150 *Mass.* 592.]

The following order was adopted by the House of Representatives on May 22, 1890, and thereupon transmitted to the Justices of the Supreme Judicial Court, who, on May 27, 1890, returned the opinion which is subjoined.

Ordered, That the opinion of the Justices of the Supreme Judicial Court be required upon the following important questions of law: —

First. Is it within the constitutional power of the legislature to enact a law conferring upon cities and towns within this Commonwealth the power to manufacture gas or electric light for use in the public streets and buildings of such cities and towns?

Second. Is it within the constitutional power of the legislature to enact a law conferring upon a city or town within this Commonwealth the power to manufacture gas or electric light for the purpose of selling the same to its own citizens?

And be it further ordered, That the Justices of the Supreme Judicial Court be informed that the foregoing questions are propounded with a view to further legislation upon the subjects therein referred to, and that, for their more particular information, a copy of House Document No. 436, being a bill now pending before this House, and upon the subject-matter of which the foregoing questions are propounded, be transmitted to the justices.

To the Honorable House of Representatives of the Commonwealth of Massachusetts:

We received on May 24, 1890, your order of May 22, 1890, a copy of which is annexed, and we respectfully submit the following opinion.

In considering the questions asked, we assume that the power to be conferred is not merely a power to receive and use property given in trust for the purposes named, but is a power to raise money by taxation, and by means of it to construct and maintain works for the manufacture and distribution of gas or electricity, to be used by the municipalities for lighting the public streets and buildings, and by the inhabitants for lighting the land and buildings which are their private property.

We also assume that the gas or electricity to be furnished to the inhabitants for their private use is to be paid for by them at rates to be established, which shall be deemed sufficient to reimburse to the cities and towns the reasonable cost of what is furnished, and that all the inhabitants of a city or town are to have the same or similar rights to be supplied with gas or electricity, so far as is reasonably practicable, and the capacity and extent of the works, which it is deemed expedient

to maintain, will permit. Whether cities and towns can be authorized to give gas or electricity to their inhabitants, or to sell either to them, at varying and disproportionate prices, selecting their customers, selling to some and arbitrarily refusing to sell to others, are questions which it is not necessary to consider.

By the Constitution, full power and authority are given to the General Court to make "all manner of wholesome and reasonable orders, laws, statutes, and ordinances," not repugnant to the Constitution, which "they shall judge to be for the good and welfare of this Commonwealth," etc., and "to impose and levy proportional and reasonable assessments, rates, and taxes upon all the inhabitants of and persons resident, and estates lying within the said Commonwealth, . . . for the public service, in the necessary defence and support of the government of the said Commonwealth, and the protection and preservation of the subjects thereof," etc. Const. Mass., Part II. chap. i. sect. i. art. iv.

The extent of the right of taxation is not necessarily to be measured by that of the right of eminent domain, but the rights are analogous. Private property can be taken without the consent of the owner only for public uses, and the owner must be paid full compensation therefor; otherwise, he would contribute more than his proportional share toward the public expenses. By taxation the inhabitants are compelled to part with their property, but the taxation must be proportional and reasonable, and for public purposes. Taxes may be imposed upon all the inhabitants of the State for general public purposes, or upon the inhabitants of defined localities for local purposes, and when distinct private benefits are received from public works special assessments may be laid upon individuals.

We have no doubt that, if the furnishing of gas and electricity for illuminating purposes is a public service, the performance of this service can be delegated by the legislature to cities and towns for the benefit of themselves and their inhabitants, and that such cities and towns can be authorized to impose taxes for this purpose upon their inhabitants, and to establish reasonable rates which the inhabitants who use the gas or electricity can be compelled to pay. The fundamental question is whether the manufacture and distribution of gas or electricity to be used by cities and towns for illuminating purposes is a public service.

The maintenance of public streets and buildings is a public service, and it may be reasonably necessary to light them in order that the greatest public benefit may be obtained from using them. To say nothing of the usefulness of lighting streets as a means of promoting order and of affording protection to persons and property, the common convenience of the inhabitants may require that they be lighted. Cities and thickly settled towns have for a long time been accustomed to light their public buildings and some of their streets at the public expense. If the streets and public buildings are to be lighted, the means is a

matter of expediency. If the legislature can authorize cities and towns to light their streets and public buildings, it can authorize them to do this by any appropriate means which it may think expedient. As a question of constitutional power, we cannot distinguish the right to authorize cities and towns to buy gas or electricity for their use, from the right to authorize them to manufacture it for their use. We therefore answer the first question in the affirmative.

The second question is one of more difficulty. It is impossible to define with entire accuracy all the characteristics which distinguish a public service and a public use from services and uses which are private. The subject has been considered many times in the opinions of the court of which we are now the justices, and *Lowell* v. *Boston*, 111 Mass. 454, is a leading case. It is there said that "an appropriation of money raised by taxation, or of property taken by right of eminent domain, by way of gift to an individual for his own private uses exclusively, would clearly be an excess of legislative power;" that "the promotion of the interests of individuals, either in respect of property or business, although it may result incidentally in the advancement of the public welfare, is, in its essential character, a private and not a public object;" and that the appropriation of property for turnpikes and railroads "can only be justified by the public service thereby secured in the increased facilities for transportation of freight and passengers, of which the whole community may rightfully avail itself." It is said that the essential point is that a public service or use affects the inhabitants "as a community, and not merely as individuals."

It was early decided that "the prevention of damage by fire is one of those objects affecting the interest of the inhabitants generally, and clearly within the scope of municipal authority." *Allen* v. *Taunton*, 19 Pick. 485. Although the property to be protected is private property, the need of protection is felt by every owner in the city or town; the property of one may be endangered by the burning of that of another; efficient means of protecting his property cannot well be furnished by every inhabitant; and there is a necessity of common action which makes the expenditure of money for the purpose properly a municipal expense.

The maintenance of sewers and drains is a public service. One object is the preservation of the public health; but apart from this they are of great convenience to the inhabitants whose estates can be drained by them. It is impracticable for every owner of land in cities and towns to construct and maintain sewers and drains exclusively on his own account; they cannot ordinarily be constructed over any considerable territory without using the public ways, or exercising the right of eminent domain; they are therefore regarded as of common convenience, and are constructed at the public expense.

The furnishing of water for cities and towns for domestic use affords perhaps the nearest analogy to the subject we are considering. It was long ago declared that "the supply of a large number of inhabitants

with pure water is a public purpose." *Lumbard* v. *Stearns*, 4 Cush. 60. The statutes are well known which authorize cities and towns to maintain water-works for supplying their inhabitants with water, and the constitutionality of these statutes has not been doubted. Water cannot ordinarily be supplied to a large city or town from ponds or streams without the exercise of the right of eminent domain and the use of the public ways; every inhabitant needs water, and often the only practicable method of obtaining it is by the agency of corporations or of the municipality. The land for the public ways having been taken for a public use, it may be subjected to other public uses, but it cannot be subjected to strictly private uses without the consent of the owners of the fee when the fee remains in the abutters. There is therefore often a necessity of having water, common to the inhabitants of a community, which cannot well be met except by the exercise of public rights, and therefore the furnishing of water has been considered a public service.

In the case of water, as in that of sewers and drains, a portion of the service is exclusively public, and the benefit to individuals cannot be separately estimated from that of the community; but a part of the service is rendered to individuals, and the benefit of this can be separately estimated. The inhabitants are therefore required to pay for the water furnished for their private use, and special assessments for the use of sewers and drains are laid upon estates specially benefited; and for the same reasons, while in laying out highways the expense is public, betterment assessments may be laid upon the owners of lands specially benefited.

Artificial light is not, perhaps, so absolutely necessary as water, but it is necessary for the comfortable living of every person. Although artificial light can be supplied in other ways than by the use of gas or electricity, yet the use of one or both for lighting cities and thickly settled towns is common, and has been found to be of great convenience, and it is practically impossible for every individual to manufacture gas or electricity for himself. If gas or electricity is to be generally used in a city or town, it must be furnished by private companies or by the municipality, and it cannot be distributed without the use of the public streets, or the exercise of the right of eminent domain.

It is not necessarily an objection to a public work maintained by a city or town, that it incidentally benefits some individuals more than others, or that from the place of residence or for other reasons every inhabitant of the city or town cannot use it, if every inhabitant who is so situated that he can use it has the same right to use it as the other inhabitants. It must often be a question of kind and degree whether the promotion of the interests of many individuals in the same community constitutes a public service or not. But in general it may be said that matters which concern the welfare and convenience of all the inhabitants of a city or town, and cannot be successfully dealt with without the aid of powers derived from the legislature, may be subjected to

municipal control when the benefits received are such that each inhabitant needs them and may participate in them, and it is for the interest of each inhabitant that others as well as himself should possess and enjoy them.

If the legislature is of opinion that the common convenience and welfare of the inhabitants of cities or towns will be promoted by conferring upon the municipalities the power of manufacturing and distributing gas or electricity for the purpose of furnishing light to their inhabitants we think that the legislature can confer the power. We therefore answer the second question in the affirmative.

We notice that the bill,[1] a copy of which was enclosed with your order, relates to the manufacture and distribution of gas or electricity, not only for furnishing light, but also for furnishing heat and power. We have not considered whether the furnishing of gas or electricity for supplying either heat or power can be regarded as a public service. We have confined our opinion to the questions asked, which, as we understand them, relate to the manufacture and distribution of gas or electricity solely for the purpose of furnishing light.

MARCUS MORTON.
WALBRIDGE A. FIELD.
CHARLES DEVENS.
WILLIAM ALLEN.
CHARLES ALLEN.
OLIVER WENDELL HOLMES, JR.
MARCUS P. KNOWLTON.

BOSTON, May 27, 1890.

OPINIONS OF THE JUSTICES

OF THE SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1892.

[155 *Mass.* 598.]

THE following order was adopted by the House of Representatives on April 12, 1892, and thereupon transmitted to the Justices of the Supreme Judicial Court, who, on May 7, 1892, returned the opinions which are subjoined.

Ordered, That the opinion of the Justices of the Supreme Judicial Court be required upon the following important questions: —

First. Is it within the constitutional power of the legislature to enact a law conferring upon a city or town within this Commonwealth the power to purchase coal and wood as fuel, in excess of its ordinary requirements, for the purpose of selling such excess, so purchased, to its own citizens?

[1] This bill was passed by the House, but was referred by the Senate to the next General Court.

Second. Is it within the constitutional power of the legislature to enact a law conferring upon a city or town within this Commonwealth the power to purchase, for the purpose of sale, and to sell to its own citizens, coal and wood as fuel?

Third. Is it within the constitutional power of the legislature to enact a law conferring upon cities and towns within this Commonwealth authority to establish and maintain municipal fuel or coal yards for the purpose of selling coal, wood, or other fuel to the inhabitants of such cities and towns?

And be it further ordered, That the Justices of the Supreme Judicial Court be informed that the foregoing questions are propounded with a view to further legislation upon the subjects therein referred to, and that for their more particular information a copy of House Document No. 395, being a bill now pending before this House, and upon the subject-matter of which the foregoing questions are propounded, be transmitted to the justices.

The House Document referred to in the above order, and transmitted therewith to the justices, contained the following bill, entitled "An Act to enable Cities and Towns to purchase, sell, and distribute Fuel." [An abstract of the bill is given in a note.[1]]

To the Honorable the House of Representatives of the Commonwealth of Massachusetts.

We, five of the Justices of the Supreme Judicial Court, in reply to your order, respectfully submit the following opinion: —

Whether the legislature can authorize a city or town to buy coal and wood, and to sell them to its inhabitants for fuel, must be determined by considering whether the carrying on of such a business for the benefit of the inhabitants can be regarded as a public service. This inquiry underlies all the questions on which our opinion is required. If such a business is to be carried on, it must be with money raised by taxation. It is settled that the legislature can authorize a city or town to tax its inhabitants only for public purposes. This is not only the law of this Commonwealth, but of the States generally and of the United States. The following are some of the decisions or opinions on the subject: *Lowell* v. *Boston*, 111 Mass. 454; *Mead* v. *Acton*, 139 Mass. 341; *Opinion of the Justices*, 150 Mass. 592; *Kingman* v. *Brockton*, 153 Mass. 255; *Loan Association* v. *Topeka*, 20 Wall. 655; *Ottawa* v.

[1] The substance of the bill is as follows: It authorizes (s. 1) any city and town to establish one or more fuel yards to supply the municipality with fuel and to sell and distribute the same to inhabitants who may buy it. It provides (s. 2) that cities must first have authority by a two-thirds vote of each branch of the city council, and the approval of the mayor and of a majority of the voters at an annual municipal election; that towns (s. 3) must have a two-thirds vote at two town meetings called for the purpose, — the later of the two at an interval of from two to thirteen months after the former. Section 4 provides for issuing bonds to pay for establishing the wood-yard and for other financial details. Sections 5 and 6 deal with enlargements of the yards, &c., and with providing regulations of management. — Ed.

Carey, 108 U. S. 110; *Cole* v. *La Grange*, 113 U. S. 1; *Allen* v. *Jay*, 60 Maine, 124; *Opinion of the Justices*, 58 Maine, 590; *Attorney-General* v. *Eau Claire*, 37 Wis. 400; *State* v. *Eau Claire*, 40 Wis. 533; *State* v. *Osawkee*, 14 Kans. 418; *Mather* v. *Ottawa*, 114 Ill. 659.

It is not easy to determine in every case whether a benefit conferred upon many individuals in a community can be called a public service within the meaning of the rule that taxes can be laid only for public purposes. In general, however, it may be said that the promotion by taxation of the private interests of many individuals is not a public service within the meaning of the Constitution. The preamble of the Constitution declares that "The end of the institution, maintenance, and administration of government is to secure the existence of the body politic, to protect it, and to furnish the individuals who compose it with the power of enjoying in safety and tranquillity their natural rights and the blessings of life." It is declared in Part I., Art. I.: "All men are born free and equal, and have certain natural, essential, and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing, and protecting property; in fine, that of seeking and obtaining their safety and happiness."

Constitutional questions concerning the power of taxation necessarily are largely historical questions. The Constitution must be interpreted as any other instrument with reference to the circumstances under which it was framed and adopted. It is not necessary to show that the men who framed it or who adopted it had in mind everything which by construction may be found in it, but some regard must be had to the modes of thought and action on political subjects then prevailing, to the discussions upon the nature of the government to be established, to the meaning of the language used as then understood, and to the grounds on which the adoption or rejection of the Constitution was advocated before the people. We know of nothing in the history of the adoption of the Constitution that gives any countenance to the theory that the buying and selling of such articles as coal and wood for the use of the inhabitants was regarded at that time as one of the ordinary functions of the government which was to be established. There are nowhere in the Constitution any provisions which tend to show that the government was established for the purpose of carrying on the buying and selling of such merchandise as at the time when the Constitution was adopted was usually bought and sold by individuals, and with which individuals were able to supply the community, no matter how essential the business might be to the welfare of the inhabitants. The object of the Constitution was to protect individuals in their rights to carry on the customary business of life, rather than to authorize the Commonwealth or the "towns, parishes, precincts, and other bodies politic" to undertake what had usually been left to the private enterprise of individuals.

In the opinion in *Loan Association* v. *Topeka*, 20 Wall. 655, 664, the Supreme Court of the United States say: "It is undoubtedly the

duty of the legislature which imposes or authorizes municipalities to impose a tax to see that it is not to be used for purposes of private interest instead of a public use, and the courts can only be justified in interposing when a violation of this principle is clear and the reason for interference cogent. And in deciding whether, in the given case, the object for which the taxes are assessed falls upon the one side or the other of this line, they must be governed mainly by the course and usage of the government, the objects for which taxes have been customarily and by long course of legislation levied, what objects or purposes have been considered necessary to the support and for the proper use of the government, whether State or municipal."

The early usages of towns undoubtedly did not exhaust the authority which the legislature can confer upon municipalities to levy taxes. Cities and towns, since the adoption of the Constitution, have been authorized to levy taxes for many other purposes than those for which taxes were then levied. Up to the present time, however, none of the purposes for which cities and towns have been authorized to raise money has included anything in the nature of what is commonly called trade or commercial business. Instances can be found of some very curious legislation by towns in the colonial and provincial times, some of which would certainly now be thought to be beyond the powers of towns under the Constitution. Whatever the theory was, towns in fact under the Colony Charter, and for some time under the Province Charter, often acted as if their powers were limited only by the opinion of the inhabitants as to what was best to be done. This was the result of their peculiar situation and condition, and the powers of towns or of the General Court were not much considered. The exercise of these extraordinary powers, however, gradually died out.

The purposes for which, by the Province laws, towns were authorized to raise money were for the maintenance of highways, the support of the ministry, schools, and the poor, and for the defraying of other necessary charges arising within the town. The words "necessary charges" (Pub. Sts. c. 27, § 10, *ad fin.*) are still retained in the statutes, but they have been strictly construed by the courts. We do not find either in the Colony or the Province laws any legislation relating to the buying and selling of coal or wood by towns for the use of the inhabitants, or any legislation on any similar subject. It is possible that there may be found in the records of some town a vote or votes showing that the town in an emergency was authorized to buy wood or coal for the purpose of supplying its inhabitants with fuel, but we have not found any. Certainly it was not usual for towns to supply their inhabitants with fuel, unless they were paupers. Neither was it usual for towns to supply their inhabitants with grain or other commodities. We know of no instance of this being done, except by the town of Boston. In the fall of 1713 there was a scarcity of grain, and the General Court prohibited the exportation of it. 1 Prov. Laws (State ed.) 724. The town of Boston in March,

1713–14, voted to lay in a stock of grain to the amount of five thousand bushels of corn, and to store it in some convenient place, and it was left to the selectmen to dispose of it as they saw fit. 8 Record Commissioner's Reports, 101, 104. After that, as shown by the records, the town regularly bought and stored grain and sold it to the inhabitants as late as 1775, and perhaps later, and it established two granaries, one of which, in the Common, remained in use probably as long as the town bought and sold grain. Whether, after the Revolution, the town continued to buy grain we are not informed, as the records have not been printed. The amount which could be sold to any one person was often limited to a few bushels at a time. The report of a committee in 1774 shows that from March, 1769, to March, 1774, the quantity of corn and rye purchased was 5,836 bushels, and that the stock on hand was 376 bushels. It is apparent that the original purpose was to provide against a famine, and that it was not the intention of the town to assume the business of buying and selling all the grain which the inhabitants needed, but of keeping such an amount in store as was necessary in order that small quantities might be obtained, particularly by the poorer inhabitants, at what the selectmen, or a committee of the town, or the town itself, deemed reasonable prices. On May 25, 1795, the town voted to sell the granary. This action of the town of Boston was an exception to the usages of towns, and it appears from the reports of committees that before the Revolution it had come to be considered as of doubtful expediency, and during the Revolution, or not long after, it was discontinued.

The nearest analogy under the Constitution to the subject we are considering is the authority given by the recent statute (St. 1891, c. 370) whereby cities and towns are empowered to maintain works for the manufacture and distribution of gas or electricity for furnishing light to the municipalities and their inhabitants. In the opinion given to the House of Representatives on May 27, 1890, which is printed in 150 Mass. 592, the justices advised that the manufacture and distribution of gas or electricity for furnishing light to the inhabitants of cities and towns might properly be regarded as constituting a public service. It was there said: "It must often be a question of kind and degree whether the promotion of the interests of many individuals in the same community constitutes a public service or not." Gas or electricity for furnishing light has in recent times become a most convenient means of lighting both public and private buildings, streets, and grounds. It is impracticable that each individual should manufacture gas or electricity for himself, but this can best be done by some company or the municipality for a considerable territory, and for the use of both the municipality itself and the inhabitants. Everybody who chooses within that territory cannot be permitted to manufacture and distribute gas or electricity for the public use or the use of other persons, as it is distributed by means of pipes or wires, and the number who properly can be permitted to lay pipes or wires in a given territory must be limited

to one, or at most to a few persons or corporations. The pipes or wires must be laid in or over the public ways, or in or over land taken for the purpose, which may require the exercise of the right of eminent domain. These were some of the reasons why the subject seemed to the justices a proper one for municipal regulation and control, and to constitute a service which a municipality could be authorized to perform for itself and its inhabitants.

But when the Constitution was adopted the buying and selling of wood and coal for fuel was a well-known form of private business, which was generally carried on as other kinds of business were carried on; and is now carried on in much the same manner as it was then. It was and is a kind of business which in its relations to the community did not and does not differ essentially from the business of buying and selling any other of the necessaries of life. Although all kinds of business may be regulated by the legislature, yet to buy and sell coal and wood for fuel requires no authority from the legislature, and requires the exercise of no powers derived from the legislature, and every person who chooses can engage in it in the same manner as in the buying and selling of other merchandise. We are not aware of any necessity why cities and towns should undertake this form of business any more than many others which have always been conducted by private enterprise, and we are not called upon to consider what extraordinary powers the Commonwealth may exercise, or may authorize cities and towns to exercise, in extraordinary exigencies for the safety of the State or the welfare of the inhabitants. If there be any advantage to the inhabitants in buying and selling coal and wood for fuel at the risk of the community on a large scale, and on what has been called the co-operative plan, we are of the opinion that the Constitution does not contemplate this as one of the ends for which the government was established, or as a public service for which cities and towns may be authorized to tax their inhabitants.

We therefore answer the questions in the negative.

WALBRIDGE A. FIELD.
CHARLES ALLEN.
MARCUS P. KNOWLTON.
JAMES M. MORTON.
JOHN LATHROP.

MAY 7, 1892.

To the Honorable the House of Representatives of the Commonwealth of Massachusetts.

I am of opinion that when money is taken to enable a public body to offer to the public without discrimination an article of general necessity, the purpose is no less public when that article is wood or coal than when it is water, or gas, or electricity, or education, to say nothing of cases like the support of paupers or the taking of land for railroads or public markets.

I see no ground for denying the power of the legislature to enact the

laws mentioned in the questions proposed. The need or expediency of such legislation is not for us to consider.

OLIVER WENDELL HOLMES, JR.

To the Honorable the House of Representatives of the Commonwealth of Massachusetts.

In reply to the questions submitted by your order of April 12, 1892, for the opinion of the Justices of the Supreme Judicial Court, I have to say that under our Constitution "The end of the institution, maintenance, and administration of government is to secure the existence of the body politic, to protect it, and to furnish the individuals who compose it with the power of enjoying in safety and tranquillity their natural rights and the blessings of life." Without artificial heat, very few of our inhabitants would have the power of enjoying these rights and blessings. So far, and so far only, as it is a necessity of society as now organized, for the government to supply fuel in order to afford an environment which shall give this power, it is competent for the government to furnish or to provide for a supply. But it is not within its constitutional power to engage in trade or manufacture merely for the purpose of having any branch of business conducted upon a convenient or economical plan. Fuel is now legitimately furnished to paupers by towns and cities at the public expense. If there is an emergency, local or general, which cannot be adequately met by ordinary private agency, it is within the constitutional power of the government to supply the needs of the people in this respect, either through the towns and cities, or through other agencies. The question of the exigency, in the first instance, is for the legislature. If there is no adequate source of supply of fuel except through the establishment of governmental agencies, they may be lawfully inaugurated. If, on the other hand, there is no want of adequate service, the legislature has no constitutional right to create agencies for the purpose. It has no right to authorize towns and cities to engage in trade merely to try an experiment in practical economics, or to put in practice a theory.

My answer to the questions propounded is, therefore, "Yes, if the necessities of society, as now organized, can be met only by the adoption of such measures," and "No, if there is no such necessity, but merely an expediency for the trial of an experiment."[1]

JAMES M. BARKER.

[1] The non-judicial character of such opinions should be remembered. See *ante*, 156, 175. — ED.

STATE *v.* CITY OF TOLEDO.

SUPREME COURT OF OHIO. 1891.

[48 *Ohio St.* 112.]

Quo warranto.

On the 22d day of January, 1889, the General Assembly passed an Act which reads as follows: "An Act to authorize cities of the third grade of the first class to borrow money and issue bonds therefor for the purpose of procuring territory and right of way, sinking wells for natural gas, purchasing wells and natural gas works, purchasing and laying pipes, and supplying such cities with natural gas for public and private use and consumption." . . . [The city of Toledo under this Act issued bonds and applied the proceeds to the purposes named above.] This proceeding in *quo warranto* is instituted in this court to oust and exclude the city of Toledo from any and all authority to have, use, and enjoy the liberty, privilege, and franchise of issuing and selling said bonds and devoting the proceeds towards the prosecution of said enterprise of supplying natural gas, on the alleged ground — fully set forth in the opinion of the court — that the said Act of January 22, 1889, is in conflict with the Constitution of this State, and therefore invalid and void in law.

D. K. Watson, Attorney-General, *Doyle*, *Scott*, *& Lewis*, *Thomas W. Sanderson*, *F. E. Hutchins*, *Frank H. Hurd*, and *E. D. Potter*, *Jr.*, for relator. *W. H. A. Read*, City Solicitor, *Barton Smith*, and *Clarence Brown*, for defendant.

DICKMAN, J. . . . We are brought now to the question whether the authority given to Toledo and other cities to issue natural gas bonds, and levy taxes to pay them, was for a purpose of so public and general a nature as not to transcend the legislative power vested in the General Assembly. In holding that there can be no lawful tax which is not imposed for a public purpose, the line of demarcation is by no means clear and distinct and well defined between what is for public and what for private purposes. It would be exceedingly difficult to lay down any general principle, or construct any formula, by which each case as it arises may be assigned to the one or the other side of the line. There are, however, certain objects, the promotion of which, by reason of their being treated as of general necessity, has been decided to be a public use or purpose. Thus it is now the well-settled doctrine throughout the several States that the business of public highways, turnpikes, bridges, canals, and other public means for travel and for the transportation of goods are a public use within the Constitution. The objects and business of aqueduct and water-works companies for the supply of cities and their inhabitants with water are a public use. *Reddall* v. *Bryan*, 14 Md. 444; *Burden* v. *Stein*, 27 Ala. 104; *Lumbard* v. *Stearns*, 4 Cush. 60; *Mayor, etc.* v. *Bailey*, 2 Denio, 433, 452,

per GARDINER, P. The sewerage of a city is also held to be a public use. *Hildreth* v. *Lowell*, 11 Gray, 345. Land taken in a city for public parks and squares, by authority of law, whether advantageous to the public for recreation, health, or business, is deemed to be taken for a public use. *In re Commissioners of Central Park*, 63 Barb. 282. And in *Bloomfield, etc. Natural Gas Light Co.* v. *Richardson*, 63 Barb. 437, the corporation undertook to conduct the natural gas flowing from a gas spring or well to the city of Rochester, a distance of about 30 miles. The case, it is true, involved the right of eminent domain, and not taxation, but in a proceeding to acquire the right of way for its mains through the lands of private owners, and to appoint commissioners of appraisal, it was held that the purposes, object, and business of the corporation were a public use within the meaning of the Constitution.

In the present controversy the object proposed is to supply the city and the citizens of Toledo with natural gas "for public and private use and consumption." The terms employed to define the object are comprehensive. Whether for fuel or as an illuminant, the design is to furnish gas for all public buildings, and for the private consumption of the community at large. The expense of the undertaking is not to be incurred in behalf of a favored class of citizens, or to foster certain branches of industry, but for the benefit of all the inhabitants of the city. If natural gas is thereby made cheap, or cheaper than before, to consumers, such an advantage will inure to any and all who may avail themselves of the privilege of using it. Nor does their use of it necessarily imply taxation for the payment of the principal and interest of the bonds issued by the municipality, as the income derived from the consumption of natural gas might prove fully adequate to such payment. Water, light, and heat are objects of prime necessity. Their use is general and universal. It is now well settled that the legislature, in the exercise of its constitutional power, may authorize cities to appropriate real estate for water-works; and levy and assess upon the general tax-list an assessment on all taxable real and personal property in the corporation for the payment of the cost and repair of such water-works; and for the purpose of paying the expenses of conducting and managing the works a water-rent may be assessed upon all tenements and premises supplied with water. And yet, in cities and towns where there are public water-works, there are often large numbers of the inhabitants who do not connect their dwellings or business establishments with the water-pipes laid in the streets, and who rely for their supply of water upon the ordinary methods and sources. They are taxed, nevertheless, for the construction of works of which they may have no immediate need to avail themselves; but such works meet the wants of the rest of the community. And as a protection from fire, as a means for the preservation of health, to supply an article of convenience and necessity to the great body of the citizens, for domestic uses, for operating manufacturing establishments, for heating

houses, for generating steam in all its varied applications, municipalities incur debts and levy taxes for constructing and maintaining expensive water-works. The benefits and conveniences offered may not be embraced by all, but they are, notwithstanding, designed for the general advantage, and subserve what is recognized as a public purpose. The city in its corporate capacity does that for the citizen which he could never accomplish by his individual effort, and leaves it to his option to accept or dispense with the privilege offered.

What we have said in reference to water-works is, for the most part, applicable to the erecting and maintaining of natural or artificial gas works. In *State* v. *City of Hamilton*, 47 Ohio St. 52, the city issued its bonds for the purpose of erecting artificial gas-works, and furnishing the public lighting for the city. This court held in that case that the city was empowered to erect its own gas-works at the expense of the corporation. It did not become necessary to decide whether, by virtue of the sections of the Revised Statutes then under consideration, the city would be authorized to construct its own gas-works, and furnish gas to the inhabitants for private consumption. That question has been argued in the case at bar by relator's counsel in *State* v. *City of Hamilton*, now pending in this court, on brief filed in the last-entitled case. But, as throwing light upon the present investigation, and as an authority entitled to the highest respect we must acknowledge the force of the language used in Opinion of the Justices of the Supreme Court to the House of Representatives, 150 Mass. 592, 597. In rendering the opinion that the legislature has the power under the Constitution to authorize the cities and towns within the Commonwealth to manufacture and distribute gas or electric light for use in their public streets and buildings, and for sale to their inhabitants, it is said: "If gas or electricity is to be generally used in a city or town it must be furnished by private companies or by the municipality, and it cannot be distributed without the use of the public streets, or the exercise of the right of eminent domain. . . . If the legislature is of opinion that the common convenience and welfare of the inhabitants of cities or towns will be promoted by conferring upon the municipalities the power of manufacturing and distributing gas or electricity for the purpose of furnishing light to their inhabitants, we think that the legislature can confer the power."

Heat being an agent or principle indispensable to the health, comfort, and convenience of every inhabitant of our cities, we do not see why, through the medium of natural gas, it may not be as much a public service to furnish it to the citizens as to furnish water. It is inquired, why do not municipalities also purchase coal mines, and issue their bonds therefor, and embark in the business of mining and selling coal to private consumers? An obvious reply is that coal and other fuel may be carried to the consumer by the ordinary channels of transportation, and at comparatively moderate expense, while, in conveying natural gas, streets must be opened, pipes laid, works erected, fixtures

and machinery purchased, and other expenses incurred, beyond the enterprise and capital of an individual. The objection that a work or undertaking prosecuted by a city at the public expense does not benefit some individuals will not deprive it of the character of a public service, or of an object for public purposes. Some individuals, as we have before suggested, may be incidentally benefited more than others; and some, from their place of residence in a city, may not use the work at all. It is sufficient "if every inhabitant who is so situated that he can use it has the same right to use it as the other inhabitants."

The source of supply of natural gas to the people of Toledo, it is said, is beyond the corporate limits; but the right of a city to aid in the construction of public works is not necessarily confined to those works which are within the locality whose people are to be taxed for them. It is the corporate interest of the city which determines the right to tax her people, and not the location of the public improvement. *Sharpless* v. *Mayor, etc.*, 21 Pa. St. 147.

It is conceded that if the Act of January 22, 1889, had authorized cities to procure natural gas solely for their own use and consumption — or for use only in public buildings and places — it would not be open to constitutional objection; but, as the Act provides for supplying cities and the citizens thereof with natural gas for public and private use and consumption, it is urged that the manifest design of the Act is to enable the city to furnish fuel to individual consumers for private use at a cheaper rate than they could obtain it from other sources; and that, such being its main object, the city cannot exercise the taxing power in promoting a purpose that is essentially private, as distinguished from one that is public. We do not so read the Act. In our view, it may as well be urged that to supply the city and public buildings with natural gas was the primary object of the Act, and the furnishing of it to citizens merely incidental thereto, as that to supply individuals was the primary object, and the supplying of the city and public buildings only incidental. But, granting that it entered into the design of the legislature to cheapen the price of natural gas, it was to cheapen it for all the inhabitants of the city, and that fact would become significant as rendering the public purpose of the Act more useful and effective.

There is a class of cases to which our attention has been called, in which are considered the legislative authority under the Constitution to pass laws enabling cities to assist individuals or corporations to establish or carry on manufacturing of various kinds within or without the corporate limits; but those cases bear but a slight analogy to the one before us. Among them, and of a cognate character, is that of *Association* v. *Topeka*, 20 Wall. 655. In that case the Citizens' Savings' & Loan Association of Cleveland brought their action in the court below against the city of Topeka on coupons for interests attached to bonds of that city. The bonds, on their face, purported to be payable to the King Wrought-Iron Bridge Manufacturing & Iron Works Company of Topeka, to aid and encourage that company in establishing and

operating bridge shops in the city of Topeka. The city issued 100 of those bonds for $1,000 each as a donation, to encourage that company in its design of establishing a manufactory of iron bridges in that city. It was properly held that there was no power in the legislature to pass a statute authorizing the levy of taxes in aid of such a purpose. The avowed object in issuing the bonds was to aid a private enterprise, to promote the interests of a private company designated by name, and singled out from all others. When the legislature authorized the city to contract the debt, the authority was implied to levy such taxes as were necessary to pay the debt. The authority was thus given, under the guise of taxation to pay the bonds, to reach the property of the citizens, and use it in aid of a private manufacturing company. The benefit accruing to the public, if any, was at most incidental, and might prove to be remote and speculative. The proprietors of the iron-works were under no legal obligations to render any duty or service whatever to the municipality or State. Nor could the State or city compel them to complete or operate the works or prevent their removal at pleasure to some other locality.

The natural gas works for which Toledo has issued its bonds, are owned and controlled by the municipality, and not by individuals; but every citizen, as a member of the community, has an interest in their construction, management, and maintenance. The advantage resulting from them is tendered on equal terms to every inhabitant of the city, and the terms and conditions upon which the benefits are to be enjoyed by the whole people are dependent largely upon the action of the people themselves. In our judgment, the taxation authorized by the General Assembly for the payment of the bonds issued was in no wise to subserve a private purpose, when used as language of constitutional limitation. The establishment of natural gas works by municipal corporations, with the imposition of taxes to pay the cost thereof, may be a new object of municipal policy. But in deciding whether in a given case the object for which taxes are assessed is a public or private purpose we cannot leave out of view the progress of society, the change of manners and customs, and the development and growth of new wants, natural and artificial, which may from time to time call for a new exercise of legislative power. And in deciding whether such taxes shall be levied for the new purposes that have arisen we should not, we think, be bound by an inexorable rule that would embrace only those objects for which taxes have been customarily and by long course of legislation levied. . . .

Judgment for defendant, and petition dismissed.[1]

[1] Compare Cooley, Princ. Const. Law, 2d ed. 57; *Talbot* v. *Hudson*, 16 Gray, 417, *ante*, p. 156; 5 Harv. Law Rev. 30. — Ed.

COMMONWEALTH *v.* HAMILTON MANUFACTURING COMPANY.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1876.

[120 *Mass.* 383.]

COMPLAINT under the St. of 1874, c. 221, to the Police Court of Lowell against a cotton and woollen manufacturing company, for employing an unmarried woman named Mary Shirley, who was over twenty-one years of age, to work in the defendant's manufacturing establishment in the manufacture of cotton goods for sixty-four hours per week. The defendant demurred to the complaint upon the following grounds: "1. That the St. of 1874, c. 221, is unconstitutional and void. 2. That the defendant, having been incorporated under a charter prior to the passage of the statute under which the complaint was made, the statute was, as applied to the defendant, in violation of the obligation of the Commonwealth to the defendant assumed in the charter, and was therefore void and of no force and effect against the defendant." The demurrer was overruled; the defendant was found guilty; and appealed to the Superior Court, where the demurrer was overruled and the judgment of the Police Court affirmed; and the defendant appealed to this court.

C. B. Goodrich and *F. T. Greenhalge*, for the defendant.

C. R. Train, Attorney-General, and *W. C. Loring*, Assistant Attorney-General, for the Commonwealth.

LORD, J. The defendant contends that the St. of 1874, c. 221, under which the complaint in this case is made, is unconstitutional and void. The provision, which it is alleged is without authority under the Constitution, is, that "no minor, under the age of eighteen years, and no woman over that age, shall be employed in laboring by any person, firm or corporation in any manufacturing establishment in this Commonwealth more than ten hours in any one day," except in certain cases, and that "in no case shall the hours of labor exceed sixty per week."

The learned counsel for the defendant in his argument did not refer to any particular clause of the Constitution to which this provision is repugnant. His general proposition was, that the defendant's Act of Incorporation, St. 1824, c. 44, is a contract with the Commonwealth, and that this Act impairs that contract. The contract, it is claimed, is an implied one; that is, an Act of Incorporation to manufacture cotton and woollen goods by necessary implication confers upon the corporation the legal capacity to contract for all the labor needful for this work. If this is conceded to the fullest extent, it is only a contract with the corporation that it may contract for all lawful labor. There is no contract implied that such labor as was then forbidden by

law might be employed by the defendant; or that the General Court would not perform its constitutional duty of making such wholesome laws thereafter as the public welfare should demand. The law, therefore, violates no contract with the defendant; and the only other question is, whether it is in violation of any right reserved under the Constitution to the individual citizen. Upon this question, there seems to be no room for debate. It does not forbid any person, firm or corporation from employing as many persons or as much labor as such person, firm or corporation may desire; nor does it forbid any person to work as many hours a day or a week as he chooses. It merely provides that in an employment, which the legislature has evidently deemed to some extent dangerous to health, no person shall be engaged in labor more than ten hours a day or sixty hours a week. There can be no doubt that such legislation may be maintained either as a health or police regulation, if it were necessary to resort to either of those sources for power. This principle has been so frequently recognized in this Commonwealth that reference to the decisions is unnecessary.

It is also said that the law violates the right of Mary Shirley to labor in accordance with her own judgment as to the number of hours she shall work. The obvious and conclusive reply to this is, that the law does not limit her right to labor as many hours per day or per week as she may desire; it does not in terms forbid her laboring in any particular business or occupation as many hours per day or per week, as she may desire; it merely prohibits her being employed continuously in the same service more than a certain number of hours per day or week, which is so clearly within the power of the legislature, that it becomes unnecessary to inquire whether it is a matter of grievance of which this defendant has the right to complain.

Judgment affirmed.

COMMONWEALTH *v.* PERRY.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1891.

[155 *Mass.* 117.]

INDICTMENT, on the St. of 1891, c. 125, in two counts, alleging in the first count that the defendant on July 13, 1891, did "impose and exact a fine, to wit, a fine of forty cents," upon one Fielding, then employed by him in his factory in Dudley in weaving woollen cloth, "for imperfections that had arisen during the process of weaving in the cloth and material woven by the said" Fielding, while he was so employed and engaged at weaving; and in the second count that the defendant at the same time and place did "withhold a certain part of the wages of said" Fielding while so employed and engaged, "to wit, the sum of forty cents for and on account of imperfections" in the weaving of Fielding, as set out in the first count.

In the Superior Court, before the jury were impanelled, the defendant moved to quash the indictment for the following reasons. . . . [These are omitted here, as not material to the opinion of the court.]

THOMPSON, J., overruled this motion.

At the trial the following facts were agreed. The defendant is a woollen manufacturer in the town of Dudley, and employed among other operatives about forty weavers. On May 18, 1891, the defendant entered into an agreement in writing under seal with such weavers, whereby in consideration of the defendant's employing them and paying them their wages monthly at certain fixed rates, they agreed among other things to accept his employment and serve him faithfully during such employment and to accept as wages "for all imperfect weaving work such reduced rates and prices, and at such rates and prices less than those paid for perfect work, as the said Perry shall deem reasonable and proper compensation for imperfections in weaving, or imperfect work, and a fair compensation for the work actually done," and "to pay to said Perry monthly, from the wages earned in his employ in weaving, the amount of such deductions for imperfect work and imperfections as said Perry on inspection shall find and judge due him for the damage, loss, and injury caused by such imperfect weaving, or imperfections, — whether such deductions be called 'fines,' 'deductions,' or be called by any other name, — which damage, fines, or deductions for such imperfect weaving and imperfections are hereby assumed, and covenanted and promised to be paid to said Perry from wages earned in said employment, as compensation for the loss and injury caused to said Perry thereby." Among the weavers signing this agreement with the defendant was the Fielding referred to in the indictment, and he had remained in the defendant's employ continuously since the date of the agreement. The wages earned by Fielding in June, 1891, would have amounted to $21.53, if the cloth woven by him had been free from imperfections, but by reason of such imperfections, which arose during the process of weaving and which injured its merchantable value, the defendant deducted therefrom and withheld from him the sum of fifteen cents and paid him for his work the balance of $21.38. This balance was a reasonable compensation for the work actually done by Fielding during that month, and the fifteen cents so deducted did not represent the actual damage done to the defendant by the imperfect work done by him.

The defendant requested the judge to rule, among other things, as follows: "Chapter 125 of the Acts of the Legislature of the year 1891, under the provisions of which the defendant was indicted, is unconstitutional and void, especially because it is in violation of the provisions thereof against granting special advantages to a class of the people as distinguished or distinct from the community, and because also it is repugnant to other fundamental principles thereof."

The judge refused so to rule, and instructed the jury, as matter of law, that, upon the agreed facts, the jury would be authorized to find the defendant guilty, and submitted the case to them.

The jury returned a verdict of guilty; and the defendant alleged exceptions.

A. J. Bartholomew, for the defendant.

A. E. Pillsbury, Attorney-General, for the Commonwealth.

KNOWLTON, J. This is an indictment under the St. of 1891, c. 125, the first section of which is as follows: "No employer shall impose a fine upon or withhold the wages or any part of the wages of an employee engaged at weaving for imperfections that may arise during the process of weaving." Section 2 provides a punishment for a violation of the provisions of the statute by the imposition of a fine of not exceeding one hundred dollars for the first offence, and not exceeding three hundred dollars for the second or any subsequent offence.

The Act recognizes the fact that imperfections may arise in weaving cloth, and it is evident that a common cause of such imperfections may be the negligence or want of skill of the weaver. When an employer has contracted with his employee for the exercise of skill and care in tending looms, it forbids the withholding of any part of the contract price for non-performance of the contract, and seeks to compel the payment of the same price for work which in quality falls far short of the requirements of the contract as for that which is properly done. It does not purport to preclude the employer from bringing a suit for damages against the employee for a breach of the contract, but he must pay in the first instance the wages to which the employee would have been entitled if he had done such work as the contract called for. It is obvious that a suit for damages against an employee for failure to do good work would be in most cases of no practical value to the employer, and a theoretical remedy of this sort does not justify a requirement that a party to such a contract shall pay the consideration for performance of it when it has not been performed. The defendant contends that the statute is unconstitutional, and it becomes necessary to consider the question thus presented.

The employer is forbidden either to impose a fine or to withhold the wages or any part of them. If the Act went no further than to forbid the imposition of a fine by an employer for imperfect work, it might be sustained as within the legislative power conferred by the Constitution of this Commonwealth, in chap. 1, sect. 1, art. 4, which authorizes the General Court "to make, ordain, and establish all manner of wholesome and reasonable orders, laws, statutes, and ordinances, directions and instructions, either with penalties or without, so as the same be not repugnant or contrary to this Constitution, as they shall judge to be for the good and welfare of this Commonwealth, and for the government and ordering thereof, and of the subjects of the same." It might well be held that, if the legislature should determine it to be for the best interests of the people that a certain class of employees should not be permitted to subject themselves to an arbitrary imposition of a fine or penalty by their employer, it might pass a law to that effect. But when the attempt is to compel payment under a contract of the price

for good work when only inferior work is done, a different question is presented.

There are certain fundamental rights of every citizen which are recognized in the organic law of all our free American States. A statute which violates any of these rights is unconstitutional and void, even though the enactment of it is not expressly forbidden. Article 1 of the Declaration of Rights in the Constitution of Massachusetts enumerates among the natural, inalienable rights of men the right "of acquiring, possessing, and protecting property." Article 1, § 10, of the Constitution of the United States provides, among other things, that no State shall pass any "law impairing the obligation of contracts." The right to acquire, possess, and protect property includes the right to make reasonable contracts, which shall be under the protection of the law.

The manufacture of cloth is an important industry, essential to the welfare of the community. There is no reason why men should not be permitted to engage in it. Indeed, the statute before us recognizes it as a legitimate business, into which anybody may freely enter. The right to employ weavers, and to make proper contracts with them, is therefore protected by our Constitution; and a statute which forbids the making of such contracts, or attempts to nullify them, or impair the obligation of them, violates fundamental principles of right which are expressly recognized in our Constitution. If the statute is held to permit a manufacturer to hire weavers, and agree to pay them a certain price per yard for weaving cloth with proper skill and care, it renders the contract of no effect when it requires him, under a penalty, to pay the contract price if the employee does his work negligently and fails to perform his contract. For it is an essential element of such a contract that full payment is to be made only when the contract is performed. If it be held to forbid the making of such contracts, and to permit the hiring of weavers only upon terms that prompt payment shall be made of the price for good work, however badly their work may be done, and that the remedy of the employer for their derelictions shall be only by suits against them for damages, it is an interference with the right to make reasonable and proper contracts in conducting a legitimate business, which the Constitution guarantees to every one when it declares that he has a "natural, essential, and unalienable" right of "acquiring, possessing, and protecting property." Whichever interpretation be given to this part of the Act, we are of opinion that it is unconstitutional; and inasmuch as the instructions of the judge permitted the jury to find the defendant guilty on the second count, a new trial must be granted.

We do not deem it important to consider the other exceptions taken by the defendant, further than to say that we are of opinion that the motion to quash was rightly overruled.

For cases supporting the view we have taken, and for a further discussion of the principles involved in the decision, see *Godcharles* v.

Wigeman, 113 Penn. St. 431; *State* v. *Goodwill*, 33 W. Va. 179; *In re Jacobs*, 98 N. Y. 98; *People* v. *Marx*, 99 N. Y. 377; *People* v. *Gillson*, 109 N. Y. 389; *Millett* v. *People*, 117 Ill. 294.

Exceptions sustained.

HOLMES, J. I have the misfortune to disagree with my brethren. I have submitted my views to them at length, and, considering the importance of the question, feel bound to make public a brief statement, notwithstanding the respect and deference I feel for the judgment of those with whom I disagree.

In the first place, if the statute is unconstitutional, as construed by the majority, I think it should be construed more narrowly and literally, so as to save it. Taking it literally, it is not infringed, and there is no withholding of wages, when the employer only promises to pay a reasonable price for imperfect work, or a price less than the price paid for perfect work, and does pay that price in fact. But I agree that the Act should be construed more broadly, and should be taken to prohibit palpable evasions, because I am of opinion that even so construed it is constitutional, so far as any argument goes which I have heard. The prohibition, if any, must be found in the words of the Constitution, either expressed or implied upon a fair and historical construction. What words of the United States or State Constitution are relied on? The statute cannot be said to impair the obligation of contracts made after it went into effect. *Lehigh Water Co.* v. *Easton*, 121 U. S. 388, 391. So far as has been pointed out to me, I do not see that it interferes with the right of acquiring, possessing, and protecting property any more than the laws against usury or gaming. In truth, I do not think that that clause of the Bill of Rights has any application. It might be urged, perhaps, that the power to make reasonable laws impliedly prohibits the making of unreasonable ones, and that this law is unreasonable. If I assume that this construction of the Constitution is correct, and that, speaking as a political economist, I should agree in condemning the law, still I should not be willing or think myself authorized to overturn legislation on that ground, unless I thought that an honest difference of opinion was impossible, or pretty nearly so.

But if the statute did no more than to abolish in certain cases contracts for a *quantum meruit*, and recoupment for defective quality not amounting to a failure of consideration, I suppose that it only would put an end to what are, relatively speaking, innovations in the common law, and I know of nothing to hinder it. This, however, is not all. I do not confine myself to technical considerations. I suppose that this Act was passed because the operatives, or some of them, thought that they were often cheated out of a part of their wages under a false pretence that the work done by them was imperfect, and persuaded the legislature that their view was true. If their view was true, I cannot doubt that the legislature had the right to deprive the employers of an honest tool which they were using for a dishonest purpose, and I cannot

pronounce the legislation void, as based on a false assumption, since I know nothing about the matter one way or the other. The statute, however construed, leaves the employers their remedy for imperfect work by action. I doubt if we are at liberty to consider the objection that this remedy is practically worthless; but if we are, then the same objection is equally true, although for different reasons, if the workmen are left to their remedy against their employers for wages wrongfully withheld. My view seems to me to be favored by *Hancock* v. *Yaden*, 121 Ind. 366, and *Slaughter-House Cases*, 16 Wall. 36, 80, 81.[1]

BRACEVILLE COAL CO. *v.* THE PEOPLE.

SUPREME COURT OF ILLINOIS. 1893.

[147 *Ill.* 66.]

APPEAL from the County Court of Grundy County; the HON. A. R. JORDAN, JUDGE, presiding.

The appellant was tried before a justice of the peace, and found guilty of violating an Act of the Legislature entitled "An Act to provide for the Weekly Payment of Wages by Corporations," approved April 23, 1891, and the penalty of fifty dollars imposed, for which and costs judgment was rendered accordingly. The case was taken by appeal to the County Court of Grundy County, where a trial was held by the court, a jury having been waived, and appellant again found guilty, and the penalty of fifty dollars imposed, and judgment entered for that amount and costs; and the case is brought here by further appeal.

The Act of the Legislature above referred to provides "that every manufacturing, mining, quarrying, lumbering, mercantile, street, electric and elevated railway, steamboat, telegraph, telephone, and municipal corporation and every incorporated express company and water company, shall pay weekly each and every employee engaged in its business the wages earned by such employee to within six days of the date of such payment; provided, however, that if at any time of payment any employee shall be absent from his regular place of labor he shall be entitled to said payment at any time thereafter upon demand." And, after providing a penalty of not less than ten dollars nor more than fifty dollars for each violation, that such action be commenced within thirty days after the violation, notice to the corporation that an action will be brought, defences that may not be set up, etc., proceeds: "No assignment of future wages payable weekly under the provisions of this Act shall be valid if made to the corporation from whom such wages are to become due, or to any person on behalf of such corporation or if made or procured to be made to any person for the purpose of relieving such corporation from the obligations to pay weekly under the provisions of

[1] See *Archer* v. *James et al.*, 2 Best & Sm. 61 (1862). — ED.

this Act. Nor shall any of said corporations require any agreement from an employee to accept wages at other periods than as provided in section 1 of this Act, as a condition of employment."

Appellant became a corporation under the general incorporation law, in force July 1, 1872, and for several years past has been engaged in the business of coal-mining, with its principal office at Braceville, Grundy County, this State. A certain contract is provided by appellant, which all persons desiring employment in its service are required to sign as a condition precedent to such employment. The complaining witness, Thomas McGuire, in November, 1891, applied to the superintendent of appellant's mines for work, and was required to sign one of its contracts, which was done, in duplicate, each party retaining a copy. Certain rules and regulations of the company on the back of its contracts are, by the terms of each contract, made a part of the same. The contract of witness McGuire, after stipulating, among other things, the wages to be paid, etc., provides: "All payments, hereunder to be made on regular pay-day, and in compliance with the rules and regulations above named; and pay-day is hereby fixed for and on the first Saturday after the 10th of each month, when and at which time all wages or moneys that may have been earned during and in the calendar month next prior to such pay-day shall be paid, less all moneys owing said party of the first part on any account whatever." By the seventh rule, printed on the back of said contract, and made part thereof, it is provided: "Every employee will be paid once a month at regular pay-day all wages or moneys he may have earned during and in the calendar month next prior to such pay-day, after deducting any indebtedness which such employee may owe to the company, or which the company, with the consent of such employee, may have assumed to pay to any other person." McGuire entered upon the employment under the contract November 3, 1891, and quit November 13, 1891, and demanded his wages. The company refused to pay him before the next pay-day, when he gave the notice under the statute, and caused this suit to be brought.

George S. House, for appellant.

Mr. S. C. Stough and *Mr. William Mooney*, for the People.

MR. JUSTICE SHOPE delivered the opinion of the court: The principles that must control the decisions of this case were announced in *Frorer* v. *People*, 141 Ill. 171. Unless we are prepared to recede from the doctrine of that case, and the subsequent case of *Ramsey* v. *People*, 142 Ill. 380, the Act under consideration must be likewise held unconstitutional and void. Section 2 of art. 2, of the Constitution of this State guarantees that no person shall be deprived of life, liberty, or property without due process of law. We said in the *Frorer Case*, the words "due process of law" "are to be held synonymous with 'the law of the land,'" and, quoting from *Millett* v. *People*, 117 Ill. 294, said: "And this means general public law, binding upon all the members of the community under all circumstances, and not partial or private laws, affect-

ing the rights of private individuals or classes of individuals." There can be no liberty, protected by government, that is not regulated by such laws, as will preserve the right of each citizen to pursue his own advancement and happiness in his own way, subject to the restraints necessary to secure the same right to all others. The fundamental principle upon which liberty is based in free and enlightened government is equality under the law of the land. It has accordingly been everywhere held that liberty, as that term is used in the Constitution, means not only freedom of the citizen from servitude and restraint, but is deemed to embrace the right of every man to be free in the use of his powers and faculties, and to adopt and pursue such avocation or calling as he may choose, subject only to the restraints necessary to secure the common welfare. *Frorer* v. *People, supra; Com.* v. *Perry,* 155 Mass. 117; *People* v. *Gillson,* 109 N. Y. 389; *Live-Stock, etc. Ass'n* v. *Crescent City, etc. Co.,* 1 Abb. (U. S.) 388; *Slaughter-House Cases,* 16 Wall. 36; *Godcharles* v. *Wigeman,* 113 Pa. St. 431; *State* v. *Goodwill,* 33 W. Va. 179. Property, in its broader sense, is not the physical thing which may be the subject of ownership, but is the right of dominion, possession, and power of disposition which may be acquired over it. And the right of property preserved by the Constitution is the right not only to possess and enjoy it, but also to acquire it in any lawful mode, or by following any lawful industrial pursuit which the citizen, in the exercise of the liberty guaranteed, may choose to adopt. Labor is the primary foundation of all wealth. The property which each one has in his own labor is the common heritage. And, as an incident to the right to acquire other property, the liberty to enter into contracts by which labor may be employed in such way as the laborer shall deem most beneficial, and of others to employ such labor, is necessarily included in the constitutional guarantee. In the *Frorer Case,* we said: "The privilege of contracting is both a liberty and a property right, and if A. is denied the right to contract, and acquire property in the manner which he has hitherto enjoyed under the law, and which B., C., and D. are still allowed by the law to enjoy, it is clear that he is deprived of both liberty and property, to the extent that he is thus denied the right to contract;" and quoted with approval: "The man or the class forbidden the acquisition or enjoyment of the property in the manner permitted the community at large would be deprived of liberty in particulars of primary importance to his or their pursuit of happiness." Cooley, Const. Lim. 393.

It is undoubtedly true that the people in their representative capacity may, by general law, render that unlawful, in many cases, which had hitherto been lawful. But laws depriving particular persons or classes of persons of rights enjoyed by the community at large, to be valid, must be based upon some existing distinction or reason, not applicable to others, not included within its provisions. *Id.* 391. And it is only when such distinctions exist that differentiate in important particulars, persons, or classes of persons from the body of the people, that laws

having operation only upon such particular persons or classes of persons have been held to be valid enactments. In the *Millett Case* we held that it was not competent, under the Constitution, for the legislature to single out operators of coal mines and impose restrictions in making contracts for the employment of labor which were not required to be borne by other employers. And in the *Frorer Case*, a law singling out persons, corporations, or associations engaged in mining and manufacturing, and depriving them of the right to contract as persons, corporations, and associations engaged in other business or vocation might lawfully do, was in violation of the Constitution, and void. So in *Ramsey* v. *People*, 142 Ill. 380, "An Act to provide for the Weighing in Gross of Coal hoisted from Mines," approved June 10, 1891, was held unconstitutional and void for the same reason.

The Act under consideration applies not to all corporations existing within the State, or to all that have been or may be organized for pecuniary profit under the general incorporation laws of the State. There is no attempt to make a distinction between corporations and individuals who may employ labor. The slightest consideration of the Act will demonstrate that many corporations that may be and are organized and doing business under the laws are not included within the designated corporations. No reason can be found that would require weekly payments to the employees of an electric railway that would not require like payment by an electric light or gas company; to a corporation engaged in quarrying or lumbering that would not be equally applicable to a corporation engaged in erecting, repairing, or removing buildings or other structures; to mining that would not exist in respect of corporations engaged in making excavations and embankments for roads, canals, or other public or private improvements of like character: that will apply to a street or elevated railway that will not make it equally important in other modes of transportation of freight and passengers. The public records of the State will show, and it is a matter of common knowledge, that very many corporations have been organized and are doing business in the State which necessarily employ large numbers of men that are not included within the Act under consideration.

The restriction of the right to contract affects not only the corporation, and restricts its right to contract, but that of the employee as well. We need not repeat the argument of the *Frorer Case* upon this point. An illustration of the manner in which it affects the employee, out of many that might be given, may be found in the conditions arising from the late unsettled financial affairs of the country. It is a matter of common knowledge that a large number of manufactories were shut down because of the stringency in the money market. Employers of labor were unable to continue production for the reason that no sale could be found for the product. It was suggested in the interest of employers, as well as in the public interest, that employees consent to accept only so much of their wages as was actually necessary to their sustenance, reserving payment of the balance until business should revive, and thus

enable the factories or workshops to be open and operated with less present expenditures of money. Public economists and leaders in the interest of labor suggested and advised this course. In this State, and under this law, no such contract could be made. The employee who sought to work for one of the corporations enumerated in the Act would find himself incapable of contracting as all other laborers in the State might do. The corporations would be prohibited entering into such a contract, and, if they did so, the contract would be voidable at the will of the employee, and the employer subject to a penalty for making it. The employee would, therefore, be restricted from making such a contract as would insure to him support during the unsettled condition of affairs, and the residue of his wages when the product of his labor could be sold. They would, by the Act, be practically under guardianship; their contracts voidable, as if they were minors; their right to freely contract for and to receive the benefit of their labor, as others might do, denied them.

But, treating the restrictions as affecting the corporations only, it is insisted that the reservation of authority by the General Assembly in section 9 of the General Incorporation Act (chapter 32, Rev. St.) authorized the passage of the Act in question. That section provides: "The General Assembly shall at all times have power to prescribe such regulations and provisions as it may deem advisable, which regulations and provisions shall be binding on any and all corporations formed under this Act." It is said this section entered into and formed a part of the contract under which the grant of the corporate franchise was conferred upon appellant company, it having been organized under the general law. It was expressly held that the reservation of the right to alter, amend, or repeal the charter entered into and formed a part of the contract between the State and the corporation chartered under the Constitution of 1848, and that the power reserved might be constitutionally exercised. *Butler* v. *Walker*, 80 Ill. 345. And undoubtedly the same construction should be placed upon the reservation of power in the section quoted. But by section 1, art. 11, of the Constitution it is provided: "No corporation shall be created by special laws, or its charter extended, changed or amended, . . . but the General Assembly shall provide by general laws for the organization of all Corporations hereafter to be created." The manifest intention of this provision of the Constitution was to require not only the creation of corporations, but amendments to charters of those existing, to be made by general laws, applicable alike to all occupying like circumstances and existing under the same conditions; and it necessarily follows that special Acts, applying to particular corporations only, and not to the general body of corporations created under the Act, would fall within the prohibition of this section.

By the general incorporation law appellant company was granted the right to contract as a corporation in and about the business for which it was organized. A restriction of its right to thus contract is necessarily

an amendment or change of its corporate powers and functions of its charter. If, therefore, the restriction is held to fall within the power reserved in section 9 of the Act, it must, in view of the constitutional provision, be construed as reserving the power to prescribe such regulations and provisions as the legislature may deem advisable by general law. The Act under consideration, not being a general law, is therefore not a warranted exercise of power.

We need not extend this opinion by further discussion. The right to contract necessarily includes the right to fix the price at which labor will be performed, and the mode and time of payment. Each are essential elements of the right to contract, and whosoever is restricted in either as the same is enjoyed by the community at large is deprived of liberty and property. The enactment being unconstitutional, there is no law authorizing the judgment of the County Court, and it will accordingly be reversed.[1]

[1] And so *Leep* v. *St. Louis, &c. Ry. Co.*, 25 S. W. Rep. 75 (Ark. Feb. 1894), but allowing such legislation as against corporations.

In *Ramsey* v. *The People*, 142 Ill. 380, BAILEY, C. J., for the court, said: "In the recent case of *Frorer* v. *People* (Ill. Sup.), 31 N. E. Rep. 395, we had occasion to consider another statute passed by the same legislature, and involving, in the main, the same constitutional principles as the one now before us, and reached the conclusion that the statute in question in that case is unconstitutional and void. That statute made it unlawful for any person, company, corporation, or association engaged in any mining or manufacturing business to engage in, or be interested, either directly or indirectly, in the keeping of a truck store, or the controlling of any store, shop, or scheme for the furnishing of supplies, tools, clothing, provisions, or groceries to his, its, or their employees, while engaged in mining or manufacturing. We held that said statute was a prohibition, not only upon the employer engaged in mining or manufacturing, but also upon his employees, and took from both the right and liberty belonging to all other members of the community to enter into such contracts, not contrary to public policy, as they may see fit; that the legislature had no power to deprive one class of persons of privileges allowed to other persons under like conditions; that the privilege of contracting is both a liberty and a property right, protected by that provision of the Constitution which guarantees that no person shall be deprived of his liberty or property without due process of law; and that if one person is denied the right to contract and acquire property in the manner which he has hitherto enjoyed under the law, and which is still allowed to other members of the community, he is deprived of both liberty and property, to the extent that he is thus deprived of the right of contract. We are of the opinion that the same rule, in substance, laid down in the *Frorer Case* applies here, and we need therefore do little more than refer to what is said in the opinion in that case. The statute now before us, in like manner with the one under consideration there, attempts to take from both employer and employee, engaged in the mining business, the right and power of fixing by contract the manner in which such wages are to be ascertained. The statute makes it imperative, where the miner is paid on the basis of the amount of coal mined, whatever may be the wishes or interests of the parties, that the coal shall be weighed on the pit cars before being screened, and that the compensation shall be computed upon the weight of the unscreened coal. In all other kinds of business involving the employment of labor, the employer and employee are left free to fix by contract the amount of wages to be paid, and the mode in which such wages shall be ascertained and computed. This is justly regarded as a very important right, vitally affecting the interests of both parties. To the extent to which it is abridged, a property right is taken away. There is nothing in the business of coal-mining which renders either the employer or employee less capable

STATE *v.* LOOMIS.

SUPREME COURT OF MISSOURI. 1893.

[115 *Mo.* 307.][1]

Dysart & Mitchell and *Lee, McKeighan, Ellis*, and *Priest*, for appellants.

BLACK, C. J. This is an information in two counts, filed by the prosecuting attorney of Macon County against the three defendants, engaged in carrying on the business of mining coal in that county. The first count avers that the defendants did unlawfully issue and circulate in payment of wages a certain order, check, etc., payable to P. Daniels otherwise than in money, without being payable, at the option of the holder, in merchandise or money. The second count states, in substance, that defendants unlawfully failed to redeem a certain order, check, etc., issued to P. Daniels in payment for wages, the same having been presented for payment thirty days from the date of the delivery thereof. The information is based upon sections 7058, 7060, of the Revised Statutes of 1889. [These sections are given in the note.[2]]

of contracting in respect to wages than in any of the other numerous branches of business in which laborers are employed under analogous conditions. There is no difference, at least in kind, so far as this matter is concerned, between coal-mining, on the one hand, and other varieties of mining, quarrying stone, grading and constructing railroads, and their operation when constructed, manufacturing in all its departments, the construction of buildings, agriculture, commerce, domestic service, and an almost infinite variety of other avocations requiring the employment of laborers, on the other hand. Upon what principle, then, can those engaged in coal-mining be singled out, and subjected to restrictions of their power to contract as to wages, while those engaged in all these other classes of business are left entirely free to contract as they see fit? We think the attempt of the legislature to impose such restrictions is clearly repugnant to the constitutional limitation above referred to, and therefore void." — ED.

[1] In Banc, reversing a decision of the same court, Division No. 1, in the same case, in October, 1892, 22 S. W. Rep. 332. See the elaborate opinion of Thomas, J., as there reported. — ED.

[2] The first of these sections provides: "It shall not be lawful for any corporation, person, or firm engaged in manufacturing or mining in this State to issue, pay out, or circulate for payment of the wages of labor, any order, check, memorandum, token, or evidence of indebtedness, payable, in whole or in part, otherwise than in lawful money of the United States, unless the same is negotiable and redeemable at its face value, without discount, in cash or in goods, wares, or merchandise or supplies, at the option of the holder, at the store or other place of business of such firm, person, or corporation; . . . and the person who, or corporation, firm, or company which, may issue any such order, check, memorandum, token, or other evidence of indebtedness, shall, upon presentation and demand within thirty days from date or delivery thereof, redeem the same in goods, wares, merchandise, or supplies at the current cash market price for like goods, wares, merchandise, or supplies, or in lawful money of the United States, as may be demanded by the holder of any such order, memorandum, token, or other evidence of indebtedness: *provided*," etc. Section 7060 makes it a misdemeanor for any person, firm, or company engaged in mining or manufacturing to issue or circulate, in payment of wages, any order, check, etc., payable otherwise than as provided in section 7058; or to fail to redeem any such order, check, etc., in money when presented for payment.

The Circuit Court, sitting as a jury, found the defendants guilty as charged in the first count of the information, and assessed their punishment at a fine of $10, and they appealed.

The evidence discloses the following facts: The defendants, composing the firm of Loomis & Snively, were the owners of coal mines, and in connection with that business carried on a store. Peter Daniels worked for them as a miner. At the end of January, 1891, he owed them $43.20. On the 18th of the following February he had earned, as wages during that month, $5.50, and on that day he requested, and the defendants' clerk gave him a "credit coupon check-book" upon their store. The coupons were in sums of five, ten, and twenty-five cents, and aggregated five dollars. It is stated on the back of the book that "the coupons in this book are not good, if detached, and are payable only in merchandise when presented by P. Daniels." Each coupon says: "Good for merchandise at our store. Not transferable. Loomis & Snively." Daniels assigned this check-book to Burge, who assigned it to Hughes, and he transferred it to Mr. Williams. The latter presented it to the defendants for payment on the 2d of April, 1891, and they then refused payment. The proof shows that defendants had monthly pay-days. On these days they gave out no orders or checks, but paid the miners what was due them in cash. At the close of the evidence, the defendants asked the court to discharge them, because the statute upon which the information was founded was unconstitutional, and therefore void, which request the court refused. The contention is that the two sections of the statute before mentioned are in conflict with several clauses of the Constitution of this State, and especially the following: —

"1. That all persons have a natural right to life, liberty, and the enjoyment of the gains of their own industry;"

"2. That no person shall be deprived of life, liberty, or property, without due process of law;"

"3. And that they violate that part of the Fourteenth Amendment of the Constitution of the United States which declares: 'Nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person the equal protection of the laws.'"

The words "due process of law," as used in these clauses of both constitutions, mean the same as "the law of the land." Story, Const. (5th ed.) § 1943: Cooley, Const. Lim. (6th ed.) 430. It was said in *Railway Co.* v. *Humes*, 115 U. S. 512: "In England the requirement of due process of law, in cases where life, liberty, and property are affected, was originally designed to secure the subject against the arbitrary actions of the Crown, and to place him under the protection of the law. The words were held to be the equivalent of 'law of the land;' and a similar purpose must be ascribed to them when applied to a legislative body in this country." It is now axiomatic that "everything which may pass under the form of an enactment is not, therefore, to be considered

the law of the land." Speaking of these words, Mr. Justice Johnson said: "They were intended to secure the individual from the arbitrary exercise of the powers of the government, unrestrained by the established principles of private rights and distributive justice." *Bank* v. *Okely*, 4 Wheat. 235. "Law of the land" is said to mean a law binding upon every member of the community under similar circumstances. *Wally's Heirs* v. *Kennedy*, 2 Yerg. 554. The word "liberty," as used in these constitutional declarations, means more than freedom of locomotion. It includes and comprehends, among other things, freedom of speech, the right to self-defence against unlawful violence, and the right to freely buy and sell as others may. 2 Story, Const. (5th ed.) § 1590.

From the foregoing descriptions and definitions of "due process of law," or its equivalent, "law of the land," it must be evident that this constitutional safeguard condemns arbitrary, unequal, and partial legislation; and it is equally clear that the right to make contracts, and have them enforced, as others may, is one of the rights so secured to every citizen. There is no doubt but many of our legislative enactments operate upon classes of individuals only, and they are not invalid because they so operate, so long as the classification is reasonable and not arbitrary. Thus, it is perfectly competent to legislate concerning married women, minors, insane persons, bankers, common carriers, and the like; and the power of the legislature to prescribe police regulations applicable to localities and classes is very great because such laws are designed to protect property, and the safety, health, and morals of the citizen. But classification for legislative purposes must have some reasonable basis upon which to stand. It must be evident that differences which would serve for a classification for some purposes furnish no reason whatever for a classification for legislative purposes. The differences which will support class legislation must be such as, in the nature of things, furnish a reasonable basis for separate laws and regulations. Thus the legislature may fix the age at which persons shall be deemed competent to contract for themselves, but no one will claim that competency to contract can be made to depend upon stature, or color of the hair. Such a classification, for such a purpose, would be arbitrary, and a piece of legislative despotism, and therefore not the law of the land. When speaking upon this subject, Judge Cooley says: "The doubt might also arise whether a regulation made for any one class of citizens, entirely arbitrary in its character, and restricting their rights, privileges, or legal capacity in a manner before unknown to the law, could be sustained, notwithstanding its generality. Distinctions in these respects must rest upon some reason upon which they can be defended, like the want of capacity in infants and insane persons; and if the legislature should undertake to provide that persons following some specified lawful trade or employment should not have capacity to make contracts, or to build such houses as others were allowed to erect, or in any other way to make such use of their property as was permissible to

others, it can scarcely be doubted that the Act would transcend the due bounds of legislative power, even though no express constitutional provision could be pointed out with which it would come in conflict. To forbid an individual or a class the right to the acquisition and enjoyment of property in such manner as should be permitted to the community at large would be to deprive them of liberty in particulars of primary importance to their pursuit of happiness; and those who shall claim a right to do so ought to be able to show specific authority therefor, instead of calling upon others to show how and where the authority is negatived." Cooley, Const. Lim. (6th ed.) 484.

There can be no doubt but the legislature may regulate the business of mining and manufacturing so as to secure the health and safety of the employees; but that is not the scope of the two sections of the statute now in question. They single out those persons who are engaged in carrying on the pursuits of mining and manufacturing, and say to such persons: "You cannot contract for labor payable alone in goods, wares, and merchandise. The farmer, the merchant, the builder, and the numerous contractors employing thousands of men may make such contracts, but you cannot." They say to the mining and manufacturing employees: "Though of full age, and competent to contract, still you shall not have the power to sell your labor for meat and clothing alone, as others may." It will not do to say these sections simply regulate payment of wages, for that is not their purpose. They undertake to deny to the persons engaged in the two designated pursuits the right to make and enforce the most ordinary, every-day contracts, — a right accorded to all other persons. This denial of the right to contract is based upon a classification which is purely arbitrary, because the ground of the classification has no relation whatever to the natural capacity of persons to contract.

Now, it may be that instances of oppression have occurred, and will occur, on the part of some mine owners and manufacturers, but do they not occur quite as frequently in other fields of labor? Conceding that such instances may and do occur, still that furnishes no reasonable basis for depriving all persons engaged in the two lawful and necessary pursuits of the right to make and enforce every-day contracts. Liberty, as we have seen, includes the right to contract as others may, and to take that right away from a class of persons following lawful pursuits is simply depriving such persons of a time-honored right which the Constitution undertakes to secure to every citizen. Applying the principle of constitutional law before stated, we can come to no other conclusion than this: That these sections of the statute are utterly void. They attempt to strike down one of the fundamental principles of constitutional government. If they can stand, it is difficult to see an end to such legislation, and the government becomes one of special privileges, instead of a compact "to promote the general welfare of the people."[1] We place our conclusion on the broad ground that these sections of the statute are not "due process of law," within the meaning of the Constitution.

Statutes like or analogous to the one in hand have been enacted in several of the States of this Union, and they have been the subject of consideration of several courts of last resort; and it is well to examine those cases with some detail, for it must be obvious that general constitutional declarations are the better understood when seen in the light of the facts of the particular cases in which they have been applied. The Supreme Judicial Court of Massachusetts had under consideration, in *Com.* v. *Perry* [155 Mass. 117], 28 N. E. Rep. 1126, a statute which provides that "no employer shall impose a fine upon, or withhold, the wages, or any part of the wages, of an employee engaged at weaving, for imperfections that may arise during the process of weaving." It was held that, if the Act went no further than to forbid the imposition of a fine for imperfect work, it might be sustained, but that the attempt to make inferior work answer a contract for good work presented a different question; that the right to acquire, possess, and protect property includes the right to make reasonable contracts, which shall be under the protection of the law. Says the court: "If it [the statute] be held to forbid the making of such contracts, and to permit the hiring of weavers only upon terms that prompt payment shall be made of the price for good work, however badly their work may be done, and that the remedy of the employer for their derelictions shall be only by suits against them for damages, it is an interference with the right to make reasonable and proper contracts in conducting a legitimate business, which the Constitution guarantees to every one when it declares that he has a 'natural, inalienable right' of 'acquiring, possessing, and protecting property.'" *Godcharles* v. *Wigeman*, 113 Pa. St. 431, was an action brought by Wigeman to recover wages as a puddler. Plea of payment, etc. During the time of his employment the plaintiff asked for, and received, orders from defendants on different parties for coal and other articles, which orders were honored by the parties on whom drawn, and the defendants paid them. It seems an Act of the Legislature made all orders given by employers engaged in the business of manufacturing, to their workmen, payable in goods, or anything but money, void. Speaking of these sections of the Act the court said: "They are utterly unconstitutional and void, inasmuch as by them an attempt has been made by the legislature to do what, in this country, cannot be done; that is, prevent persons who are *sui juris* from making their own contracts. The Act is an infringement, alike, of the right of the employer and employee. He may sell his labor for what he thinks best, whether money or goods, just as his employer may sell his iron or coal; and any and every law that proposes to prevent him from so doing is an infringement of his constitutional privileges, and consequently vicious and void." In *State* v. *Goodwill*, 33 W. Va. 179, a statute of that State prohibited persons engaged in mining and manufacturing from issuing orders in payment of labor, except such as should be made payable in money. It made a violation of its provisions a misdemeanor. The Constitution of that State declares that

all men have certain inherent rights; that is to say, "the enjoyment of life and liberty, with the means of acquiring and possessing property, and of pursuing and obtaining happiness and safety." The statute was held unconstitutional, after a full consideration. Says the court: "The right to use, buy, and sell property, and contract in respect thereto, including contracts for labor, which is, as we have seen, property, is protected by the Constitution." The scope of the opinion is well summarized in the headnote in these words: "It is not competent for the legislature, under the Constitution, to single out owners and operators of mines and manufacturers of every kind, and provide that they shall bear the burdens not imposed on other owners of property or employers of labor, and prohibit them from making contracts which it is competent for other owners of property or employers of labor to make." And this ruling was followed and approved in *State* v. *Fire Creek Coal & Coke Co.*, 33 W. Va. 188. The statute brought in question in *Millett* v. *People*, 117 Ill. 294, required all coal produced in the State to be weighed on scales to be furnished by the mine-owners, and subjected the mine-owner to a fine or imprisonment for a failure to comply with its provisions. By another section it was provided "that all contracts for the mining of coal, in which the weighing of the coal as provided for in this Act shall be dispensed with, shall be null and void." It was held that the mine-owners could not be compelled to make their contracts for mining coal so as to be regulated by weight; and that they could not be compelled to keep and use scales for such purposes, save when they saw fit to make contracts for mining on the basis of weight. The law was considered repugnant to the constitutional provision that "no person shall be deprived of life, liberty, or property without due process of law;" that to single out coal-mine owners, and prohibit them from making contracts which it was competent for other employers of labor to make, was not due process of law. And for like reasons the same court held an Act void which denied to persons and corporations engaged in mining and manufacturing the right to keep, or be interested in, a truck store for furnishing supplies, etc. *Frorer* v. *People*, 31 N. E. Rep. 395.

Some of the cases just cited cannot be distinguished from this one. In others, there is some difference in the facts, and in the statutes considered, and in some of them the constitutional provisions use different words from the clauses of our Constitution before set out; but the cases just cited are all, in point of principle, like the one in hand. The differences, such as they are, strengthen, rather than weaken, the conclusion which we have before expressed, for it must be evident that they all teach this doctrine: that constitutional declarations concerning the liberty of the citizen, though using different words, are not to be reduced to an empty sound. Liberty, we have seen, includes the right to acquire property, and that means and includes the right to make and enforce contracts. We do not say that such rights cannot be regulated by general law, but we do say that the legislature cannot single out

one class of persons, who are competent to contract, and deprive them of rights in that respect which are accorded to other persons. The constitutional declaration that "no person shall be deprived of life, liberty, or property without due process of law" was designed to protect and preserve their existing rights against arbitrary legislation, as well as against arbitrary executive and judicial Acts. The sections of our statute in question deprive a class of persons of the right to make and enforce ordinary contracts, and they introduce a system of State paternalism which is at war with the fundamental principles of our government, and, as we have before said, are not due process of law. It cannot be said that these defendants, in operating their coal mines, are pursuing a public business, or that they have in any way, shape, or form devoted their property to a public use; and, this being so, the cases of *Munn* v. *Illinois*, 94 U. S. 113, and *Budd* v. *New York*, 143 U. S. 517, are not in conflict with what we have said. On the contrary, the line of argument pursued in those cases goes far to show that a statute like the one in hand cannot stand. The many adjudications upholding police regulations need not be noticed, for it cannot be claimed that the law in question is of that character. The case of *Hancock* v. *Yaden*, 121 Ind. 366, goes far to support and uphold this law, but we cannot agree to the doctrine of that case. Slow as we are, and should be, to declare legislative enactment void, we can reach no other conclusion than that before expressed.

The judgment is reversed, and the defendants discharged. All concur, except BARCLAY, J., who dissents.

BARCLAY, J. The reasons of my learned associate, Chief Justice Black, for holding the statute unconstitutional, seem to me unsatisfactory, and the importance of the case warrants a statement of the grounds of dissent.

1. There is no issue touching the impairment of obligation of any contract concluded before the passage of the Act. The transactions in view occurred long afterwards. The only controversy now is whether or not the statute violates the guarantees of "liberty" and "property," and of "due process of law," on which the judgment of the majority of the court is placed. In the principal opinion it is conceded that the legislature has power to restrict freedom of contract in some directions, and in respect to certain parties; for example, "infants and insane persons." That concession may be taken as a starting-point for the present investigation; for when it is granted that liberty to make contracts is not absolute and unlimited, our difference is narrowed into the inquiry, what is the peculiarity of the subject-matter of the statute under review which exempts it from regulation by the law-making power?

One reason given for condemning the law before us is that the subjection of corporations, and other persons operating mines and manufacturing establishments, to such regulation, is a "purely arbitrary"

classification; therefore, an infringement of their constitutional liberty. Although that proposition seems a vital one to support the conclusion reached, it is said in another part of the opinion that "it is perfectly competent to legislate concerning married women, minors, insane persons, bankers, common carriers, and the like." In this connection the Supreme Court has held (in a case which furnishes an elaborate list of instances of such legislation) that "class legislation is not necessarily obnoxious to the Constitution. It is a settled construction of similar constitutional provisions that a legislative Act which applies to and embraces all persons 'who are or who may come into like situations and circumstances' is not partial." *Humes* v. *Railway Co.* (1884), 82 Mo. 231, cited recently and followed in an opinion by the present Chief Justice in *Perkins* v. *Railway Co.* (1891), 103 Mo. 56. To the same point, see *Budd* v. *New York*, 143 U. S. 517.

The law-maker necessarily deals with conditions as he finds them. If he observes, and wishes to abate, some fraudulent practice or abuse of power prevailing only in some one line of business, the fact that, in legislating to correct it, he does not also include in his remedy all other phases of human affairs, can furnish no reason for stigmatizing his remedy as no law at all. If an Act reaching only mining and manufacturing concerns is, on that account, not "due process of law," what must be held of statutes establishing special rules of liability, or business regulations, applicable to railroads only, to warehousemen, pawnbrokers, auctioneers, millers, and the many other classes of persons whose affairs form topics of treatment in separate laws? Are all such statutes void, because each relates to persons engaged only in the particular class of business named in it? Probably they would not be so held. Some of them are acted on and enforced almost daily. Yet if they are valid, what, let me ask, is there so exceptional about the truck system that precludes legislation applicable to those lines of business in which it prevails? If laws regulating the contracts of bankers (Revised Statutes 1889, § 706), common carriers (Id. § 944), mechanics (Id. § 6705), and insurance companies (Id. § 5856), as distinct classes of persons, are constitutional, and involve no invasion of their rights to "liberty or property," how can the position be maintained that such legislation, touching contracts of miners and manufacturers, invades these rights? The opinion certainly furnishes no reason, founded on any language of the Constitution, for nullifying the latter, while approving the former, statutes. It admits that "the legislature may regulate the business of mining and manufacturing so as to secure the health and safety of the employees." In *Durant* v. *Mining Co.* (1889), 97 Mo. 62, the same learned judge gave full effect to a statute "providing for the health and safety of persons employed in coal mines." Session Acts, 1881, p. 165.

If a law applicable only to persons engaged in mining is constitutional when dealing with the topic of their health and safety, it is obvious that an Act designed to prevent fraud or oppression in the payment of wages

by mining and manufacturing enterprises is not objectionable on the ground of the selection or "classification" of those enterprises as subjects for separate legislation.

Touching this particular point, the Supreme Court of the United States has said: "Legislation is not open to the charge of depriving one of his rights without due process of law, if it be general in its operation upon the subjects to which it relates." *Dent* v. *West Virginia* (1889), 129 U. S. 124. The same court has held that statutes creating a different rule of liability, as applied to one class of persons, from that generally in force, do not infringe the right to "due process of law." *Railway Co.* v. *Humes* (1885), 115 U. S. 512; *Railway Co.* v. *Mackey* (1888), 127 U. S. 205. And the Supreme Court of this State has determined that "a statute which relates to persons or things as a class is a general law, while a statute which relates to particular person or things of a class is special." *State ex rel. Lionberger* v. *Tolle* (1880), 71 Mo. 650. If the Act is invalid, it cannot be because it treats of mining and manufacturing concerns only. *In re Oberg* (1891), 21 Or. 406; *Youngblood* v. *Trust & Sav. Co.* (Ala., 1892), 12 South. Rep. 579.

2. The gist of the opinion is to be found in the ruling that the constitutional guarantee of "due process" condemns "arbitrary, unequal, and partial legislation;" that the statute in question is of that nature, and is therefore annulled as unconstitutional and void. With due respect for the judgment of my colleagues, that view appears to me erroneous. The Act, in part, was passed in 1881. It was amended in 1885, and re-enacted by the revision of 1889. It has thus received the sanction of the 31st, 33d, and 35th General Assemblies of Missouri and of Governors Crittenden, Marmaduke, and Francis, successively. Its plain purpose is to put some restraint upon that sort of freedom which would permit the employer to contract for labor, payable in goods, and then place his own prices upon the goods delivered in payment.

The general objects of such a law, as well as the principle upon which it rests, have been fully stated by English judges, having before them a British law of similar character, commonly called the "Truck Act." 1 & 2 Wm. IV. (1831), c. 37. "In passing the statute referred to, the legislature seems to have considered the artificer as requiring special protection in his dealings with his employers, and to have thought it right, therefore, to make the contracts between these parties one of the exceptions to the general rule that persons should be allowed to make their own contracts, in their own way. The particular evil to be remedied (and which, notwithstanding former enactments, still prevailed) was the truck system, or payment by masters of their men's wages wholly or in part with goods, — a system manifestly to the disadvantage of the workman, who was practically forced to take the goods at his master's valuation. In order to obviate this, the statute reciting 'that it is necessary to prohibit the payment, in certain trades, of wages in goods, or otherwise than in the current coin of the realm,' by

section 1 enacts that any contract by which the whole or any part of the wages of the artificer is made payable in any other manner than in the current coin shall be null and void."—KEATING, J., in *Archer* v. *James* (1862), 2 Best & S. 73.

"The old truck enactments are very numerous, and date from about the year 1464 (4 Edw. IV.). They were applied first to one branch of manufacture, and then in succession to others, as experience and the progress of manufactures dictated, till they embraced the whole, or nearly the whole, of the manufactures of England. They established the obligation, and produced, or at least fortified, the custom, of uniformly paying the whole wages of artificers in the current coin of the realm. They were finally collected and consolidated into one Act by the statute now under consideration. 1 & 2 Wm. IV. c. 37. They were, in truth, part of a system of legislation regulating the relation of master and workman, this part of it being in favor of the workman, who, as an individual, was deemed weaker than his master, and therefore liable to oppression. . . . The Truck Act, when passed, was a practical deduction from a principle, still more general, pervading more or less all systems of law founded on experience; that is to say, that where two classes of persons are dealing together, and one class is, generally speaking, weaker than the other, and liable to oppression, either from natural or incidental causes, the law should, as far as possible, redress the inequality, by protecting the weak against the strong. On this principle rests the protection thrown around infants and persons of unsound or weak mind, the protection afforded even by the common law to the victims of fraud, and by the Court of Chancery at this day to heirs, expectants, and sellers of reversions against catching and unconscionable bargains, though entered into without fraud, and by persons of full age. No doubt all such legislation or judicial interposition is in many cases ineffectual. . . . The efficacy of such provisions must not be estimated by the abuses actually remedied, so much as by the abuses prevented by the knowledge that such is the law. So viewed, the Truck Act must have been deemed by the legislature which passed it a highly remedial statute, and is therefore now, as I admit, notwithstanding the penal clauses, to be construed liberally, so as to advance the supposed remedy, and suppress the supposed mischief."—BYLES, J., in *Archer* v. *James* (1862), 2 Best & S. 82. Some of the bargains referred to by that learned judge, as well as a great variety of other agreements, have been nullified by courts in this country, as well as in England, without the aid of statutes, on the ground that they were contrary to public policy (Greenhood on Public Policy), while judges possessing equity jurisdiction have for ages exercised, unquestioned, the power to declare agreements void between attorney and client, or between other persons occupying confidential relationships, where advantage was taken of the confidence to secure a bargain which the court considered unduly favorable to the dominant party thereto. In *The Juliana* (1822), 2 Dod. 504, Lord Stowell refused to enforce a

covenant between a mariner and his employer to the effect that the former should not be entitled to any part of his wages unless the ship should return to the last port of discharge. The decision is placed on the ground that, in view of the relative situation of the parties and the nature of the agreement, its effect was oppressive, and not enforceable in a court governed by the "rules of natural justice." So that at common law, in equity and in admiralty, the judiciary exercise the right to annul certain agreements because unfair and unconscionable; the principle of such rulings being that, in some circumstances, real contractual equality, or that entire freedom of action essential to the legal idea of a contract, is wanting.

It seems unreasonable to hold that the courts alone may determine what the public policy of a State shall be, respecting the validity of agreements between parties situated so that one may have an undue advantage over the other. Why has not the legislature power, by general law, operating on future dealings, to declare a similar public policy? The judgments of the courts above mentioned have never been considered an arbitrary infringement of the liberty of contract; nor should a statute, aimed at a system affording the opportunity for oppression described by the English judges quoted, be so considered.

Liberty, "on its positive side, denotes the fulness of individual existence; on its negative side it denotes the necessary restraint on all which is needed to promote the greatest possible amount of liberty for each." Amos, Science of Law, p. 90. Rational freedom is not a license to oppress. "As soon as any part of a person's conduct affects prejudicially the interests of others, society has jurisdiction over it." Mill, Liberty, c. 4. In our country the people have furnished a philosophic, as well as noble, manifestation of the true spirit of liberty, in those guarantees of individual and personal rights of the minority, by which the majority have imposed certain constitutional bounds to their own public action. They stand as barriers to encroachments upon the liberties so protected, but none of them purports to confer or secure absolute freedom of contract. Neither the State nor Federal Constitution so declares. Laws impairing the obligation of contracts are forbidden; but the interdiction stops at that. In *Railway Co.* v. *Gebhard* (1883), 109 U. S. 527, the United States Supreme Court held that but for the protection of the fundamental law the obligation of contracts was subject to legislative control. and was not secured by any general principles of jurisprudence outside the constitutional guarantee. The right to regulate contracts so as to mitigate the oppression of the truck system, without impairing the obligation of any existing agreement, is a part of the police power, "which is but another name for that authority which resides in every sovereignty to pass all laws for the internal regulation and government of the State, necessary for the public welfare." *People* v. *Budd* (1889), 117 N. Y. 14; the *License Cases* (1847), 5 How. 583.

By the Constitution of Missouri it is declared that "the exercise of

the police power of the State shall never be abridged, or so construed as to permit corporations to conduct their business in such manner as to infringe the equal rights of individuals, or the general well-being of the State." Article 12, § 5, Const. 1875.

The police power in recent years has been applied in many notable instances, where it was contended that the liberty of making contracts was not subject to limitation by the legislative power; but the courts of last resort have ruled against that contention in the *Granger Cases* (*Munn* v. *Illinois* [1876], 94 U. S. 113); in the *Bread Cases* (*Mayor* v. *Yuille* [1841], 3 Ala. 137; *People* v. *Wagner* [1891], 86 Mich. 594); and in the *Elevator Cases* (*People* v. *Budd* [1889], 117 N. Y. 14; *Budd* v. *New York* [1892], 143 U. S. 517; *State* v. *Brass* [1892], 2 N. D. 482. In *Water Works* v. *Schottler* (1884), 110 U. S. 347, 4 Sup. Ct. Rep. 48, it was said that government had power to regulate the prices at which water should be sold by one enjoying a virtual monopoly of the sale.

These decisions show that the right of self-preservation, which exists in the Commonwealth no less than in the individual, may, in some circumstances, justify limitations upon freedom of contract; and that when, for any reason (for instance, the existence of a monopoly), real liberty of action is wanting on the side of one of the parties, in dealings forming part of the activities of civilized society, a reasonable check may justly be placed by law upon the power of the other to oppress his fellow-citizen. Such checks upon liberty of contract have been sustained by the highest courts. Others involving the application of the same police power (though in less exigent circumstances) have been long in force in Missouri in many statutes, among which are especially noteworthy the laws fixing a maximum rate of interest for the use of money (Revised Statutes 1889, § 5972), giving mechanics a lien in certain circumstances (*Henry & Coatsworth Co.* v. *Evans* [1889], 97 Mo. 47), governing the liability of common carriers (Revised Statutes 1889, § 944), forbidding contracts to limit the time for bringing any action (Id. § 2394), putting into insurance contracts statutory terms, and nullifying "any stipulation in the policy to the contrary" (Id. § 5856, enforced by the United States Supreme Court in *Society* v. *Clements* [1890], 140 U. S. 226), and the laws establishing standards of weights and measures (Revised Statutes 1889, c. 170). The enactment before us comes very near to the class last named. Examining its terms (section 7058) closely, it will be observed that it merely impresses upon contracts for the payment of wages with goods, etc., certain statutory conditions, intended to give the employee an option to demand payment in cash or goods, as his interest may appear to require. As the employer fixes the price of the goods, he is not prejudiced by such a regulation. Its effect is to establish a just standard of value for every dollar due for wages. It does not differ in principle from governmental regulations in the form of laws by which a person who has contracted to receive a yard of cloth or a bushel of corn is protected against the

necessity of accepting such a short yard or light bushel as the seller may choose to impose upon him. Statutes designed to prevent that sort of overreaching have been universally regarded as proper exertions of the police power. *Charleston* v. *Rogers* (1823), 2 McCord, 495; *Stokes* v. *City of New York* (1835), 14 Wend. 87; *Green* v. *Moffett* (1856), 22 Mo. 529; *Yates* v. *Milwaukee* (1860), 12 Wis. 673; *Eaton* v. *Kegan* (1874), 114 Mass. 433.

In view of the onerous bearing of the truck system upon some of those whom it affects, in compelling them to accept payment for labor in articles whose value is determined by the party adversely interested in the bargain, this statute (which seeks to relieve against that hardship) should be held (no less than those already mentioned) "due process of law." Adam Smith, the great advocate of freedom of commerce, declared such legislation "perfectly just and equitable." Wealth of Nations, bk. 1, c. 10, approvingly quoted by Bramwell, J., in *Archer* v. *James* (1862), 2 Best & S. 89.

Whether or not that view is sound it is not our province to determine, for all question of the policy, wisdom, or expediency of the law belongs to other departments, not to the judiciary. The people, in the exercise of the prerogative of self-government, have thought proper to establish a rule of conduct on the subject which appeared to them conducive towards maintaining the equilibrium of right and duty between citizens whose common welfare was important to the State. No express command of the Constitution forbade such action, and in my judgment it should be sustained.

3. In his opinion the learned Chief Justice adopts a quotation to the effect that an Act of the Legislature may "transcend the due bounds of legislative power, even though no express constitutional provision could be pointed out with which it would come in conflict." That view of the extent of the revisory power of the Supreme Court over Acts of the General Assembly has not previously prevailed in Missouri. It is in conflict with several precedents. In *County Court* v. *Griswold* (1874), 58 Mo. 192, it was declared: "That the law is unjust, or impolitic, or oppressive will not authorize a court to declare it illegal, unless it violates some specific provision of the Constitution. . . . A law may be unjust in its operation, or even in the principles upon which it was founded, but that would not justify a court in expanding the prohibitions of the Constitution beyond their natural and original meaning, in order to remedy an evil in any particular case. These principles have now become axiomatic." To the same purport is *Hamilton* v. *County Court* (1851), 15 Mo. 3. Each of these decisions was given under a constitution containing language the same as that now in force concerning "due process." Afterwards, that language was repeated in the present Constitution; hence that construction of the language, according to a recognized rule of interpretation, should be taken to have been adopted with it when the new Constitution went into force, in 1875. *Gas Co.* v. *Higby* (1890), 134 Ill. 557; *People* v. *O'Brien*

(1892), 96 Cal. 171. The latter instrument, as though to give emphasis to that construction, provides that the legislative power is vested in the General Assembly, "subject to the limitations herein contained." Constitution 1875, Article 4, § 1. See, also, the later case of *Phillips* v. *Railway Co.* (1885), 86 Mo. 540. The spirit and intent of terms used in the Constitution are, no doubt, as much a part of it as its letter, and should be considered in its interpretation. But that is a rule essentially different from the proposition that a statute may be pronounced void because it appears to some court to be in conflict with the supposed general spirit or principles of free government, not expressed in any particular provision of the Constitution. To that proposition, or any approach towards declaring it, my dissent is earnestly entered.

The authority of the court is drawn from the organic law, which asserts the independence of the three departments of government (Const. 1875, art. 3), and the power of each is marked by the terms of that instrument.

It has heretofore been considered settled that all action of the legislative department comes within range of the presumption that public officers have rightly acted, until the contrary is made clearly to appear; consequently, that "a party who wishes us to pronounce a law unconstitutional takes upon himself the burden of proving beyond doubt that it is so." *State* v. *Addington* (1882), 77 Mo 110; *State* v. *Laughlin* (1881), 75 Mo. 147. But now a majority of the court sanctions the idea that some legislation is not to be considered as *prima facie* constitutional, but calls for a showing of "specific authority" to sustain it. Such a doctrine (reversing the presumption of the validity of statutes), coupled with the other proposition already discussed in this paragraph, subjecting every Act of the General Assembly to the hazard of being declared void, "though no express constitutional provision could be pointed out with which it would come in conflict," furnishes a very interesting formula to determine the constitutionality of legislation, but one quite different from that defined in former precedents in this State. It amounts, in substance, to a declaration that statutes which seem to the court unjust or unreasonable are not "due process of law," though not otherwise distinctly forbidden by the Constitution.

To catch the full force of this ruling, it will be well to recall that the guarantee of "due process" is now a part of the Fourteenth Amendment to the Federal Constitution, as well as of our own organic law; so that the test of the validity of Missouri legislation is to be whether or not it conforms to the standard of reasonableness indicated by the Chief Justice, as applied by the Federal courts, as well as by our own. It would greatly prolong this opinion to point out the far-reaching consequences of adopting such a standard, and its wide divergence from the principles of republican government through co-ordinate departments, as established by our written constitutions. It is enough now to assert a dissent to those views of the organic law, as well as to the judgment in this case to which they have led.

4. Some decisions elsewhere have been cited to sustain the conclusion of my colleagues. The Pennsylvania case should be read along with the later one, in which it was held that the legislature might, under the police power, interfere with freedom of contract to the extent of forbidding totally the sale of an article of food, even though pure and wholesome. *Powell* v. *Com.* (1886), 114 Pa. St. 265. Judge Gordon, who wrote the former decision, dissented from the latter; but it was affirmed (1888) by the United States Supreme Court. 127 U. S. 678. In a yet later unanimous opinion in that State, a statute was held valid, prohibiting citizens from assigning certain claims against others, for the purpose of suit in another State. *Sweeny* v. *Hunter* (1891), 145 Pa. St. 363. The West Virginia case cited by the Chief Justice has been much limited, if not overruled, by *State* v. *Coal Co.* (1892), 36 W. Va. 802; and the Massachusetts decision was by a divided court. The cases in Illinois are placed chiefly on the ground that it is unconstitutional to establish rules to govern mining and manufacturing concerns different from those which regulate other legitimate enterprises. To that contention the remarks in the first paragraph above are intended to apply. Moreover, the legislation considered in that State differs in important particulars from that here in view.

On the other side, *Hancock* v. *Yaden* (1890), 121 Ind. 366, supports the position taken in this opinion. In *State* v. *Manufacturing Co.* (R. I., 1892), 17 L. R. A. 856 [25 Atl. Rep. 246], a law requiring the payment of wages weekly was held valid; and the principles declared in the decisions sustaining statutes prohibiting the manufacture and sale of oleomargarine are wholly inconsistent with the judgment of the majority of the court in the case at bar. *State* v. *Addington* (1882), 12 Mo. App. 214, affirmed (1882) 77 Mo. 110; *Powell* v. *Pennsylvania* (1888), 127 U. S. 678; *Butler* v. *Chambers* (1886), 36 Minn. 69.

5. It has been suggested in the main opinion, as well as at the bar, that the statute in question is subject to criticism as being an exhibition of paternalism in government. To this it may properly be answered that that consideration affects only the policy of the statute, and not the constitutional power of the legislature to enact it. Students of juridical history are aware that governmental interferences with liberty of contract between man and man are less frequent now than in earlier epochs of the English law. Spencer, "Justice," ch. 15, sec. 70; Maine, Ancient Law, 3 Am. ed., ch. 9, p. 295. But the power to interfere when necessary to prevent oppression is an important prerogative of sovereignty, and resides in the people of this State, subject only to the limitations expressed in their constitutions. The cure for paternal legislation is not to be found in an assumption by the courts of any part of the power of self-government belonging to the people or their representatives. To borrow the words of Mr. Justice Harlan in the United States Supreme Court, referring to the oleomargarine law: "If all that can be said of this legislation is that it is unwise, or unnecessarily oppressive to those manufacturing or selling wholesome oleomar-

garine as an article of food, their appeal must be to the legislature, or to the ballot-box, not to the judiciary. The latter cannot interfere without usurping powers committed to another department of government." *Powell* v. *Pennsylvania* (1888), 127 U. S. 686.

When the present case was in the second division of the court, an able opinion was rendered by Judge Thomas (*State* v. *Loomis* [1892], 20 S. W. Rep. 832), affirming the judgment of Judge Ellison on the circuit. The result then announced appears to me correct.[1]

[1] Compare *Hewlett* v. *Allen*, [1892] 2 Q. B. 662, in which the English Truck Acts were applied. By a recent Act, St. 50 & 51 Vict. c. 46, s. 6, it was provided that "No employer shall directly or indirectly, by himself or his agent, impose as a condition, express or implied, in or for the employment of any workman any terms as to the place at which, or the manner in which, or the person with whom, any wages or portion of wages paid to the workman are or is to be expended, and no employer shall, by himself, or his agent, dismiss any workman from his employment for or on account of the place at which, or the manner in which, or the person with whom, any wages or portion of wages paid by the employer to such workman are or is expended or fail to be expended." — ED.

PART III.

CHAPTER VI.

THE RIGHT OF EMINENT DOMAIN.

If we examine the subject critically, we shall find that the most important consideration in the case of eminent domain is the necessity of accomplishing some public good which is otherwise impracticable; and we shall also find that the law does not so much regard the means as the need. The power is much nearer akin to that of the public police than to that of taxation; it goes but a step farther, and that step is in the same direction. . . . The butcher in the vicinity of whose premises a village has grown up finds himself compelled to remove his business elsewhere, because his right to make use of his lot as a place for the slaughter of cattle has become inconsistent with the superior right of the community to the enjoyment of pure air and the accompanying blessings and comforts. The owner of a lot within the fire limits of a city may be compelled to part with the property, because he is unable to erect a brick or stone structure upon it, and the local regulations will not permit one of wood. Eminent domain only recognizes and enforces the superior right of the community . . . in a similar way. — Cooley, J., for the court, in *People* v. *Salem*, 20 Mich. 452 (1870); and so Cooley, *Const. Lim.* 6th ed. 660, note (1890).

The phrase Eminent Domain appears to have originated with Grotius, and the nature of the power which it designates is accurately described by him. That power is a universal one, and is as old as political society. Writers on public law who succeeded Grotius found some fault with the name, as seeming to import State ownership of all private property; but they agreed as to the real scope of the power in question, and all recognized the name as an accepted one.

The statements of Grotius, and some passages from the leading writers among his successors down to the middle of the last century, sometimes cited in our reports, are given below. To these are added observations from Blackstone. These passages will bring out the conceptions upon this subject which the framers of our first constitutions entertained. It was said by Chief Justice Marshall, in 1827 (*Ogden* v. *Saunders*, 12 Wheat. 213, 353), in discussing the meaning of the phrase, "obligation of contracts," that, "When we advert to the course of reading generally pursued by American statesmen in early life, we must suppose that the framers of our Constitution were intimately acquainted with the writings of those wise and learned men whose treatises on the laws of nature and nations have guided public opinion on the subject of obligation and contract." This is peculiarly true and peculiarly applicable, as regards the topic now in hand.

The effect of our constitutional restraints in their usual form, that which we find in the earlier instruments (*e. g. supra*, p. 412, art. 5), is simply to add to the moral duty of compensation, described by Grotius, a legal sanction. They do not change the scope or nature of the power itself. That power has to do merely with depriving a person of his property for the benefit of the State. It will be observed that another matter was suggested by Bynkershoek (*infra*, pp. 949, 950 n.), an extension of the doctrine of Eminent Domain: *Quidni generaliter statuamus omne damnum quod privati ferunt pro necessitate vel utilitate communi, commune, et proinde ex arca publica refarciendum esse?* To this question he gives no decisive answer; but his own opinion seems to incline in favor of this doctrine, that every citizen should be reimbursed for any loss suffered for the public benefit. Undoubtedly no such doctrine was recognized by the writers on public law as an established one. As a broad and universal maxim, English usage knew nothing of it. Our early constitutions did not introduce it. They dealt with this great, well-known, universal power of all governments, to apply to the use of the State, in an exigency, any private property whatever; and gave a legal sanction, not elsewhere existing, to those moral limitations upon it which all the writers on public law had acknowledged.

Some of the later American constitutions, however, (*e. g.* Colorado, *supra*, p. 435, s. 15), beginning with Illinois in 1870, have accepted the moral obligation which Bynkershoek suggested, and have given a legal sanction to that also, requiring compensation where property is damaged by public authority and not merely where it is taken away. And in some cases, even the courts, without the aid of any such clause, moved by the inconsiderate action of legislatures, have sought to reach the same result by their interpretation of the words "property" and "taking." The legitimacy of this latter course of action may be doubted. As to the former, that of changing the constitutions, the propriety of this method cannot be questioned, if any community has come to think so considerable a tying-up of their legislature to be necessary or desirable. That compensation is often omitted when it should be given, is true enough; the remedy for this is another matter. See *infra*, pp. 954, 983 n.[1]

From GROTIUS, *De Jure Belli et Pacis*, lib. i. c. 1 (1625). III. In naming this treatise *De Jure Belli*, we mean to suggest first, what has just been said, Whether any war is just; and, second, In war, what is just? For *jus*, here, means merely what is just; and that rather in a negative than a positive sense, — that *jus* is what is not unjust. That is unjust which is contrary to the nature of a society of rational creatures. . . . IV. There is another meaning of *jus*, different from this, yet derived from it, which refers to a person ["as when we say my right," — Whewell's Translation]; in which sense right [*jus*] is a moral quality belonging to a person, whereby he may justly have or do anything. . . . A moral quality, when perfect, we call *facultas*; when not perfect, *aptitudo*. . . . V. *Facultas* is so called by the jurists, — by its own name. We, hereafter, shall call it *jus*, in the strict and proper sense of that word. Under this are included (1) *Potestas*, — whether over one's self, which is

[1] See also Thayer's *Orig. and Scope Am. Doct. Const. Law*, pp. 29, 30. — ED.

called liberty; or over others, as the father's or the master's power; (2) *Dominium*, whether full, or not full, as usufruct, or the right of a pledgee (*jus pignoris*); and (3) *Creditum*, the right which stands opposed to debt. VI. This *facultas*, again, is two-fold; namely, *vulgaris*, which exists for private use, and *eminens*, which is superior to the *jus vulgaris*, since it belongs to the community, for the common benefit, as against persons and things. Thus the *regia potestas* has under it the father's and the master's power of control; so, as against what belongs to individuals, the *dominium Regis*, for the common benefit, is greater than that of private owners; and [as regards *Creditum*] every one has a greater obligation to the State, for public ends, than to his private creditor.[1]

Ibid. lib. iii. c. 20. VII. 1. This also is a common question; what may be done for the sake of peace with the goods of individuals, by kings who have no other right over the property of subjects than the regal right. We have elsewhere said, that the property of subjects is under the eminent domain of the State; so that the State, or he who acts for it, may use, and even alienate and destroy such property; not only in case of extreme necessity, in which even private persons have a right over the property of others; but for ends of public utility, to which ends those who founded civil society must be supposed to have intended that private ends should give way. 2. But it is to be added, that when this is done, the State is bound to make good the loss to those who lose their property; and to this public purpose, among others, he who has suffered the loss must, if need be, contribute. Nor is the State relieved from this *onus*, if, for the present, it be unable to discharge it; but at any future time, when the means are there, the obligation which had been suspended revives.[2]

From PUFENDORF, *De Jure Naturæ et Gentium*, lib. i. c. 1, s. 19 (1672). *Potestas* (control), in respect of what is one's own, is called *dominium; potestas*, in respect of

[1] III. De jure belli cum inscribimus hanc tractationem, primum hoc ipsum intelligimus, quod dictum jam est, sitne bellum aliquod justum, et deinde quid in bello justum sit? Nam jus hic nihil aliud quam quod justum est significat, idque negante magis sensu quam aiente, ut jus sit quod injustum non est. Est autem injustum, quod naturæ societatis ratione utentium repugnat. . . . IV. Ab hac juris significatione diversa est altera, sed ab hac ipsa veniens, quæ ad personam refertur: quo sensu jus est, Qualitas moralis personæ competens ad aliquid juste habendum vel agendum. . . . Qualitas autem moralis perfecta, facultas nobis dicitur; minus perfecta, aptitudo. . . . V. Facultatem Jurisconsulti nomine sui appellant, nos posthac jus proprie aut stricte dictum appellabimus: sub quo continentur Potestas, tum in se, quæ libertas dicitur, tum in alios; ut patria, dominica: Dominium, plenum sive minus pleno, ut usufructus, jus pignoris: et Creditum, cui ex adverso respondet debitum. VI. Sed hæc facultas rursum duplex est: vulgaris scilicet, quæ usus particularis causa comparata est; et eminens, quæ superior est jure vulgari, utpote communitati competens in partes et res partium, boni communis causa. Sic regia potestas sub se habet et patriam et dominicam potestatem: sic in res singulorum majus est dominium Regis ad bonum commune, quam dominorum singularium: sic reipublicæ quisque ad usus publicos magis obligatur, quam creditori.

[2] VII. 1. Disputari et hoc solet, quid in res singulorum possint pacis causa statuere, qui reges sunt, nec in res subditorum aliud jus habent quam regium. Alibi diximus res subditorum sub eminenti dominio esse civitatis, ita ut civitas, aut qui civitatis vice fungitur, iis rebus uti, easque etiam perdere et alienare possit, non tantum ex summa necessitate, quæ privatis quoque jus aliquod in aliena concedit, sed ob publicam utilitatem, cui privatas cedere illi ipsi voluisse censendi sunt, qui in civilem coetum coierunt. 2. Sed addendum est, id cum fit, civitatem tenere his, qui suum amittunt, sarcire damnum de publico, in quod publicum nomen et ipse, qui damnum passus est si opus est, contribuet. Neque hoc onere levabitur civitas, si nunc forte ei præstatione par non sit, sed quandocumque copia suppetit, exseret sese quasi sopita obligatio.

The translation of this last passage from Grotius is mainly taken from Dr. Whewell's edition (Cambridge, University Press, 1853). His rendering of the former one is inaccurate, and another is substituted. For a third passage from Grotius, see *infra*, p. 982, note. — ED.

other persons is, properly speaking, *imperium*; *potestas*, in respect of the property of other persons, constitutes a servitude.[1]

Ibid. lib. viii. c. 5, s. 7. As regards eminent domain, some persons condemn, not so much the thing itself, as its name. For they say that the very nature of supreme rule (*imperium*) established for the public welfare, gives a sufficient title to the prince, when necessity presses, for using the property of his subjects; since all must be understood to be surrendered, without which the common good cannot be obtained; and, further, that it is a swelling phrase, which bad rulers may abuse to squander the resources of their subjects.[2] But it is idle to contend over words; and it is not unreasonable to designate by a specific name a portion of the supreme rule which manifests itself in a specific way about a specific matter. What the import is of this *dominium* may be gathered from these considerations. It is a matter of natural equity, when there is to be a contribution towards the preservation of anything possessed in common, by those who share in it, that individuals should contribute only a proportional share, and that no one should be oppressively loaded beyond others. The same thing holds in States. But since often the exigencies of a government are such that either urgent necessity does not allow the fixing of the proportions of what is to be collected from individuals, or else some specific possession of one citizen, or of a few, is required for the necessary uses of the State, the supreme government must be able to apply this thing to the public necessities: provided, nevertheless, that what exceeds the proportional share of its owners shall be refunded by the other citizens.[3]

From HEINECCIUS, *Elem. Jur. Nat. et Gent.* lib. ii. c. 8, s 168 (1730) Among the inherent rights of supreme power there is, furthermore, the right of imposing taxes and tribute upon its citizens; nay, even of applying to the use of the State their property, when necessity requires it, — a right which is usually called the right of eminent domain. [Note.] We confess, however, that this use of the word is not quite apt, for the conception of *dominium* and that of *imperium* are different things: it is the latter and not the former which belongs to rulers (*imperantibus*). For this reason what Grotius, *de jure belli et pacis*, i. 1, 6, first styled *dominium eminens*, Seneca, *de benef.* vii. 4, more accurately called *potestas*. To kings, he said, belongs the control of all things (*potestas omnium*), to individuals the ownership (*proprietas*) of them. . . . But, so long as the controversy is about the name and origin of the thing, and no one doubts about the actual right of rulers, when necessity requires, to apply to the use of

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[1] Potestas in res proprias, vocatur *dominium*. Potestas in personas alias, *imperium* proprie est; potestas in rem alienam, *servitus*.

[2] It behoves a democracy, like our own, to remember that this objection has a distinct application to them. A ruler who is ignorant or careless is no less a bad ruler, because he means well. The evil in question is a specific result; it does not matter what the motives of the ruler are. — ED.

[3] Dominii eminentis non tam rem, quam vocabulum aliqui damnant. Ipsam enim vim imperii propter salutem publicam instituti, sufficientem principi titulum præbere, urgente necessitate utendi bonis suorum subditorum; eo quod omnia simul concessa intelligantur, sine quibus obtineri bonum commune non potest. Ambitiosum quoque esse id vocabulum, quo mali principes abuti possint ad dissipandas subditorum facultates. Verum uti super vocabulis litigare supervacuum est; ita particulam summi imperii, quæ certo sese modo circa certam rem exserit, peculiari nomine insignire, non præter rationem est. Ejus autem dominii quæ vis sit, ex hisce intelligetur. Naturalis est æquitatis, ut si ad communem quampiam rem conservandam ab iis qui de eadem participant, conferendum quid sit, singuli ratam duntaxat partem conferant, nec unus supra cæteros graviter oneretur. Idem et in civitatibus obtinet. Sed cum sæpe ea sint reipublicæ tempora, ut vel urgens necessitas non admittat ratas partes a singulis colligi, vel certa quæpiam res unius aut paucorum civium ad necessarios usus reipublicæ requiratur, poterit summum imperium eam rem publicis necessitatibus adhibere; ita tamen, ut quod ratam partem dominorum excedit, a cæteris civibus sit ipsis refundendum.

the State the property of citizens, we see no fit reason whatever for wholly condemning the word, when once it has been accepted.[1]

From BYNKERSHOEK, *Quest. Jur. Pub.* lib. ii. c. 15 (1737). That power (*potestas*) wherein a prince excels (*eminet*) his subjects, is what the writers on public law call *dominium eminens* or *supereminens*, — following Grotius, who led in this. L. i. *De Jure B. & P.* c. 3, s. 6, n. 2, and l. ii. c. 14, s. 7 & 8. But I agree with Thomasius, *ad Huberum de jure civitatis* l. i. s. 3, c. 6, n. 38, in thinking it more accurately called *imperium eminens*, rather than *dominium eminens*, for whatever of this right princes use, proceeds from their supreme power. . . . That *potestas eminens* extends to the persons and property of the subjects; and if this were taken away all will readily allow that the State could not be preserved. By this power, if so it seem good to the prince, war is declared, peace made, treaties entered into, tribute and taxes imposed, obligations laid upon subjects and their property, even the whole of them, nay, even the possessions of single individuals seized upon. Of this power none of the wise ever doubted; the whole dispute is over fixing the limits of it. . . . But before you can accurately fix these, all the details (*species*) of supreme power (*imperii eminentis*) must be reckoned up, and we must carefully deliberate and pass upon each. . . . I have determined to treat merely of that part by which the prince, out of his supreme power (*imperio eminenti*), takes away from his subjects an acquired right, whether it consists in a thing itself (*in re*), whether movable or immovable, or in a claim (*in actione*). That the prince may do this, all agree; but it is not equally agreed on what occasion he may do it. Pufendorf, l. viii. *De Jure Nat. et Gent.* c. 5, s. 7, where he treats of this right of the prince, thought that there was no place for the right of eminent domain unless the necessity of the State should call for it, not meaning, however, that the last extreme of necessity should be demanded. Grotius was contented with utility (*utilitate*) only. L. ii. *De Jure B. & P.* c. 14, s. 7; for he said, that in order to take away an acquired right from subjects by virtue of eminent domain, (*ex vi supereminentis dominii*), there must be, first, a public use (*utilitas*), and then, if possible, compensation must be made, out of the common funds, to him who has lost what was his. And afterwards, s. 6, the right of subjects is subordinated to this right of eminent domain (*ei dominio*), so far as public uses demand. It is, indeed, true enough that both formerly and now, on all hands, princes have exercised this right for both reasons, as well necessity as utility: but convenience often shades off into necessity, so that you cannot easily tell this from that; and what one man will call utility another will call necessity. For my part I do not urge, nor do I know of any one who does, that the prince may not exercise this right for both reasons. . . . But when a fit reason requires it, whatever he takes away, let him take it with as little harm to his subjects as may be, and upon paying the price out of the common chest. Whoever purposes anything else is rather a robber than a prince. . . . He who requires, as I do, in order to the exercise of the supreme power (*imperium eminens*) public necessity or a public use (*utilitatem*), excludes all other causes, without exception. Since the subject, then, is bound to part with his property for both reasons, as I said, must he also lose it for purposes of public pleasure or æsthetic gratification, or even public decoration alone? I should not think so, nor did the Roman Senate think so in the case of Marcus Licinius Crassus, who objected to leading through his farm

[1] Inter immanentia majestatis jura est etiam jus tributa et vectigalia imperandi civibus; quin et eorum bona, exigente necessitate, reipublicæ usibus adplicandi, quod jus *dominium eminens* adpellare mos est. [Author's note. Fatemur tamen non satis commode hoc adhiberi vocabulum, quum diversi sint dominii et imperii conceptus; et non illud, sed hoc competat imperantibus. Unde quod Grotius, *de jure belli et pac.* i. 1, 6, primus vocavit *dominium eminens*, id Seneca, *de benef.* vii. 4, rectius denominavit *potestatem*. Ad reges, inquit, potestas omnium, ad singulos proprietas pertinet. . . . Sed dum lis est de vocabulo reique origine, et de ipso jure imperantium bona civium urgente necessitate reipublicæ usibus adplicandi, nemo dubitat, cur vocabulum semel receptum plane proscribendum putaremus, nullam omnino idoneam rationem vidimus.]

an aqueduct which the Prætors were building, and which was said to have no other occasion than public pleasure and decoration. . . . But for whatever reason the subject's property or claims (*res vel actiones*) are taken and destroyed, what Grotius adds, in the passage quoted, is fair and just, that the owner's compensation should be paid out of the public money. . . . This, indeed, in these cases. But why may we not lay it down generally, that every loss (*damnum*) which private persons bear for the common necessity or utility, is a common loss and therefore one to be refunded from the common chest [2] . . . It is fit as regards losses which arise from the calamity of war, that all subjects should bear them with calmness, and that no restitution should ever be made for them. But as to what Consultor says, that the value of lands is not to be paid which are taken for purposes of fortification, perhaps it is true when war is raging, and while laws are silenced by arms, and when sudden and temporary defences are made; but when they are constructed for permanent use, I cannot recognize this as true. The rules which I have brought forward in this chapter and the last are at war with this view, and the usages of nations as received here and elsewhere are at war with it.[1]

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[1] Illa potestas, qua princeps supra subditos eminet dominium eminens vel supereminens appellant scriptores juris publici, sequuti Grotium, qui ita præivit, l. i. *De Jure B. & P.* c. 3, s. 6, n. 2, & l. ii. c. 14, s. 7 & 8. Assentior tamen Thomasio, *Ad Huberum de Jure Civitatis*, l. i. sect. 3. c. 6, n. 38, existimanti, rectius, dici imperium eminens, quam dominium eminens: nam quicquid ejus juris exercent principes, proficiscitur a suprema eorum potestate. . . . Potestas illa eminens porrigitur ad personas & bona subditorum, & facile largiuntur omnes, ea sublata, civitatem salvam esse non posse. Ex ea potestate bellum indicitur, pax pangitur, fœdera ineuntur, tributa & vectigalia imperantur, subditi eorumque bona, etiam in solidum, obligantur, quin & occupantur res singulorum, si ita visum fuerit principi. De ea principis potestate nemo, qui sapit, dubitavit unquam, sed de finibus ejus regundis omnis disputatio est. . . Priusquam autem hos recte regas, recensendæ omnes species imperii eminentis, de singulis deliberandum & caute pronunciandum est. . . . De ea specie duntaxat agere constitui, qua princeps, ex imperio eminenti, subditis aufert jus quæsitum, sive id consistat in re mobili, sive immobile, sive in actione. Id principi licere inter omnes constat, sed non æque constat, ex qua causa liceat. Pufendorfius, l. viii. *De Jure Nat. & Gent.* c. 5, s. 7, ubi de eo jure principis agit, existimavit, dominio eminenti locum non esse, nisi reipublicæ Necessitas requisiverit, ita tamen, ut postremum necessitatis gradum non desideret. Grotius sola *utilitate* contentus est, l. ii. *De Jure B. & P.* c. 14, s. 7; nam, ut jus quæsitum subditis auferatur ex vi supereminentis dominii, primum, inquit, requiritur, utilitas publica, deinde, ut, si fieri potest, compensatio fiat ei, qui suum amisit, ex communi. Et mox, s. 6, subditorum jus ei dominio subest, quatenus publica utilitas desiderat. Sane verissimum est, ex utraque causa, tam necessitatis, quam utilitatis id jus & olim exercuisse principes, & nunc passim exercere. Sed & sæpe utilitas in necessitatem incidit, ut non facile hanc ab illa distinxeris; quodque alius utilitatem, alius necessitatem appellabit. Ipse non intercedo, nec scio quemquam intercedere, quominus princeps et utraque causa eo jure uti possit. . . . Sin autem urgeat ratio idonea, quicquid aufert, auferet quam minimo subditorum detrimento, & soluto, ex arca communi, pretio. Qui aliter in animum induxerit suum, prædo potius est, quam princeps. . . . Qui, ut imperium eminens exerceri possit, necessitatem vel utilitatem publicam desiderat, ut ipse desidero, reliquas causas, sine exceptione omnes, excludit. An igitur, ut subditus re sua carere tenetur ex utraque, quam dixi, causa, ita quoque tenebitur, ex causa voluptatis vel amoenitatis publicæ, vel etiam ex causa solius ornatus publici? non putaverim, neque etiam putavit Senatus Romanus in causa M Licinii Crassi, nolentis per fundum suum derivari aquæductum, quem moliebantur Prætores, quique non aliam, quam voluptatis & ornatus causam habere dicebatur. . . . Ex quacunque autem causa res vel actiones subditorum ad bonum publicum occupantur vel destruuntur æquum & justum est, quod addit Grotius d. loc. pretium dominis e publico esse refarciendum. . . . Atque hæc quidem in hisce causis. Sed quidni generaliter statuamus, omne damnum, quod privati ferunt pro necessitate vel utilitate communi, commune, & proinde ex arca publica refarciendum

From VATTEL, *Le Droit des Gens*, liv. i. c. 20, s. 244 (1758). In political society everything must give way to the common good; and if even the person of the citizens is subject to this rule, their property cannot be excepted. The State cannot live, or continue to administer public affairs in the most advantageous manner, if it have not the power, on occasion, to dispose of every kind of property under its control. It should be presumed that when the nation takes possession of a country, property in specific things is given up to individuals only upon this reservation. The right which belongs to society or to the sovereign to dispose, in case of necessity and for the public welfare, of every possession which the State contains, is called eminent domain. It is evident that in certain cases this right is necessary to him who governs, and therefore that it makes part of the empire or sovereign power, and should be placed among the *droits de majesté*. § 45. When the people, then, confer the empire upon any one, they award to him, at the same time, the eminent domain, unless they expressly reserve it. Every prince who is really sovereign is clothed with this right, when the nation has not excepted it, in whatever way his authority may be otherwise limited. If the sovereign dispose of public property, in virtue of his eminent domain, the alienation is valid as having been made with sufficient authority. And so when he disposes, in an exigency, of the property of a community or an individual, the alienation will be valid, for the same reason. But justice demands that this community or this individual be made whole out of the public money; and if the State have not enough to do this, all the citizens are bound to contribute; for the expenses of the State should be borne equally or in a just proportion. In this respect it is like throwing merchandise overboard to save the ship.[1]

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esse? . . . Damnum, quod oritur ex calamitate belli, opportet, et omnes subditi æquo animo ferant, nec ejus ulla unquam fit restitutio. Sed quod ait Consultor, non refundi pretium agrorum, qui muniendi ergo capiuntur, fortasse, verum est fervente bello, quamdiu legibus silentium imponunt arma, aut cum munitiones fiunt tumultariæ, & ad tempus, sed cum exstruuntur in perpetuum, id verum esse nondum potui animadvertere. Repugnant leges, quas hoc & præcedenti capite attuli, repugnant mores, hic & alibi gentium recepti.

[1] Tout doit tendre au bien commun dans la société politique, et si la personne même des citoyens est soumise à cette règle, leurs biens n'en peuvent être exceptés. L'Etat ne pourroit subsister, ou administrer toujours les affaires publiques de la manière la plus avantageuse, s'il n'avoit pas le pouvoir de disposer dans l'occasion de toutes sortes de biens soumis à son empire. On doit même présumer, que quand la nation s'empare d'un pays, la propriété de certaines choses n'est abandonnée aux particuliers qu'avec cette réservé. Le droit qui appartient à la société, ou au souverain, de disposer, en cas de nécessité & pour le salut public, de tout bien renfermé dans l'Etat, s'appelle domaine éminent. Il est évident que ce droit est nécessaire, en certains cas, à celui qui gouverne, & par conséquent qu'il fait partie de l'empire, ou du souverain pouvoir, & doit être mis au nombre des droits de majesté. (§ 45.) Lors donc que le peuple défère l'empire à quelqu'un, il lui attribue en même-tems le domaine éminent, à moins qu'il ne le réserve expressément. Tout prince véritablement souverain est revêtu de ce droit, quand la nation ne l'a point excepté, de quelque manière que son autorité soit limitée à d'autres égards. Si le souverain dispose des biens publics, en vertu de son domaine éminent, l'aliénation est valide, comme ayant été faite avec un pouvoir suffisant. Lorsqu'il dispose de même, dans un besoin, des biens d'une communauté, ou d'un particulier, l'aliénation sera valide, par la même raison. Mais la justice demande que cette communauté ou ce particulier soit dédommagé des deniers publics: & si le trésor n'est pas en état de le faire, tous les citoyens sont obligés d'y contribuer; car les charges de l'Etat doivent être supportées avec égalité, ou dans une juste proportion. Il en est de cela comme du jet des marchandises, qui se fait pour sauver le vaisseau.

In copying the foregoing passage from an Amsterdam edition of Vattel, of 1775, I observe an interesting confirmation of Chief Justice Marshall's remark on page 945, *supra*. It is entered as a gift to the library of Harvard College from Benjamin Franklin — ED.

From 1 *Blackstone's Commentaries* (*Chitty's ed.*, 1829) 139 [1st ed. (1765) 105]. So great moreover is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the general good of the whole community. If a new road, for instance, were to be made through the grounds of a private person, it might perhaps be extensively beneficial to the public; but the law permits no man, or set of men, to do this without consent of the owner of the land. In vain may it be urged, that the good of the individual ought to yield to that of the community; for it would be dangerous to allow any private man, or even any public tribunal, to be the judge of this common good, and to decide whether it be expedient or no. Besides, the public good is in nothing more essentially interested, than in the protection of every individual's private rights, as modelled by the municipal law. In this and similar cases the legislature alone can, and indeed frequently does, interpose, and compel the individual to acquiesce. But how does it interpose and compel? Not by absolutely stripping the subject of his property in an arbitrary manner; but by giving him a full indemnification and equivalent for the injury thereby sustained. The public is now considered as an individual, treating with an individual for an exchange. All that the legislature does, is to oblige the owner to alienate his possessions for a reasonable price; and even this is an exertion of power, which the legislature indulges with caution, and which nothing but the legislature can perform. [Note by Joseph Chitty.] (18) These observations must be taken with considerable qualification, for, as observed by Buller, J., there are many cases in which individuals sustain an injury, for which the law gives no action · for instance, pulling down houses or raising bulwarks for the preservation and defence of the kingdom against the king's enemies. The civil law writers indeed say that the individuals who suffer have a right to resort to the public for a satisfaction, but no one ever thought that the common law gave an action against the individual who pulled down the house, &c. And where the acts of commissioners appointed by a paving Act occasion a damage to an individual, without any excess of jurisdiction on their part, the commissioners, or paviors acting under them, are not liable to an action. 4 Term Rep. 794, 6, 7; 3 Wils. 461; 6 Taunton, 29. In general, however, a power of this nature must be created by statute, and which usually provides compensation to the individual. Thus by the Highway Act (13 Geo. III. c. 78; and 3 Geo. IV. c. 126, sec. 84, 85), two justices may either widen or divert any highway through or over any person's soil, even without his consent, so that the new way shall not be more than thirty feet wide, and that they pull down no building, nor take away the ground of any garden, park, or yard. But the surveyor shall offer the owner of the soil, over which the new way is carried, a reasonable compensation, which if he refuses to accept, the justices shall certify their proceedings to some general quarter sessions; and the surveyor shall give fourteen days' notice to the owner of the soil of an intention to apply to the sessions; and the justices of the sessions shall impanel a jury, who shall assess the damages which the owner of the soil has sustained, provided that they do not amount to more than forty years' purchase. And the owner of the soil shall still be entitled to all the mines within the soil, which can be got without breaking the surface of the highway. Many other Acts for local improvements, recently passed, contain similar compensation clauses.[1]

"The power to take private property for public use," said FIELD, J., for the court, in *U. S.* v. *Jones*, 109 U. S. 513, 518 (1883), "generally termed the right of eminent

[1] It is, perhaps, Blackstone's figurative phrase, that "the public is now considered as an individual treating with an individual for an exchange," that has led some judges and writers to define the right of eminent domain as a right of compulsory purchase. But such a conception must be taken with reserve. This power, apart from any clause of restraint in our written constitutions, must be regarded as a universal power possessed by all governments, — the right to take and to apply to the public use that which the public welfare requires. The obligation to give just compensation, unquestionable and universally admitted, is a moral obligation, not enforceable by courts, it would seem, as against clear and indubitable action of the legislature, unless the Constitution add to this moral obligation a legal sanction. — ED.

domain, belongs to every independent government. It is an incident of sovereignty, and, as said in *Boom* v. *Patterson*, 98 U. S. 106, requires no constitutional recognition. The provision found in the Fifth Amendment to the Federal Constitution, and in the constitutions of the several States, for just compensation for the property taken, is merely a limitation upon the use of the power. It is no part of the power itself, but a condition upon which the power may be exercised. It is undoubtedly true that the power of appropriating private property to public uses vested in the general government — its right of eminent domain, which Vattel defines to be the right of disposing, in case of necessity and for the public safety, of all the wealth of the country — cannot be transferred to a State any more than its other sovereign attributes; and that, when the use to which the property taken is applied is public, the propriety or expediency of the appropriation cannot be called in question by any other authority. But there is no reason why the compensation to be made may not be ascertained by any appropriate tribunal, capable of estimating the value of the property. There is nothing in the nature of the matter to be determined which calls for the establishment of any special tribunal by the appropriating power.

"The proceeding for the ascertainment of the value of the property, and consequent compensation to be made, is merely an inquisition to establish a particular fact as a preliminary to the actual taking; and it may be prosecuted before commissioners or special boards or the courts, with or without the intervention of a jury, as the legislative power may designate. All that is required is that it shall be conducted in some fair and just manner, with opportunity to the owners of the property to present evidence as to its value, and to be heard thereon. Whether the tribunal shall be created directly by an Act of Congress, or one already established by the States shall be adopted for the occasion, is a mere matter of legislative discretion."

The Right of Eminent Domain, 19 Monthly Law Reporter (Boston), 241, 247. The right of eminent domain is that attribute of sovereignty by which the State may take, appropriate, or divest private property whenever the public exigencies demand it; or, according to the usual definition, it is the right of taking private property for public purposes. And to this right the obligation always attaches of making just compensation for the property taken. . . .

By our definition, it is the right of taking, appropriating, or divesting property; and so is distinguished, on the one hand, from a right of property, and on the other, from a mere right of regulating the use of property. It can only be exercised when some specific subject-matter of property is required, for which there can be no sufficient substitute; and herein it is distinguished from the right of taxation. . . . Again, the right is distinguished from that of taxation, in that the property taken under it is taken without any reference to collecting the owner's share of the common public expenses; and also in this, that it operates upon individual parties, while the right of taxation deals with the whole community, or with a special class of persons in the community, on some rule of apportionment; and finally, when the right of eminent domain is exercised, compensation must be made to the private party with whom the State is dealing, wherein this right is distinguished from the right of taxation and from all other rights of sovereignty. . . . What is taken under this right, is regarded as so much above or aside from the owner's share of the common expenses; and since it is manifestly unjust that he should be compelled to contribute more than the other members of the community, he must be reimbursed from that common fund to which all contribute, himself as well as the rest. . . .

But while this obligation is thus well established and clear, let it be particularly noticed upon what ground it stands, *viz.*, upon the natural rights of the individual. On the other hand, the right of the State to take springs from a different source, *viz.*, a necessity of government. These two, therefore, have not the same origin; they do not come, for instance, from any implied contract between the State and the individual, that the former shall have the property, if it will make compensation: the right is no mere right of pre-emption, and it has no *condition* of compensation annexed to it, either precedent or subsequent. But there is a right to take, and attached to it as an

incident, an obligation to make compensation; this latter, morally speaking, follows the other, indeed, like a shadow, but it is yet distinct from it, and flows from another source.

See, then, the consequences. If the State appropriate private property to satisfy a public exigency, and fail to make or provide for compensation, has it therefore exercised its power wrongfully? It would seem not for if a public exigency exist, requiring the property, and it be appropriated accordingly, that, as we have seen, is legitimate; so far all is right, and the citizen cannot complain; and if the sovereign do not make recompense, then he fails indeed in his duty to the individual; but for all that, he does no more than his duty to the community in taking the property, and therefore the individual cannot demand his property back, although the State should never pay him. He has an eternal claim indeed against the State, which can never be blotted out except only by satisfaction; but this claim is for compensation, and not for his former property.

Therefore, in the absence of constitutional provisions affecting the question, it would follow that a loss of property from an exercise of the right of eminent domain, which is fair in all respects other than in making or providing for compensation, must be regarded by the courts as *damnum absque injuria*.[1] Every court must hold the assumption of private property to satisfy a public exigency to be just and proper, and an exercise of clear legislative power. And herein such a case would differ from one where the legislature should seek to transfer property from one individual to another, with no pretence of public necessity; such an act would not be the exercise of due legislative power, but would involve an arbitrary assumption of power, and might be reached, as such, by the courts. . . . If there be a public exigency, or if there be room to say that any public advantage is to be gained by the appropriation of private property, or its transfer from one individual to another, then it would seem that the discretion of the legislature could not be controlled (in the absence of constitutional provision) by any power short of the supreme power of the sovereign. For the judiciary may not substitute their discretion for that of the legislature, nor exercise it at all in a matter intrusted to the sole discretion of another department.

Ibid. 241, 323. If the ground taken at the outset of our investigation be the true one, *viz.*: that the right of eminent domain is an inherent right of sovereignty, and therefore the same in all States, and one to be interpreted upon principles applicable the whole world over, — then, of course, in all our American States, this right, so far as it remains unaffected by constitutional provisions, stands upon the general principles which govern the sovereignty in all other countries, and which it has been sought to set forth and maintain in the course of this essay.

All the American constitutions, however, may be said to have provisions that affect this right in some degree; since all provide that the sovereign power of legislation, which includes this right, shall be vested in the legislature; and so in a body constantly changing, and bound by a perpetual obligation to transmit the sovereignty to its successors intact. Thus all the American constitutions, in declaring that the right of eminent domain shall be vested in the legislature, provide, by necessary implication, that the legislature shall not impair or part with it.

A number of the State constitutions have no other provision than this, that can properly be held to apply to our subject.

A majority of them, however, and the Federal Constitution besides, contain a clause (substantially the same in all) that "private property shall not be taken for public purposes without just compensation." . . .

Some States have other provisions explaining or limiting the right of eminent domain, as it exists in the hands of their legislatures, which we will now very briefly indicate. Most of these, it will be noticed, serve only to enunciate, and put under the protection of the judiciary, some one or more of those principles already laid down and enforced in our pages.

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[1] But compare Randolph, *Eminent Domain*, s 227. — Ed.

The Constitution of Vermont provides that the owner of property taken, "ought to receive an equivalent in money." That of Ohio has a similar provision, requiring either money or a deposit of money.

That of New York requires that when property is taken, the damages must be assessed by a jury, or by not less than three commissioners appointed by a court of record. It also authorizes the taking of lands for private roads, — the necessity of the road to be ascertained and the damages to be assessed, by a jury, and that amount, together with the expenses of the proceeding, to be paid by the person to be benefited.

The Constitution of New Jersey has the usual provision, to which it is added that "land may be taken as heretofore for public highways, until the legislature shall direct compensation to be made."

The Constitution of Pennsylvania forbids the legislature to authorize any corporate body or individual to take private property for public use without requiring compensation to be made, or adequate security to be given, before the taking. . . .

The constitutions of Mississippi and Kentucky require compensation to be made before the property is taken. That of Ohio has a similar provision, excepting only cases of necessity, demanding immediate seizure.

The Constitution of Ohio also provides that benefits shall not be deducted in ascertaining compensation.

Those of Georgia and Texas forbid the legislature to pass laws emancipating slaves, without the consent of each of the owners previously.

The constitutions of Alabama and Kentucky forbid the legislature to emancipate slaves without their owners' consent, or paying to the owners, previously to such emancipation, a full equivalent in money for the slaves so emancipated.

We have now referred to all the provisions relating to our subject, that occur in the United States constitutions. The clauses in them relating to trial by jury seem to be generally, if not universally, held inapplicable to proceedings under the right of eminent domain. And the same is true of that provision engrafted into a number of the State constitutions from Magna Charta, that "no freeman shall be deprived of his property, but by the judgment of his peers or by the law of the land."[1]

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[1] The foregoing statement was made in 1856. Now, only three constitutions, New Hampshire, North Carolina, and Virginia are without a clause expressly requiring compensation. Sixteen, beginning with Illinois, in 1870, require compensation even when property has been "damaged;" and three others require it where municipal and other corporations exercise the right in question.

For the existing provisions in all our constitutions, see RANDOLPH, *Em. Dom.*, 401-416. — ED.

KOHL ET AL. v. UNITED STATES.

SUPREME COURT OF THE UNITED STATES. 1875.

[91 *U. S.* 367.]

ERROR to the Circuit Court of the United States for the Southern District of Ohio.

This was a proceeding instituted by the United States to appropriate a parcel of land in the city of Cincinnati as a site for a post-office and other public uses.

The plaintiffs in error owned a perpetual leasehold estate in a portion of the property sought to be appropriated. They moved to dismiss the proceeding on the ground of want of jurisdiction; which motion was overruled. They then demanded a separate trial of the value of their estate in the property; which demand the court also overruled. To these rulings of the court the plaintiffs in error here excepted. Judgment was rendered in favor of the United States. . . . [Here follows a citation of the statutes relating to the matter, which is placed in a note.[1]]

[1] There are three Acts of Congress which have reference to the acquisition of a site for a post-office in Cincinnati. The first, approved March 2, 1872, 17 Stat. 39, is as follows: —

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Treasury be, and he is hereby, authorized and directed to purchase a central and suitable site in the city of Cincinnati, Ohio, for the erection of a building for the accommodation of the United States courts, custom-house, United States depository, post-office, internal-revenue and pension offices, at a cost not exceeding three hundred thousand dollars; provided that no money which may hereafter be appropriated for this purpose shall be used or expended in the purchase of said site until a valid title thereto shall be vested in the United States, and until the State of Ohio shall cede its jurisdiction over the same, and shall duly release and relinquish to the United States the right to tax or in any way assess said site and the property of the United States that may be thereon during the time that the United States shall be or remain the owner thereof."

In the Appropriation Act of June 10, 1872, 17 Stat. 352, a further provision was made as follows: —

"To commence the erection of a building at Cincinnati, Ohio, for the accommodation of the United States courts, custom-house, United States depository, post-office, internal-revenue and pension offices, and for the purchase, at private sale or by condemnation, of ground for a site therefor, — the entire cost of completion of which building is hereby limited to two million two hundred and fifty thousand dollars (inclusive of the cost of the site of the same), — seven hundred thousand dollars; and the Act of March 12, 1872, authorizing the purchase of a site therefor, is hereby so amended as to limit the cost of the site to a sum not exceeding five hundred thousand dollars."

And in the subsequent Appropriation Act of March 3, 1873, 17 Stat. 523, a further provision was inserted as follows: —

"For purchase of site for the building for custom-house and post-office at Cincinnati, Ohio, seven hundred and fifty thousand dollars."

Mr. E. W. Kittredge, for plaintiffs in error.

Mr. Assistant Attorney-General Edwin B. Smith, contra.

MR. JUSTICE STRONG delivered the opinion of the court.

It has not been seriously contended during the argument that the United States government is without power to appropriate lands or other property within the States for its own uses, and to enable it to perform its proper functions. Such an authority is essential to its independent existence and perpetuity. These cannot be preserved if the obstinacy of a private person, or if any other authority, can prevent the acquisition of the means or instruments by which alone governmental functions can be performed. The powers vested by the Constitution in the general government demand for their exercise the acquisition of lands in all the States. These are needed for forts, armories, and arsenals, for navy-yards and light-houses, for custom-houses, post-offices, and court-houses, and for other public uses. If the right to acquire property for such uses may be made a barren right by the unwillingness of property-holders to sell, or by the action of a State prohibiting a sale to the Federal government, the constitutional grants of power may be rendered nugatory, and the government is dependent for its practical existence upon the will of a State, or even upon that of a private citizen. This cannot be. No one doubts the existence in the State governments of the right of eminent domain, — a right distinct from and paramount to the right of ultimate ownership. It grows out of the necessities of their being, not out of the tenure by which lands are held. It may be exercised, though the lands are not held by grant from the government, either mediately or immediately, and independent of the consideration whether they would escheat to the government in case of a failure of heirs. The right is the offspring of political necessity; and it is inseparable from sovereignty, unless denied to it by its fundamental law. Vattel, c. 20, 34; Bynk., lib. 2, c. 15; Kent's Com. 338–340; Cooley on Const. Lim. 584 *et seq.* But it is no more necessary for the exercise of the powers of a State government than it is for the exercise of the conceded powers of the Federal government. That government is as sovereign within its sphere as the States are within theirs. True, its sphere is limited. Certain subjects only are committed to it; but its power over those subjects is as full and complete as is the power of the States over the subjects to which their sovereignty extends. The power is not changed by its transfer to another holder.

But, if the right of eminent domain exists in the Federal government, it is a right which may be exercised within the States, so far as is necessary to the enjoyment of the powers conferred upon it by the Constitution. In *Ableman* v. *Booth*, 21 How. 523, Chief Justice Taney described in plain language the complex nature of our government, and the existence of two distinct and separate sovereignties within the same territorial space, each of them restricted in its powers, and each, within its sphere of action prescribed by the Constitution of the United States, independent of the other. Neither is under the necessity of applying to

the other for permission to exercise its lawful powers. Within its own sphere, it may employ all the agencies for exerting them which are appropriate or necessary, and which are not forbidden by the law of its being. When the power to establish post-offices and to create courts within the States was conferred upon the Federal government, included in it was authority to obtain sites for such offices and for court-houses, and to obtain them by such means as were known and appropriate. The right of eminent domain was one of those means well known when the Constitution was adopted, and employed to obtain lands for public uses. Its existence, therefore, in the grantee of that power, ought not to be questioned. The Constitution itself contains an implied recognition of it beyond what may justly be implied from the express grants. The fifth amendment contains a provision that private property shall not be taken for public use without just compensation. What is that but an implied assertion, that, on making just compensation, it may be taken? . . . [Here follows a passage from Cooley, Const. Limitations.]

We refer also to *Twombley* v. *Humphrey*, 23 Mich. 471; 10 Pet. 723; *Dickey* v. *Turnpike Co.*, 7 Dana, 113; *McCullough* v. *Maryland*, 4 Wheat. 429.

It is true, this power of the Federal government has not heretofore been exercised adversely; but the non-user of a power does not disprove its existence. In some instances, the States, by virtue of their own right of eminent domain, have condemned lands for the use of the general government, and such condemnations have been sustained by their courts, without, however, denying the right of the United States to act independently of the States. Such was the ruling in *Gilmer* v. *Lime Point*, 18 Cal. 229, where lands were condemned by a proceeding in a State court and under a State law for a United States fortification. A similar decision was made in *Burt* v. *The Merchants' Ins. Co.*, 106 Mass. 356, where land was taken under a State law as a site for a post-office and sub-treasury building. Neither of these cases denies the right of the Federal government to have lands in the States condemned for its uses under its own power and by its own action. The question was, whether the State could take lands for any other public use than that of the State. In *Twombley* v. *Humphrey*, 23 Mich. 471, a different doctrine was asserted, founded, we think, upon better reason. The proper view of the right of eminent domain seems to be, that it is a right belonging to a sovereignty to take private property for its own public uses, and not for those of another. Beyond that, there exists no necessity; which alone is the foundation of the right. If the United States have the power, it must be complete in itself. It can neither be enlarged nor diminished by a State. Nor can any State prescribe the manner in which it must be exercised. The consent of a State can never be a condition precedent to its enjoyment. Such consent is needed only, if at all, for the transfer of jurisdiction and of the right of exclusive legislation after the land shall have been acquired.

It may, therefore, fairly be concluded that the proceeding in the case

we have in hand was a proceeding by the United States government in its own right, and by virtue of its own eminent domain. The Act of Congress of March 2, 1872, 17 Stat. 39, gave authority to the Secretary of the Treasury to purchase a central and suitable site in the city of Cincinnati, Ohio, for the erection of a building for the accommodation of the United States courts, custom-house, United States depository, post-office, internal-revenue and pension offices, at a cost not exceeding $300,000; and a proviso to the Act declared that no money should be expended in the purchase until the State of Ohio should cede its jurisdiction over the site, and relinquish to the United States the right to tax the property. The authority here given was to purchase. If that were all, it might be doubted whether the right of eminent domain was intended to be invoked. It is true, the words "to purchase" might be construed as including the power to acquire by condemnation; for, technically, purchase includes all modes of acquisition other than that of descent. But generally, in statutes as in common use, the word is employed in a sense not technical, only as meaning acquisition by contract between the parties, without governmental interference. That Congress intended more than this is evident, however, in view of the subsequent and amendatory Act passed June 10, 1872, which made an appropriation "for the purchase at private sale or by condemnation of the ground for a site" for the building. These provisions, connected as they are, manifest a clear intention to confer upon the Secretary of the Treasury power to acquire the grounds needed by the exercise of the national right of eminent domain, or by private purchase, at his discretion. Why speak of condemnation at all, if Congress had not in view an exercise of the right of eminent domain, and did not intend to confer upon the secretary the right to invoke it?

But it is contended upon behalf of the plaintiffs in error that the Circuit Court had no jurisdiction of the proceeding. There is nothing in the Acts of 1872, it is true, that directs the process by which the contemplated condemnation should be effected, or which expressly authorizes a proceeding in the Circuit Court to secure it. Doubtless Congress might have provided a mode of taking the land, and determining the compensation to be made, which would have been exclusive of all other modes. They might have prescribed in what tribunal or by what agents the taking and the ascertainment of the just compensation should be accomplished. The mode might have been by a commission, or it might have been referred expressly to the Circuit Court; but this, we think, was not necessary. The investment of the Secretary of the Treasury with power to obtain the land by condemnation, without prescribing the mode of exercising the power, gave him also the power to obtain it by any means that were competent to adjudge a condemnation. The Judiciary Act of 1789 conferred upon the circuit courts of the United States jurisdiction of all suits at common law or in equity, when the United States, or any officer thereof, suing under the authority of any Act of Congress, are plaintiffs. If, then, a proceeding to take land

for public uses by condemnation may be a suit at common law, jurisdiction of it is vested in the Circuit Court. That it is a "suit" admits of no question. In *Weston* v. *Charleston*, 2 Pet. 464, Chief Justice Marshall, speaking for this court, said, "The term [suit] is certainly a very comprehensive one, and is understood to apply to any proceeding in a court of justice by which an individual pursues that remedy which the law affords. The modes of proceeding may be various; but, if a right is litigated in a court of justice, the proceeding by which the decision of the court is sought is a suit." A writ of prohibition has, therefore, been held to be a suit; so has a writ of right, of which the Circuit Court has jurisdiction (*Green* v. *Liter*, 8 Cranch, 229); so has *habeas corpus*. *Holmes* v. *Jamison*, 14 Pet. 564. When, in the eleventh section of the Judiciary Act of 1789, jurisdiction of suits of a *civil* nature at common law or in equity was given to the circuit courts, it was intended to embrace not merely suits which the common law recognized as among its old and settled proceedings, but suits in which legal rights were to be ascertained and determined as distinguished from rights in equity, as well as suits in admiralty. The right of eminent domain always was a right at common law. It was not a right in equity, nor was it even the creature of a statute. The time of its exercise may have been prescribed by statute; but the right itself was superior to any statute. That it was not enforced through the agency of a jury is immaterial; for many civil as well as criminal proceedings at common law were without a jury. It is difficult, then, to see why a proceeding to take land in virtue of the government's eminent domain, and determining the compensation to be made for it, is not, within the meaning of the statute, a suit at common law, when initiated in a court. It is an attempt to enforce a legal right. It is quite immaterial that Congress has not enacted that the compensation shall be ascertained in a judicial proceeding. That ascertainment is in its nature at least *quasi* judicial. Certainly no other mode than a judicial trial has been provided.

It is argued that the assessment of property for the purpose of taking it is in its nature like the assessment of its value for the purpose of taxation. It is said they are both valuations of the property to be made as the legislature may prescribe, to enable the government, in the one case, to take the whole of it, and in the other to take a part of it for public uses; and it is argued that no one but Congress could prescribe in either case that the valuation should be made in a judicial tribunal or in a judicial proceeding, although it is admitted that the legislature might authorize the valuation to be thus made in either case. If the supposed analogy be admitted, it proves nothing. Assessments for taxation are specially provided for, and a mode is prescribed. No other is, therefore, admissible. But there is no special provision for ascertaining the just compensation to be made for land taken. That is left to the ordinary processes of the law; and hence, as the government is a suitor for the property under a claim of legal right to take it, there

appears to be no reason for holding that the proper Circuit Court has not jurisdiction of the suit, under the general grant of jurisdiction made by the Act of 1789.

. . . . . .

The judgment of the Circuit Court is affirmed.[1]

[FIELD, J., dissented on certain incidental points.]

IN *Van Brocklin* v. *Tennessee*, 117 U. S. 151 (1886), GRAY, J., for the court, in deciding that lands, in a State, belonging to the United States, which had been bid in by the United States at auction, in default of payment of direct taxes by the former owner, could not be taxed by the State, commented upon a decision of MCLEAN, J., in *U. S.* v. *R. R. Bridge Co.*, 6 McLean, 517, and said: "The question in issue in that case was not of the State's right of taxation, but of its right of eminent domain for the construction of roads and bridges. The decision of the learned justice in favor of the validity of the exercise of that right by a State over lands of the United States, without the consent of the United States, manifested either by an express Act of Congress or by the assent of a department or officer vested by law with the power of disposing of lands of the United States, appears to have been based upon the theory that the United States can hold land as a private proprietor, for other than public objects, and upon a presumption of the acquiescence of Congress in the State's exercise of the power as tending to increase the value of the lands; and it finds some support in *dicta* of Mr. Justice Woodbury, in a case in which, however, the exercise of the power by the State was adjudged to be unlawful. *United States* v. *Chicago*, 7 How. 185, 194, 195. But it can hardly be reconciled with the views expressed by Congress, in Acts concerning particular railroads, too numerous to be cited, as well as in general legislation. Acts of August 4, 1852, ch. 80, March 3, 1855, ch. 200, 10 Stat. 28, 683; July 26, 1866, ch. 262, § 8, 14 Stat. 253; Rev. Stat. § 2477. When that question shall be brought into judgment here, it will require and will receive the careful consideration of the court."[2]

[1] Compare *Cherokee Nation* v. *So. Kans. Ry.* 135 U. S. 641, 656, *Twombley* v. *Humphrey*, 23 Mich. 471 (1871), *In re Sec. Treasury*, 45 Fed. Rep. 396 (U. S. C. C. S. D. N. Y. 1891), *U. S.* v. *Engeman et al.* 45 Fed. Rep. 546 (U. S. Dist. Ct. E. D. N. Y. 1891) — ED.

[2] See *Prop'rs Mt. Hope Cem.* v. *Boston et al.*, 158 Mass. 509 (1893). — ED.

THE PEOPLE, EX REL. HERRICK ET AL., v. SMITH.

NEW YORK COURT OF APPEALS. 1860.

[21 *N. Y.* 595.]

APPEAL from a judgment of the Supreme Court. The relators sued out a *certiorari*, for the purpose of reviewing an order of the county judge of Suffolk County, whereby he reversed an order of the commissioners of highways of the town of Riverhead, — refusing to lay out a highway in that town, pursuant to a petition of twelve freeholders, — and proceeded to lay out such highway. The relators are owners and occupants of a part of the lands through which the highway, so laid out, runs; which lands will have to be appropriated for its track. The single ground of error relied on was, that no notice was served on the relators of the proceedings, on the appeal, or of the hearing before the county judge. The Supreme Court, being of opinion that such notice was not required by law, affirmed the order of the judge, and from this judgment of affirmance the present appeal was taken by the relators. The case was submitted on printed arguments.

Miller & Tuthill, for the appellants.

William Wickham, for the respondent.

DENIO, J. The subject of highways and bridges on Long Island is regulated by a statute passed in 1830, entitled "An Act regulating Highways and Bridges in the Counties of Suffolk, Queen's and King's." (ch. 56.) The system, in its general features, is similar to that established by the Revised Statutes for other parts of the State; but there are some discrepancies, and upon them, I think, the question in the present case may turn. By the Long Island Act, the commissioners have power to lay out new roads without the consent of the owners of the land through which they may run, upon the petition of twelve freeholders of the town, verified by oath or affirmation. (§§ 2, 47.) Nothing is said respecting their giving notice to any one of the hearing of the application before them. Every person conceiving himself aggrieved by a determination of the commissioners, either in laying out, or refusing to lay out, a highway, may appeal to three judges of the Court of Common Pleas. (§ 66.) This jurisdiction is now vested in the county judge under the present Constitution. (Laws, 1847, p. 642, § 27.) Where the determination appealed from is against an application for laying out a road, the judge is to give notice of the time and place of hearing the appeal, to the commissioners by whom such determination was made; and where the commissioners' determination was in favor of the application, notice is not only to be given to the commissioners, but to one or more of the applicants for the road. (§ 69.) The proofs and allegations of the parties are to be heard, and where the appeal is from an order refusing to lay out a road, the judge

is to lay it out in the same manner in which commissioners are directed to proceed in like cases. (§§ 71, 74.)

It will thus be seen that the only notice which the statute requires to be given, in a case like the present, is of the time and place of hearing the appeal, and that such notice is only required to be given to the commissioners who made the order appealed from. If the commissioners had been required to give any notice of the hearing before them, then, when the judge came to lay out the road, in consequence of his reversal of the order of the commissioners, he ought to give the same notice, because he is required to proceed, in the performance of that duty, in the same manner in which the commissioners were directed to proceed when the case was before them; but in the absence of any provision for notice of the hearing before the commissioners, no such duty is required of the judge. It follows that, if the relators, as owners and occupants of the land which was to be taken for the road track, were entitled to notice of the hearing before the judge, it is in consequence of some general principle of law, and not because it is required by any provision of the statute. This is the view of the matter taken by the appellant's counsel, for he expressly admits in his printed argument that there is nothing in the Act requiring notice to be given to the landowners.

The question then is, whether the State, in the exercise of the power to appropriate the property of individuals to a public use, where the duty of judging of the expediency of making the appropriation, in a class of cases, is committed to public officers, is obliged to afford to the owners of the property an opportunity to be heard before those officers when they sit for the purpose of making the determination. I do not speak now of the process for arriving at the amount of compensation to be paid to the owners, but of the determination whether, under the circumstances of a particular case, the property required for the purpose shall be taken or not; and I am of opinion that the State is not under any obligation to make provision for a judicial contest upon that question. The only part of the Constitution which refers to the subject is that which forbids private property to be taken for public use without compensation, and that which prescribes the manner in which the compensation shall be ascertained. It is not pretended that the statute under consideration violates either of these provisions. There is therefore no constitutional injunction on the point under consideration. The necessity for appropriating private property for the use of the public or of the government is not a judicial question. The power resides in the legislature. It may be exercised by means of a statute which shall at once designate the property to be appropriated and the purpose of the appropriation; or it may be delegated to public officers, or, as it has been repeatedly held, to private corporations established to carry on enterprises in which the public are interested. There is no restraint upon the power, except that requiring compensation to be made. And where the power is committed to public officers, it is a subject of legis-

lative discretion to determine what prudential regulations shall be established to secure a discreet and judicious exercise of the authority.

The constitutional provision securing a trial by jury in certain cases, and that which declares that no citizen shall be deprived of his property without due process of law, have no application to the case. The jury trial can only be claimed as a constitutional right where the subject is judicial in its character. The exercise of the right of eminent domain stands on the same ground with the power of taxation. Both are emanations of the law-making power. They are the attributes of political sovereignty, for the exercise of which the legislature is under no necessity to address itself to the courts. In imposing a tax or in appropriating the property of a citizen, or a class of citizens, for a public purpose, with a proper provision for compensation, the legislative act is itself due process of law; though it would not be if it should undertake to appropriate the property of one citizen for the use of another, or to confiscate the property of one person, or a class of persons, or a particular description of property upon some view of public policy, where it could not be said to be taken for a public use. *The People* v. *The Mayor of Brooklyn*, 4 Comst. 419; *Taylor* v. *Porter*, 4 Hill, 140; *Wynehamer* v. *The People*, 3 Kern. 378.

It follows from these views that it is not necessary for the legislature in the exercise of the right of eminent domain, either directly, or indirectly through public officers or agents, to invest the proceeding with the forms or substance of judicial process. It may allow the owner to intervene and participate in the discussion before the officer or board to whom the power of determining whether the appropriation shall be made in a particular case, or it may provide that the officers shall act upon their own views of propriety and duty without the aid of a forensic contest. The appropriation of the property is an act of public administration, and the form and manner of its performance is such as the legislature shall in its discretion prescribe. In the case before us the Act declares that the judge shall give notice to the commissioners of highways whose order is appealed from, and it is silent as to notice to any other person. The appellants and the commissioners are the only parties who are required to be convened on the hearing before the judge, or to have notice of that hearing, and it is their proofs and allegations only which the judge is obliged to hear. It was doubtless considered that the commissioners, who had officially decided against the Act which the appellants were seeking to promote, would sufficiently represent the views upon that side of the question. But if we should think it was discreet that the land-owners should have been furnished with notice and allowed to participate, still the Act furnishes the rule, and the court has no power to change it.

The counsel for the appellant relies upon the case of *The People* v. *The Judges of Herkimer*, 20 Wend. 186, where it was held that a written notice of a hearing upon appeal before the judges in a case like the present, which was governed by the Revised Statutes, ought to be

given; and the proceedings of the judges were reversed for the want of such a notice. The case illustrates the difference between the general highway law and the system provided for Long Island in this respect. . . . The difference between the cases is, that the Revised Statutes provide for giving the notice, the want of which is here objected to, and the Long Island Act does not. The judgment of the Supreme Court must be affirmed.

All the judges concurring, *Judgment affirmed.*[1]

FAIRCHILD ET AL. *v.* CITY OF ST. PAUL.

SUPREME COURT OF MINNESOTA, 1891.

[46 *Minn.* 540.]

APPEAL by plaintiffs, H. S. Fairchild and Greenleaf Clark, from a judgment of the District Court for Ramsey County, where the action (brought to recover $33,634.50 for quarrying and removing stone from plaintiff's premises and for other trespasses thereon) was tried by KELLY, J.

C. H. Benedict and *S. Duffield Mitchell*, for appellants. *Daniel W. Lawler* and *Herman W. Phillips*, for respondent.

MITCHELL, J. This was an action to recover damages for certain alleged acts of trespass in removing stone from the premises of the plaintiffs. The defendant justified the acts on the ground that it had acquired a title to the land for the purposes of a public street. The case was tried upon the theory that its decision depended on the question whether or not the city of St. Paul had acquired a title in fee, and by stipulation it was agreed that the court should determine two questions, *viz.*: First, had the defendant the power and right to condemn the fee of land for street purposes? and, if so, second, had the defendant duly condemned, for such purposes, the fee of the land in question?

1. The main contention of the plaintiffs upon the argument was, to use their own language, "that the public exigencies do not demand the taking and condemnation of the absolute fee-simple title to land for the purpose of highways and streets; that the public wants are supplied by the enjoyment of an easement; and that any act of the legislature which assumes and attempts to authorize a municipality to take and condemn the absolute fee-simple title to land for such purposes is unconstitutional and void." More briefly stated, the proposition is that the legislature cannot authorize the taking of any greater estate in land for public use than is necessary; that an estate in fee is not necessary for the purposes of a street; therefore the legislature cannot authorize the taking of such an estate for such purposes. While we

[1] Compare, as regards taxation, *Spencer* v. *Merchant*, 125 U. S. 345; s. c. *ante*, 647 — ED.

have given the question the careful examination due to the elaborate brief and very earnest argument of the learned counsel, yet it has never seemed to us that there was anything in his contention. In this case it must be conceded that the legislature, if it had the power to do so, has given the city of St. Paul authority to condemn an estate in fee for street purposes; the language of the charter being: "In all cases the land taken and condemned in the manner aforesaid (for streets) shall be vested absolutely in the city of St. Paul in fee-simple." Mun. Code 1884, § 153 (Sp. Laws 1874, p. 59, § 17). There is nothing better settled than that, the power of eminent domain being an incident of sovereignty, the time, manner, and occasion of its exercise are wholly in the control and discretion of the legislature, except as restrained by the Constitution. It rests in the wisdom of the legislature to determine when and in what manner the public necessities require its exercise; and with the reasonableness of the exercise of that discretion the courts will not interfere. *Wilkin* v. *First Div., etc., R. Co*, 16 Minn. 244 (271); *Weir* v. *St. Paul, S. & T. F. R. Co.*, 18 Minn. 139 (155). As the legislature is the sole judge of the public necessity which requires or renders expedient the exercise of the power of eminent domain, so it is the exclusive judge of the amount of land, and of the estate in land, which the public end to be subserved requires shall be taken. The only limitation — at least, the only one applicable to a case like the present — which the Constitution imposes upon the exercise of the right of eminent domain by the legislature is that private property shall not be taken for public use without just compensation therefor first paid or secured. Of course, there is the further limitation, necessarily implied, that the use shall be a public one; upon which question the determination of the legislature is not conclusive upon the courts. But, when the use is public, the necessity or expediency of appropriating any particular property is not a subject of judicial cognizance. Consequently, if in the legislative judgment it is expedient to do so, it has the power expressly to authorize a municipal corporation compulsorily to acquire the absolute fee-simple to lands of private persons condemned for street or any other public purpose. The authorities are so numerous and uniform to this effect that an extended citation of them is unnecessary. See, however, Dill. Mun. Corp. § 589; Cooley, Const. Lim. 688; Lewis, Em. Dom. 277; Elliott, Roads & S. 172; Mills, Em. Dom. §§ 50, 51; *Boom Co.* v. *Patterson*, 98 U. S. 403, 406; *Sweet* v. *Buffalo, etc., Ry. Co.*, 79 N. Y. 293, 299.

It is often laid down as the law that the taking of property must always be limited to the necessity of the case, and, consequently, no more can be appropriated in any instance than is needed for the particular use for which the appropriation is made. But it will be found that this is almost invariably said, not in discussing the extent of the power of the legislature, but with reference to the construction of statutes granting authority to exercise the right of eminent domain, and where the authority to take a certain quantity of land or a particular

estate therein depended, not upon an express grant of power to do so, but upon the existence of an alleged necessity, from which the disputed power is to be implied. This distinction is clearly brought out by Justice Cornell in *Milwaukee & St. Paul Ry. Co.* v. *City of Faribault*, 23 Minn. 167. Upon the principle that statutes conferring compulsory powers to take private property are to be strictly construed, it follows that, when the estate or interest to be taken is not defined by the legislature, only such an estate or interest can be taken as is necessary to accomplish the purpose in view, and, when an easement is sufficient, no greater estate can be taken. It is on this principle that where the legislature has authorized the taking of land for the purposes of streets, without defining the estate that may be taken, or expressly authorizing the taking of the fee, it is held that only an easement can be taken. This is construed, under such statutes, to be the extent of the grant of authority; but no well-considered case can be found which holds that the legislature might not authorize the taking of the fee, if it deemed it expedient.

It is perhaps foreign to the present inquiry to consider the nature and extent of the title which the city of St. Paul acquires in land condemned for street purposes. But, notwithstanding the broad language used in the city charter, we think that it must be construed as only a qualified or terminable fee, — that is, the fee-simple for street purposes, — which gives the city absolute control over the land for those purposes, but that its title is not a proprietary, but what might be termed a sovereign or prerogative, one, which it, as an agency of the State, holds in trust for the public for street purposes, and which it can neither sell nor devote to a private use. . . . *Judgment affirmed.*[1]

In *Stubbings* v. *Evanston*, 134 Ill. 37, 41 (1891), in sustaining a ruling that where a part of premises under lease were taken, "the tenant remains bound to pay rent for the whole, according to the terms of the lease," the court (Craig, J.) said:

The general rule no doubt is, that eviction of the lessee from the premises by a paramount title will discharge him from the payment of any rent which may fall due, by the terms and conditions of the lease, after eviction. But where a part of leased premises may be taken under the power of eminent domain, can such a taking be regarded as an eviction? Washburn (1 Real Prop. p. 342), in speaking on this subject, says: "It has sometimes been attempted to apply the principle of eviction from a part of the premises, where lands under lease have been appropriated to public use under the exercise of eminent domain. . . . But the better rule, and one believed to be adopted in most of the States, is, that such a taking operates, so far as the lessee is concerned, upon his interest as property, for which the public are to make him compensation, and does not affect his liability to pay rent for the entire estate, according to the terms of his lease, — and this extends to ground rent. Such taking does not abate any part of the rent due."

[1] And so *Dingley* v. *Boston*, 100 Mass. 544. — Ed.

Parks v. *City of Boston*, 15 Pick. 198, is an interesting case on the question. It was there held: "Where part of a lot of land under lease is taken by the mayor and aldermen of Boston, for the purpose of widening a street, the lease is not thereby extinguished, nor is the lessee discharged from his liability to pay the reserved rent during the residue of the term, but the lessor and lessee are each entitled to recover compensation for the damage so sustained by them, respectively." The same principle was announced in an earlier case, *Ellis* v. *Welch*, 6 Mass. 246, and in a later case, *Patterson* v. *City of Boston*, 20 Pick. 159.

In *Foote* v. *City of Cincinnati*, 11 Ohio, 408, where the leased premises had been appropriated for a street, the Supreme Court held that the lessee was not relieved from the payment of rent, but he was entitled to recover from the city for the damages sustained. See, also, the following cases, where the same principle is announced: *Workman* v. *Mifflin*, 30 Pa. St. 362; *Frost* v. *Ernest*, 4 Whart. 86; *Garrity* v. *City of Chicago*, 7 Bradw. 474.

Under the authorities it seems that a tenant, where a portion of the leased premises is taken, under the power of eminent domain, for the use of the public, cannot, as against his landlord, claim an eviction, and be released from the payment of rent; and as his liability for the payment of rent continues after a part of his term has been taken by the public and appropriated to public use, he would be entitled to recover such damages as he sustained by the taking of his leased property by the public. In other words, the lessee takes and holds his term in the same manner as any other owner of real property holds his title, subject to the right of the public to take a part or the whole of it for public use, at such time as the public necessity may require, upon the payment of just compensation.

In a proceeding to condemn lands for a public purpose, it is not some particular interest which the public seek to take, but the land itself. If A has one estate in the land and B another, in the proceeding to condemn each is entitled to compensation for the land taken, as his interest may appear in the property; and, as said before, if one has a leasehold interest, he may recover damages for such interest and still be held liable for the payment of rent, as that liability existed before the leasehold interest was taken for public use. A different rule has been adopted in some States, particularly in Missouri. *Biddle* v. *Hussman*, 23 Mo. 597; *Barclay* v. *Pickles*, 38 Id. 143. In those cases it was held, that as to the part of the leased premises appropriated to public use the rent was extinguished, and no liability existed against the lessee for such rents. But we think that the weight of authority is the other way, and we are not disposed to adopt a rule of that character.[1]

[1] "But upon what principle can it be maintained, that a lessee under such circumstances would be exempted from the payment of the stipulated rent? The lessee takes his term, just as every other owner of real estate takes title, subject to the right and power of the public to take it, or a part of it, for public use, whenever the public

THE BOSTON WATER POWER COMPANY *v.* THE BOSTON AND WORCESTER RAILROAD CORPORATION ET AL.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1840.

[23 *Pick.* 360.]

BILL in equity, filed in March, 1833, containing the following allegations.

By St. 1814, c. 39, divers persons were incorporated by the name of the Boston and Roxbury Mill Corporation, and by that statute and those of 1816, c. 40, 1819, c. 65, and 1822, c. 34, the corporation was authorized to purchase and hold real and personal estate; to build a dam from Charles Street, at the westerly end of Beacon Street, in Boston, westerly to Sewall's Point, in Brookline, so as to exclude the tide-water on the northerly side of the dam and form on the southerly side a reservoir or receiving basin of the space between the dam and Boston Neck; to build another dam from Gravelly Point, in Roxbury, to the dam first mentioned, so as to enclose the tide-water within Tide-Mill Creek, on the westerly side of this cross dam;[1] to cut any number of convenient raceways from the full basin to the receiving basin; to maintain and keep up all their works forever; and to lease or sell the right of using the water, upon any terms and in any manner they might think proper; and it was provided, that no other person should have a right to dispose of the water, without the consent of the corporation. The corporation was authorized to make over the main dam first mentioned a good and substantial road, and to receive toll for passing over it. Certain duties and obligations in favor of the public, set forth at large in the bill, were imposed upon the corporation, and certain penalties and forfeitures created to secure the performance of its undertakings. These Acts were accepted by the corporation, whereby

necessity and convenience may require it. Such a right is no incumbrance; such a taking is no breach of the covenant of the lessor for quiet enjoyment.

"The lessee then holds and enjoys exactly what was granted him, as a consideration for the reserved rent; which is, the whole use and beneficial enjoyment of the estate leased, subject to the sovereign right of eminent domain on the part of the public. If he has suffered any loss or diminution in the actual enjoyment of this use, it is not by the act or sufferance of the landlord; but it is by the act of the public, against whom the law has provided him an ample remedy. If he is compelled to pay the full compensation, for the estate actually diminished in value, this is an element in computing the compensation which he is to receive from the public. In this view it becomes unimportant, in settling the principle we are now discussing, whether the taking for public use diminishes the leased premises, little or much, in quantity or in value; all this will be taken into consideration in assessing the damages which the lessee may sustain." — SHAW, C. J., for the court, in *Parks* v. *Boston*, 15 Pick. 198, 205 (1834). Compare *Scoville* v. *McMahon*, 62 Conn. 378. — ED.

[1] For a plan of this part of Boston, which elucidates these statements, see 7 Pick. at p. 388. — ED.

a contract conformable to the terms of the Acts was created between the corporation and the Commonwealth.

This contract was performed on the part of the corporation, by the erection of the works required, being works of great magnitude and expense, and of great public convenience and utility; and thereby the corporation became entitled to the exclusive right and privilege of forever using the soil included within the limits of the full basin, for the purpose of keeping it covered with water to the height and extent of surface to which the tide naturally flowed it, and the exclusive right and privilege of forever keeping the soil included within the limits of the receiving basin uncovered by the tide-waters, and using it for a reservoir to receive and carry off the waters flowing from the full basin through the raceways cut, or which should thereafter be cut, through the cross dam, and the exclusive right and privilege of cutting raceways through any part of the cross dam, and of using or disposing, by lease or otherwise, of the water-power thereby created.

The plaintiffs were incorporated by the name of the Boston Water Power Company, on June 12th, 1824 (St. 1824, c. 26), with power to purchase and hold any quantity of the water-power created by the establishment of the dams above mentioned, and by an indenture, dated May 9th, 1832, the Boston and Roxbury Mill Corporation transferred to them, for the sum of 175,000 dollars, all the grantors' right to the land above the main dam, and all the water-power, and all their privileges, contracts, duties, and obligations respecting the water-power; and the plaintiffs thereby, so far as regards the water-power, became entitled to the exclusive right and privilege of forever using the soil included within the two basins, for the purposes before mentioned, and to all the water-power which can be and is created by the constructing and maintaining of the dams, without any hindrance, obstruction, interruption, or diminution of the capacity of the basins respectively.

The plaintiffs allege, that the Boston and Worcester Railroad Corporation deny and disregard these vested rights, and threaten to build a railroad through the full basin, and over the cross dam, and through the receiving basin; and have actually commenced building the same, by driving piles in both of the basins; and have taken for their road a strip of land twenty-six feet wide through the full basin, and five rods wide through the receiving basin.

The construction of the railroad through and across the two basins and cross dam will, it is alleged, greatly diminish the water-power, and abridge the franchise vested in the plaintiffs, of using the soil and space between the main dam and Boston Neck for their basins, to their irreparable injury, and, so far as their rights are concerned, will be a nuisance.

The bill concludes with a prayer for a perpetual injunction and other relief. . . . [The rest of the statement of facts is a recital of the defendants' answer, the substance of which sufficiently appears from the opinion.]

C. G. Loring (with whom were *J. Mason* and *Gardiner*), for the plaintiffs.

Aylwin, and *F. Dexter*, for the defendants.

SHAW, C. J., delivered the opinion of the court. . . . For the purposes of this hearing it is admitted, by the defendants, that the piers, embankments, and bridges erected by them in the construction of the Boston and Worcester Railroad in and over the full and receiving basins claimed by the plaintiffs, do, to a certain extent, diminish the volume of water which those basins would otherwise contain, and do therefore to some extent impair and diminish the water-power to be derived therefrom. But they insist that this is *damnum absque injuria*, that they are legally justified in so laying out the railroad over the basins, that the damage thereby suffered by the plaintiffs is not in consequence of a tort done by the defendants, to be deemed in law or equity a nuisance, or abated as such, but an act done by rightful authority, for which the remedy is by a compensation in damages, to be obtained in the manner provided by law. This, at present, constitutes the question between the parties. This is a question involving public and private interests of very great magnitude, and requiring the most mature consideration. In deciding it, the court have the satisfaction of feeling that they have derived great benefit from a full, able, and ingenious argument, which seems quite to have exhausted the subject.

The first question which we propose to consider is, whether the legislature had the legal and constitutional authority to grant to the corporation created for the purpose of establishing a railroad from Boston to Worcester, the power to lay their road over and across the basins of the plaintiffs, on paying them the damage sustained thereby, and to keep up and maintain the same.

It is contended on the part of the plaintiffs, and this constitutes one of the main grounds of their complaint, that the legislature had no such authority, because they hold a franchise in and over all the lands, flats and waters included in their full and receiving basins, obtained by a grant from the Commonwealth for a valuable consideration, and that the authority contended for by the defendants would constitute an interference with and an encroachment upon their franchise, amounting in substance and effect, to revocation or destruction of the franchise, and a withdrawal of the beneficial uses of the grant. In order to judge of this, it is necessary to consider the nature and origin of the plaintiffs' rights as claimed and set forth by them, and the manner in which they are affected by the acts of the defendants, supposing them warranted by the Act of the Legislature.

We do not now stop to inquire into the objections taken by the defendants, that the plaintiffs have not complied with the conditions of the grants made to them, by the Act incorporating the Boston and Roxbury Mill Corporation, and the several subsequent Acts; that is a subject of separate and distinct consideration. Supposing them to

have complied with those conditions, what are the rights claimed by them? The plaintiffs were authorized to enclose and pen up a portion of the navigable waters adjoining Boston, so as to prevent the ebb and flow of the tide therein, and to discontinue any further use thereof by the public for purposes of navigation, to make use of part of the public domain, being all that part of the land covered by water lying below low-water mark, or more than one hundred rods from high-water mark, and to acquire by purchase or by appraisement, without the consent of the owners, that part of the soil belonging to individuals, and to have the perpetual use thereof for mill purposes, and to make a highway on their dams and take toll thereon. Other rights, no doubt, were incident, but this is a summary of their important rights and privileges.

The effect of the authority granted to the railroad corporation to lay their road over these basins, was to some extent to diminish their surface, and reduce their value. But the court are of opinion, that this could in no proper legal sense be considered as annulling or destroying their franchise. They could both stand together. The substance of the plaintiffs' franchise was to be a corporation, to establish a highway and take toll, to establish mills, and to make use of land for mill ponds, derived partly from the public and partly from individuals, either by purchase or by taking it, for public use, at an appraisement, by authority of the legislature. So far as this gave them a right to the use of land, it constituted an interest and qualified property in the land, not larger or more ample, or of any different nature, from a grant of land in fee, and did not necessarily withdraw it from a liability to which all the lands of the Commonwealth are subject, to be taken for public use, at an equivalent, when in the opinion of the legislature, the public exigency, or as it is expressed in case of highways, when public convenience and necessity may require it. The plaintiffs still retain their franchise, they still retain all their rights derived from the legislative grants, and the only effect of the subsequent Acts is to appropriate, to another and distinct public use, a portion of the land over which their franchise was to be used. We cannot perceive how it differs from the case of a turnpike or canal. Suppose a broad canal extends across a large part of the State. The proprietors have a franchise similar to that of the plaintiffs, to use the soil in which the bed of the canal is formed, and it is, in the same manner, derived by a grant from the legislature. It is a franchise. But if afterwards it becomes necessary to lay a turnpike, or a public highway across it, would this be a disturbance or revocation of the franchise and inconsistent with the power of the legislature in exercising the right of eminent domain, for the public benefit? It might occasion some damage; but that would be a damage to property, and pursuant to the bill of rights, must be compensated for by a fair equivalent. It may be said, that the way might be carried high over the canal, and so not obstruct it. But suppose a railroad, a new erection,

not contemplated when the canal was granted, and from the nature of which, it must be kept on a level, so as to subject the canal proprietors to considerable expense and trouble; whatever other objections might be made to it, it seems to us, that it could not be considered as a revocation, still less an annihilation of the franchise of the proprietors.

If it is suggested, that under this claim of power, the legislature might authorize a new turnpike, canal, or railroad on the same line with a former one to its whole extent, we think the proper answer is, that such a measure would be substantially and in fact, under whatever color or pretence, taking the franchise from one company and giving it to another, in derogation of the first grant, not warranted by the right of eminent domain, and incompatible with the nature of legislative power. In that case the object would be to provide for the public the same public easement, which is already provided for, and secured to the public, by the prior grant, and for which there could be no public exigency. Such a case therefore cannot be presumed.[1]

If the whole of a franchise should become necessary for the public use, I am not prepared to say, that the right of eminent domain, in an extreme case, would not extend to and authorize the legislature to take it, on payment of a full equivalent. I am not aware that it stands upon a higher or more sacred ground, than the right to personal or real property. Suppose, for instance, that a bridge had been early granted over navigable waters, say in this harbor, at the place where East Boston ferry now is, and the extension of our foreign commerce, and the exigencies of the United States in maintaining a navy for the defence of the country, should render it manifestly necessary to remove such bridge; I cannot say that it would not be in the power of the legislature to do it, paying an equivalent.

Or suppose, as it has sometimes been suggested, that these dams of the plaintiffs, by checking the tide-waters flowing through the channels below Charles River bridge, and through the harbor of Boston, should have so far altered the regimen of the stream, as gradually to fill up the main channel of the harbor and render it unfit for large ships; suppose it were demonstrated, to the entire satisfaction of all, that this was the cause, that the harbor would become unfit for a naval station, or for commerce, by means of which most extensive damage would ensue to the city, to the Commonwealth, and to the Eastern States (for I mean to put a strong case for illustration), would it not be competent for the legislature to require the dams to be removed, the basins again laid open to the flux and reflux of the tide? I am not prepared to say that it would not, on payment of an equivalent. But it is not necessary to the decision of this cause, to consider such a case, because, as before said, the act of the defendants does not, in any legal sense, annul or destroy the franchise of the plaintiffs.

Nor, in the opinion of the court, is this exercise of power by the

[1] Compare *Greenwood* v. *Freight Co.* 105 U. S. 13, and 1 Hare, Am. Const. Law, 345. — ED.

legislature, a law impairing the obligation of contracts, within the meaning of the Constitution of the United States. A grant of land is held to be a contract within the meaning of this provision; and such grant cannot be revoked by a State legislature. This was held in regard to the revocation of grants of land by the State of Georgia. *Fletcher* v. *Peck*, 6 Cranch, 87. And yet there can be no doubt, that land granted by the government, as well as any other land, may be taken by the legislature in the exercise of the right of eminent domain, on payment of an equivalent. Such an appropriation therefore is not a violation of the contract by which property, or rights in the nature of property, and which may be compensated for in damages, are granted by the government to individuals.

The right by which individuals owning mills are enabled to flow the lands of proprietors of meadows is essentially of the same character with that of the plaintiffs, and the main difference is, that the former are obtained by the operation of a general law, and the latter by a special act. But in the former case, the mill-owners obtain an easement or franchise, not a property in the soil, and that, without and against the consent of the owners, upon high considerations of public expediency and necessity. But it seems to us, that it cannot be successfully maintained, that a railroad, canal, or turnpike, could not be laid over such a pond, because it would diminish the capacity of the pond, and proportionably lessen the mill-power. *Forward* v. *Hampshire and Hampden Canal Co.*, 22 Pick. 462.

It is difficult, perhaps impossible, to lay down any general rule, that would precisely define the power of the government, in the exercise of the acknowledged right of eminent domain. It must be large and liberal so as to meet the public exigencies; and it must be so limited and restrained, as to secure effectually the rights of the citizen. It must depend in some measure upon the nature of the exigencies as they arise, and the circumstances of particular cases. In the present case, the court are all of opinion, that the rights of the plaintiffs, in the land of the full and receiving basins, are not of such a character as to exclude the authority of the legislature, from taking a small portion of it, for laying out a railroad, it being for another and distinct public use, not interfering with the franchise of the plaintiffs, in any other way than by occupying such portion of this land.

But it is contended that the Act in question is not valid, inasmuch as it does not provide a compensation for the damage done to the plaintiffs' franchise. We are, however, of opinion, that this objection is founded upon the assumption already considered, *viz.*, that the taking of a portion of the land over which the franchise extends is a taking of their franchise. The Act does not take away the plaintiffs' franchise, but provides for taking part of the land, in which the plaintiffs have a qualified right of property. This is provided for in the first section of the Act of Incorporation, which directs that all damage occasioned to any person or corporation, by the taking of such land or materials, that

is, land five rods wide, for the purposes aforesaid, shall be paid for, by the said corporation, in the manner thereinafter provided.

It has been held, that these provisions for taking land, and providing for an indemnity, are remedial and to be construed liberally and beneficially, and will therefore extend to leaseholds, easements, and other interests in land, as well as to land held by complainants in fee. *Ellis* v. *Welch*, 6 Mass. R. 246; *Parks* v. *Boston*, 15 Pick. 203.

Another ground much relied upon to show that the Act is unconstitutional and invalid, is, that the Act does not of itself appropriate the specific land taken, to public use, but delegates to the corporation the power of thus taking private property for public use, and therefore, the appropriation, or the right of eminent domain, is not exercised by the competent and proper authority, and that such power cannot be delegated.

This power is certainly one of a high and extraordinary character, and ought to be exercised with great caution and deliberation. This objection deserves and has received great consideration. On the whole, the court are of opinion, that the Act is not open to this objection. Taking the whole Acts of Incorporation together, we are of opinion that it sufficiently declares the public necessity and convenience of a railroad, fixes the *termini, viz.* in or near the city of Boston and thence to any part of Worcester in the county of Worcester, in such manner and form as the corporation shall think most expedient. Nothing therefore is delegated to the corporation, but the power of directing the intermediate course between the *termini*. The question of necessity for public use is passed upon and decided by the legislature. Whether the road goes over the lands of one or another private individual, does not affect that question. So far as the objection is, that the power is delegated to the corporation instead of being exercised by county commissioners, or any other public body, it is rather a question of propriety and fitness, than one of power. In the present case we think that the interests of the corporation and those of the public were so nearly coincident, it being plainly for the advantage of both that the shortest, safest, and cheapest route should be chosen, that the power might be safely intrusted to a corporation thus constituted. This mode of exercising the right of eminent domain is warranted by numerous precedents, both in our own Commonwealth and in most of the other States of the Union.

We are then brought to another and very important inquiry, which is this; supposing the legislature has a full and constitutional authority to pass an Act, empowering the defendants to lay out their railroad over the land used by the plaintiffs, whether they have in fact granted any such power. This must depend upon the construction of the Act of Incorporation. . . .

The court are of opinion, upon the whole case, that the legislature had the constitutional power, to a limited extent, to exercise the right of eminent domain over the lands used by the complainants as their

full and receiving basins, providing in the Act suitable measures for making compensation to the complainants, if they sustained damage thereby; that the Act did make such provision; that the power of the legislature was well executed, in declaring the general purpose and exigency of appropriating private property for public use, by establishing a railroad within certain *termini* expressed, and by granting to a corporation, established and constituted as the defendant corporation was, the power of determining the particular course and direction of the railroad between those *termini;* that the defendants were not restrained, by express words, or any necessary, just, or reasonable implication, from laying out their railroad as they have done, over the basins used by the complainants under their franchise, and therefore, that the averment of the complainants, that the railroad is laid over their basins without any just and lawful authority, and is consequently a nuisance, is not supported.

IN *The West River Bridge Co.* v. *Dix et al.*, 6 How. 507, 532 (1848), on error, to the Supreme Court of Vermont, it was held that the real estate, easement, and franchise of a bridge corporation, chartered by the State, might be taken by the right of eminent domain. The court (DANIEL, J.) said: "Into all contracts, whether made between States and individuals or between individuals only, there enter conditions which arise not out of the literal terms of the contract itself; they are superinduced by the pre-existing and higher authority of the laws of nature, of nations, or of the community to which the parties belong; they are always presumed, and must be presumed, to be known and recognized by all, are binding upon all, and need never, therefore, be carried into express stipulation, for this could add nothing to their force. Every contract is made in subordination to them, and must yield to their control, as conditions inherent and paramount, wherever a necessity for their execution shall occur. Such a condition is the right of eminent domain. This right does not operate to impair the contract effected by it, but recognizes its obligation in the fullest extent, claiming only the fulfilment of an essential and inseparable condition. Thus, in claiming the resumption or qualification of an investiture, it insists merely on the true nature and character of the right invested. The impairing of contracts inhibited by the Constitution can scarcely, by the greatest violence of construction, be made applicable to the enforcing of the terms or necessary import of a contract; the language and meaning of the inhibition were designed to embrace proceedings attempting the interpolation of some new term or condition foreign to the original agreement, and therefore inconsistent with and violative thereof. It, then, being clear that the power in question not being within the purview of the restriction imposed by the tenth section of the first article of the Constitution, it remains with the States to the full extent in which it inheres in every sovereign government, to be exercised by them in that degree that shall by them be deemed com-

mensurate with public necessity. So long as they shall steer clear of the single predicament denounced by the Constitution, shall avoid interference with the obligation of contracts, the wisdom, the modes, the policy, the hardship of any exertion of this power are subjects not within the proper cognizance of this court. This is, in truth, purely a question of power; and conceding the power to reside in the State government, this concession would seem to close the door upon all further controversy in connection with it. The instances of the exertion of this power, in some mode or other, from the very foundation of civil government, have been so numerous and familiar, that it seems somewhat strange, at this day, to raise a doubt or question concerning it. In fact, the whole policy of the country, relative to roads, mills, bridges, and canals, rests upon this single power, under which lands have been always condemned; and without the exertion of this power, not one of the improvements just mentioned could be constructed. In our country it is believed that the power was never, or, at any rate, rarely, questioned, until the opinion seems to have obtained that the right of property in a chartered corporation was more sacred and intangible than the same right could possibly be in the person of the citizen; an opinion which must be without any grounds to rest upon, until it can be demonstrated either that the ideal creature is more than a person, or the corporeal being is less. For, as a question of the power to appropriate to public uses the property of private persons, resting upon the ordinary foundations of private right, there would seem to be room neither for doubt nor difficulty. A distinction has been attempted, in argument, between the power of a government to appropriate for public uses property which is corporeal, or may be said to be in being, and the like power in the government to resume or extinguish a franchise. The distinction thus attempted we regard as a refinement which has no foundation in reason, and one that, in truth, avoids the true legal or constitutional question in these causes; namely, that of the right in private persons, in the use or enjoyment of their private property, to control and actually to prohibit the power and duty of the government to advance and protect the general good. We are aware of nothing peculiar to a franchise which can class it higher, or render it more sacred, than other property. A franchise is property, and nothing more."

In *Boston & Lowell R. R. Corp.* v. *Salem & Lowell R. R. Co., et al.*, 2 Gray, 1, 35 (1854), after holding that a legislative provision in plaintiffs' charter that no other railroad should be authorized between certain points for thirty years was a valid contract, the court (Shaw, C. J.) said: "But it is earnestly insisted that the grants to the defendant corporations do warrant and justify them in setting up the line of transportation by railroad, by the union of the several sections of their respective railroads; and that it may be regarded as lawfully done, under the right of the government to appropriate private property for public use. It is fully conceded that the right of eminent domain, the

right of the sovereign, exercised in due form of law, to take private property for public use, when necessity requires it, of which the government must judge, is a right incident to every government, and is often essential to its safety. And property is *nomen generalissimum*, and extends to every species of valuable right and interest, and includes real and personal property, easements, franchises, and incorporeal hereditaments. Even the term 'taking,' which has sometimes been relied upon as implying something tangible or corporeal, is not used in the Massachusetts Declaration of Rights; but the provision is this: 'Whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor.' Declaration of Rights, art. 10. Here again the term 'appropriate' is of the largest import, and embraces every mode by which property may be applied to the use of the public. Whatever exists, which public necessity demands, may be thus appropriated. It was held in the Supreme Court of the United States that a franchise to build and maintain a toll bridge might be so appropriated; and that the right of an incorporated company to maintain such a bridge, under a charter from a State, might, under the right of eminent domain, be taken for a highway. *West River Bridge* v. *Dix*, 6 How. 507. The same point was afterwards decided in the same court in the case of a railroad. *Richmond, Fredericksburg, & Potomac Railroad* v. *Louisa Railroad*, 13 How. 83. Such appropriation is not regarded as impairing the right of property, or the obligation of any contract; on the contrary, it freely admits such right, and in all just governments provision is made for an adequate compensation, which recognizes the owner's right.

"Nor does it appear to us to make any difference whether the land, or any other right or interest thus appropriated, be derived directly from the government, or acquired otherwise; for the reason already stated, that it does not revoke the grant or annul or impair the contract, but recognizes and admits the validity of both. If, for instance, government, through its authorized agent, had contracted to convey land to an individual, and afterwards, and before the title passed, it should be necessary to appropriate such land to public uses, such taking would not impair the obligation of the contract; the individual would have the same right to compensation for the loss of his equitable title to the land, as he would have had for the land itself if the title to it had passed. If, therefore, in the great advancement of public improvements, in the great changes which take place, in the number of inhabitants, in the number of passengers and quantity of property to be transported, or in great and manifest improvements in the mode of travel and locomotion, it becomes necessary to appropriate, in whole or in part, a franchise previously granted, the existence of which is recognized and admitted, we cannot doubt that it would be competent for the legislature, in clear and express terms, to authorize the appropriation of such franchise, making adequate compensation for the same.

"But we cannot perceive in the Acts of Incorporation of the three defendant corporations, or in any of the Acts in addition thereto, any Act of the government, taking or appropriating any of the rights, franchises, or privileges of the plaintiff corporation under the right of eminent domain. The characteristics of such an Act of appropriation are known and well understood. It must appear that the government intend to exercise this high sovereign right, by clear and express terms, or by necessary implication, leaving no doubt or uncertainty respecting such intent. It must also appear by the Act that they recognize the right of private property, and mean to respect it; and under our Constitution, the Act conferring the power must be accompanied by just and constitutional provisions for full compensation to be made to the owner. If the government authorizes the taking of property, for any use other than a public one, or fails to make provision for a compensation, the Act is simply void; no right of taking as against the owner is conferred; and he has the same rights and remedies against a party acting under such authority, as if it had not existed. In general, therefore, when any Act seems to confer an authority on another to take property, and the grant is not clear and explicit, and no compensation is provided by it, for the owner or party whose rights are injuriously affected, the law will conclude that it was not the intent of the legislature to exercise the right of eminent domain, but simply to confer a right to do the act, or exercise the power given, on first obtaining the consent of those thus affected."

GARDNER *v.* TRUSTEES OF NEWBURGH.

COURT OF CHANCERY OF NEW YORK. 1816.

[2 *Johns. Ch.* 162.]

THE bill, which was for an injunction, stated that the plaintiff is owner of a farm, in the village of Newburgh, through which a stream of water has, from time immemorial, run, having its source from a spring in the adjoining farm of the defendant, Hasbrouck, and after entering the plaintiff's land, continues its whole course through his farm until it empties into the Hudson River. That this stream greatly fertilizes his fields, and, running near his house, serves for watering his cattle, and for various domestic and economical purposes. That it supplies water to a brick-yard on the farm of the plaintiff, where most of the bricks used in Newburgh are made; it also supplies a large distillery erected by him at great expense, and a churning-mill, and water for a mill-seat, where the plaintiff is about to erect a mill for grinding plaster of paris. That the trustees of the village of Newburgh, the defendants, by false representations, obtained an Act of the Legislature,

passed the 27th of March, 1809, to enable the said trustees to supply the inhabitants of the village with pure and wholesome water. That the trustees applied to the plaintiff for leave to divert the stream, offering him a trifling and very inadequate compensation, which he refused. That the said trustees having obtained leave from the defendant, Hasbrouck, the owner of the spring, to use and divert the water, or a part thereof, that is, a stream one inch and a quarter in diameter, taken from a great elevation, have commenced a conduit and threaten to divert the stream, or a great part thereof, from the plaintiff's farm. That the plaintiff is apprehensive that if this is done, there will not, in a dry season, be water sufficient even for his cattle, etc. The plaintiff, therefore, prayed an injunction to prevent the defendants from diverting the water, etc. The bill was sworn to, and the plaintiff produced several affidavits, which stated that the stream was not more than sufficient for the distillery, brick-yard, etc., of the plaintiff, and if diverted through a pipe, or tube, of the proposed diameter, would greatly injure, if not render the works useless. One of the affidavits stated that the whole stream would pass through a tube of one inch diameter, with a head of five feet.

Burr and *J. V. N. Yates*, for the plaintiff.

THE CHANCELLOR. The statute under which the trustees of the village of Newburgh are proceeding (sess. 32, ch. 119) makes adequate provision for the party injured by the laying of the conduits through his land, and also affords security to the owner of the spring, or springs, from whence the water is to be taken. But there is no provision for making compensation to the plaintiff, through whose land the water issuing from the spring has been accustomed to flow. The bill charges, that the trustees are preparing to divert from the plaintiff's land the whole, or the most part of the stream, for the purpose of supplying the village. The plaintiff's right to the use of the water is as valid in law, and as useful to him as the rights of others who are indemnified or protected by the statute; and he ought not to be deprived of it, and we cannot suppose it was intended he should be deprived of it, without his consent, or without making him a just compensation. The Act is, unintentionally, defective, in not providing for his case, and it ought not to be enforced, and it was not intended to be enforced, until such provision should be made.

It is a clear principle in law, that the owner of land is entitled to the use of a stream of water which has been accustomed, from time immemorial, to flow through it, and the law gives him ample remedy for the violation of this right. To divert or obstruct a water-course is a private nuisance; and the books are full of cases and decisions asserting the right and affording the remedy. (F. N. B. 184. *Moore* v. *Browne*, Dyer, 319 *b*; *Lutterel's Case*, 4 Co. 86; *Glynne* v. *Nichols*, Comb. 43, 2 Show. 507; *Prickman* v. *Trip*, Comb. 231.)

The Court of Chancery has also a concurrent jurisdiction, by injunction, equally clear and well established in these cases of private

nuisance. Without noticing nuisances arising from other causes, we have many cases of the application of equity powers on this very subject of diverting streams. In *Finch* v. *Resbridger* (2 Vern. 390), the Lord Keeper held, that after a long enjoyment of a water-course running to a house and garden, through the ground of another, a right was to be presumed, unless disproved by the other side, and the plaintiff was quieted in his enjoyment, by injunction. So, again, in *Bush* v. *Western* (Prec. in Ch. 530), a plaintiff who had been in possession, for a long time, of a water-course, was quieted by injunction, against the interruption of the defendant, who had diverted it, though the plaintiff had not established his right at law, and the court said such bills were usual. These cases show the ancient and established jurisdiction of this court; and the foundation of that jurisdiction is the necessity of a preventive remedy when great and immediate mischief, or material injury would arise to the comfort and useful enjoyment of property. The interference rests on the principle of a clear and certain right to the enjoyment of the subject in question, and an injurious interruption of that right which, upon just and equitable grounds, ought to be prevented. (*Anon.* 1 Vern. 120; *East India Company* v. *Sandys*, 1 Vern. 127; *Hills* v. *University of Oxford*, 1 Vern. 275; *Anon.* 1 Vesey, 476; *Anon.* 2 Vesey, 414; *Whitchurch* v. *Hide*, 2 Atk. 391; 2 Vesey, 453; *Attorney-General* v. *Nichol*, 16 Vesey, 338).

In the application of the general doctrines of the court to this case, it appears to me to be proper and necessary that the preventive remedy be applied. There is no need, from what at present appears, of sending the plaintiff to law to have his title first established. His right to the use of the stream is one which has been immemorially enjoyed, and of which he is now in the actual possession. The trustees set up no other right to the stream (assuming, for the present, the charges in the bill) than what is derived from the authority of the statute; and if they are suffered to proceed and divert the stream, or the most essential part of it, the plaintiff would receive immediate and great injury, by the suspension of all those works on his land which are set in operation by the water. In addition to this, he will lose the comfort and use of the stream for farming and domestic purposes; and, besides, it must be painful to any one to be deprived, at once, of the enjoyment of a stream which he has been accustomed always to see flowing by the door of his dwelling. A right to a stream of water is as sacred as a right to the soil over which it flows. It is a part of the freehold of which no man can be disseised "but by lawful judgment of his peers, or by due process of law." This is an ancient and fundamental maxim of common right to be found in *magna charta*, and which the legislature has incorporated into an Act declaratory of the rights of the citizens of this State. (Laws, sess. 10, ch. 1.)

I have intimated that the statute does not deprive the plaintiff of the use of the stream, until recompense be made. He would be entitled to his action at law for the interruption of his right, and all his remedies

at law, and in this court, remain equally in force. But I am not to be understood as denying a competent power in the legislature to take private property for necessary or useful public purposes; and, perhaps, even for the purposes specified in the Act on which this case arises. But to render the exercise of the power valid, a fair compensation must, in all cases, be previously made to the individuals affected, under some equitable assessment to be provided by law. This is a necessary qualification accompanying the exercise of legislative power, in taking private property for public uses; the limitation is admitted by the soundest authorities, and is adopted by all temperate and civilized governments, from a deep and universal sense of its justice.

Grotius (De Jur. B. & P. b. 8, ch. 14, s. 7),[1] Puffendorf (De Jur. Nat. et Gent. b. 8, ch. 5, s. 7), and Bynkershoeck (Quæst. Jur. Pub. b. 2, ch. 15), when speaking of the eminent domain of the sovereign, admit that private property may be taken for public uses, when public necessity or utility require it; but they all lay it down as a clear principle of natural equity, that the individual whose property is thus sacrificed, must be indemnified. The last of those jurists insists, that private property cannot be taken, on any terms, without consent of the owner, for purposes of public ornament or pleasure; and, he mentions an instance in which the Roman Senate refused to allow the prætors to carry an aqueduct through the farm of an individual, against his consent, when intended merely for ornament. The sense and practice of the English government are equally explicit on this point. Private property cannot be violated in any case, or by any set of men, or for any public purpose, without the interposition of the legislature. And how does the legislature interpose and compel? . . . [Here follows a passage from 1 Bl. Com. 139. See *supra*, p. 952.]

I may go further, and show that this inviolability of private property, even as it respects the acts and the wants of the State, unless a just indemnity be afforded, has excited so much interest, and been deemed of such importance, that it has frequently been made the subject of an express and fundamental article of right in the constitution of govern-

[1] This citation should be Book ii. c. 14, s. 7. The treatise has but three books. Chapter fourteen relates to the promises and contracts of kings. After speaking of the sense in which they may be said to incur obligations to their subjects, the author goes on, in section 7, thus: "VII. Sed hoc quoque sciendum est, posse subditis jus etiam quæsitum auferri per regem duplici modo, aut in pœnam, aut ex vi supereminentis dominii. Sed ut id fiat ex vi supereminentis dominii, primum requiritur utilitas publica; deinde, ut si fieri potest compensatio fiat ei qui suum amisit, ex communi. Hoc ergo sicut in rebus aliis locum habet, ita et in jure quod ex promisso aut contractu quæritur."

In Whewell's translation the passage is given thus: "This also is to be noted, that a right, even when it has been acquired by subjects, may be taken away by the king in two modes; either as a Penalty, or by the force of Eminent Dominion. But to do this by the force of Eminent Dominion, there is required, in the first place, public utility; and next, that, if possible, compensation be made to him who has lost what was his, at the common expense. And as this holds with regard to other matters, so does it with regard to rights which are acquired by promise or contract."

For other passages from Grotius, as well as the other citations in the text, see *supra*, pp. 946–950. — Ed.

ment. Such an article is to be seen in the bill of rights annexed to the constitutions of the States of Pennsylvania, Delaware, and Ohio; and it has been incorporated in some of the written constitutions adopted in Europe (Constitutional charter of Lewis XVIII. and the ephemeral, but very elaborately drawn, Constitution *de la République Française* of 1795). But what is of higher authority, and is absolutely decisive of the sense of the people of this country, it is made a part of the Constitution of the United States, "that private property shall not be taken for public use, without just compensation." I feel myself, therefore, not only authorized, but bound to conclude, that a provision for compensation is an indispensable attendant on the due and constitutional exercise of the power of depriving an individual of his property; and I am persuaded that the legislature never intended, by the Act in question, to violate or interfere with this great and sacred principle of private right. This is evident from the care which this Act bestows on the rights of the owners of the spring, and of the lands through which the conduits are to pass. These are the only cases in which the legislature contemplated or intended that the Act could or should interfere with private right, and in these cases due provision is made for its protection, or for compensation. There is no reason why the rights of the plaintiff should not have the same protection as the rights of his neighbors, and the necessity of a provision for his case could not have occurred, or it, doubtless, would have been inserted. Until, then, some provision be made for affording him compensation, it would be unjust, and contrary to the first principles of government, and equally contrary to the intention of this statute, to take from the plaintiff his undoubted and prescriptive right to the use and enjoyment of the stream of water. . . .

I shall, accordingly, upon the facts charged in the bill, and supported by affidavits, as a measure immediately necessary to prevent impending injury, allow the injunction, and wait for the answer, to see whether the merits of the case will be varied. *Injunction granted.*[1]

[1] Compare Chancellor Kent, in 1832 (1 Kent's Com. *447): "The principle in the English government, that the Parliament is omnipotent, does not prevail in the United States; though, if there be no constitutional objection to a statute, it is with us as absolute and uncontrollable as laws flowing from the sovereign power under any other form of government." See *ante*, p. 165, note.

This case and that of *Sinnickson* v. *Johnson* (*infra*, p. 986), are sometimes referred to as if they judicially held that in a State where the Constitution is silent, the courts can disregard a legislative Act which plainly and indisputably takes private property for public purposes, without providing for compensation. Neither case so holds. In *Gardner* v. *Newburgh*, the statute was not set aside; but its true construction was declared, and the defendants were enjoined from violating it. This construction was reached on the ground, first, that other parts of the statute indicated the intention to be what is now laid down; and, second, that the contrary view would impute to the legislature what would be "unjust and contrary to the first principles of government." This method, in constitutional questions, that of construction, is one on which courts may travel far; and they do and should. Compare *Note to Paxton's Case*, *ante*, p. 48, Doe, J., in *Orr* v. *Quimby*, 54 N. H. 647, and *Com.* v. *Lehigh, &c. Co.*, 29 Atl. Rep. 664, 665 (Pa. July, 1894). — Ed.

ROGERS *v.* BRADSHAW.

NEW YORK COURT OF ERRORS. 1823.

[20 *Johns.* 735.[1]]

S. Young and *H. Bleecker*, for the plaintiffs in error.

A. Van Vechten, for the defendant in error.

The CHANCELLOR [KENT]. This case came before the Supreme Court upon *certiorari*, founded on a justice's judgment.

It appeared by the return of the justice, that Bradshaw sued Rogers and Magee, in trespass, for entering, in June, 1821, upon his land, and cutting down timber. They justified under the several Acts relative to the canals. It was shown in proof, that the route of the northern canal, at the place in question, was directed by the chief engineer; that the turnpike road adjoining the place where the trespass was alleged to have been committed, was unavoidably encroached on by the tract or course of the canal, and that another road was indispensable at that place, and must have been made before the canal was commenced; that the land on which the entry was made, was a necessary, if not the only course for the road, and was the least expensive, and best for the accommodation of the public; the chief engineer approved of the road as staked out, and it was staked out by his direction, and was in length about forty-two rods, and in width four rods; and the two defendants, under the authority of the canal commissioners, and in pursuance of a contract with one of them, were putting the ground in the form of a turnpike, when the action of trespass was brought. The timber and wood cut down were supposed to have been worth from twenty to forty dollars. Upon these facts, the justice held the justification valid, and gave judgment for the defendants.

The Supreme Court reversed the judgment of the justice; and in the opinion delivered by the Chief Justice in behalf of the court, it was stated, that the land of Bradshaw was not entered upon for the prosecution of canal improvements, but was taken as a substitute for part of the turnpike road, which had been broken up and taken for the canal, and therefore the case did not come within the powers given to the canal commissioners by the Act of 1817. It was further stated, that the case did not come within the powers granted by the Act of 1820, because a turnpike was not a public road or highway, within the meaning of the Act, and because the Act contained no provision for compensation to the owner of the land so taken. . . .

According to my view, then, of the case, the Supreme Court were mistaken when they held, that the Act of 1817 did not apply to the case, on the ground that the land of the defendant in error had not been entered upon for the prosecution of the canal improvements. I

[1] The statement of facts is omitted. — ED.

apprehend, they were equally in an error when they held, that under the subsequent Act of 1820, the proceedings were indefensible. . . .

It appears to me to be a sufficient answer to this objection, that the Act of 1817 had provided the remedy for compensation for every injury committed by the commissioners in the execution of their powers; and when new powers are added (though, I apprehend, the Act of 1820 did not, on this point, confer any power not before existing), the same remedy would apply. . . .

If the remedy given in 1817 did not extend to lands appropriated under the powers mentioned in the latter Act, yet I should doubt exceedingly, whether the general principle, that private property is not to be taken for public uses without just compensation, is to be carried so far as to make a public officer who enters upon private property by virtue of legislative authority, specially given for a public purpose, a trespasser, if he enters before the property has been paid for. I do not know, nor do I find, that the precedents will justify any court of justice in carrying the general principle to such an extent. The Supreme Court, in one part of their opinion, admit, that the canal commissioners have a right to enter upon, and occupy lands, necessary to effectuate the objects of their appointment, without having first paid the loss and damage the proprietor of lands may sustain. This equitable and constitutional title to compensation, undoubtedly, imposes it as an absolute duty upon the legislature to make provision for compensation, whenever they authorize an interference with private right. Perhaps, in certain cases, the exercise of the power might be judicially restrained, until an opportunity was given to the party injured to seek and obtain the compensation. But it would deserve a very grave consideration before we undertook to lay down the broad proposition, that notwithstanding a statute clearly and expressly directed the assumption of private property for a necessary public object, it would still be a nullity, and the officer who undertook to execute it a trespasser, if a provision for compensation did not constitute part and parcel of the Act itself. However, it is not necessary to give any opinion on this point, for, as I have already observed, the provision for compensation, in the Act of 1817, extended to cases arising under the Act of 1820.

I am, accordingly, of opinion, that whether the justification of the commissioners be referred to the Act of 1817, or of 1820, it is equally valid and effectual, and that the judgment of the Supreme Court is, consequently, erroneous, and ought to be reversed.

This being the unanimous opinion of the court, it was, thereupon, ordered, adjudged, and decreed, that the judgment of the Supreme Court be reversed, &c., and that the record be remitted, &c.

Judgment of reversal.[1]

[1] And so *Jerome* v. *Ross*, 7 Johns. Ch. 315, 344. But see Randolph, *Eminent Domain*, s. 229.

In a case relating to taxation it was said by BREWER, J., for the court, in *Paulsen* v. *Portland*, 149 U. S. 30, 38 (1892), that, "While not questioning that notice to the

SINNICKSON v. JOHNSON ET AL.

NEW JERSEY SUPREME COURT OF JUDICATURE. 1839.

[2 *Harrison*, 129.]

R. P. Thompson, for plaintiff, *W. N. Jeffers*, for defendants.

DAYTON, J. The declaration complains of the defendants for an injury done to their meadows by reason of the erection and continuance of a dam over Salem Creek. The defendants plead as a justification, that said dam was erected and continued by virtue of an Act of the Legislature of the State, entitled, "An Act to authorize John Denn, of the county of Salem, to shorten the Navigation of Salem Creek, by cutting a Canal," passed November 6, 1818. All which is set out with proper averments. To this plea, the plaintiff has demurred, and the defendants have filed a joinder. [The statement of the contents of the Act is placed in a note.[1]]

tax-payer in some form must be given before an assessment for the construction of a sewer can be sustained, as in any other demand upon the individual for a portion of his property, we do not think it essential to the validity of a section in the charter of a city granting power to construct sewers that there should in terms be expressed either the necessity for or the time or manner of notice. The city is a miniature State, the council is its legislature, the charter is its Constitution; and it is enough if, in that, the power is granted in general terms, for when granted, it must necessarily be exercised subject to all limitations imposed by constitutional provisions, and the power to prescribe the mode of its exercise is, except as restricted, subject to the legislative discretion of the council."

Compare *Davidson* v. *N. O.*, 96 U. S. 97, 105; s. c. *supra*, pp 610, 614 — ED.

[1] The Act in question (Pamph. L. of 1818, p. 5) enacts substantially as follows: —

Sec. 1. That John Denn be authorized to cut the canal as therein prescribed.

Sec. 2. That the canal shall be cut wholly on the land of said Denn, at least twenty-two feet broad at the top and of sufficient width at the bottom, and depth of water for all vessels navigating said creek; and shall, when cut and opened, be at all times afterward a public highway, and be kept open at least of the depth and width aforesaid, at the sole expense of said Denn, his heirs and assigns.

Sec. 3. That when said Denn shall have completed the canal, as is directed, and obtained a certificate thereof from the Chosen Freeholders of the townships of Mannington and Lower Penns Neck, or a majority of them, and filed the same in the Clerk's Office of the county of Salem, "it shall and may be lawful for the said John Denn, his heirs and assigns, to build a bridge over the said Salem Creek, *for the accommodation of himself, his heirs and assigns*, opposite the mansion house of the said John Denn," provided that the land to be occupied in its construction be his own, and that he do not by its abutments contract the creek so as to injure the navigation; and do put a draw in the same, at least twenty-two feet wide, and that he, his heirs and assigns, maintain said bridge and draw, at their own cost and charges.

Sec. 4. That any person who shall obstruct the digging of the canal, &c., or injure the bridge, &c., shall forfeit one hundred dollars, to said Denn, his heirs and assigns

Sec. 5. That when the canal shall have been completely finished, and made navigable for vessels as aforesaid, and shall be used and found sufficient for the space of three years after being first used, "it shall and may be lawful for the said Denn, his heirs or assigns, to stop the creek at the place where the said bridge may have been erected;" from which time his liability to maintain the bridge and draw shall cease.

The point presented by the demurrer, is this: Does the above Act exonerate John Denn, his heirs and assigns, from the payment of damages done to individuals, by stoppage of the creek? Great care has been used by the legislature, in providing another navigable highway for the public, in lieu of that which was authorized to be stopped up. So, too, the legislature have provided against all damages (which could be anticipated) to private rights. John Denn was to use no one's land but his own, and everything was to be done at his individual expense. But although I think it plain that the legislature never intended to injure private rights, yet the unforeseen result is otherwise. The meadows in question are admitted, by the state of the pleadings, to have been damnified by the stoppage of this creek; and yet the statute which authorizes the Act has not provided compensation for the injury. The constitutionality of the law is not now questioned; but it is insisted that the common law right of the plaintiff to recover damages is in full force. And in this position, I think, the plaintiff is right.

It is a well settled rule, that statutes in derogation of common law rights are to be strictly construed; and we are not to infer that the legislature intended to alter the common law principles, otherwise than is clearly expressed. 11 Mod. 149.

Chancellor Vroom in an opinion delivered in the term of August, 1835, in reference to another branch of the same subject matter, which is now before us, laid down the position distinctly, that the Act in question does not exempt him who does an injury from damages; which opinion, thus far, the counsel contend, is not law.

But the question whether a party who has acted in pursuance of a statute, is protected from damages, where the statute itself is silent, has been before some, at least, of our most respectable State courts. In the case of *Gardner* v. *The Trustees of Newburgh et al.*, 2 J. C. C. 162, a company had been chartered to supply the town of Newburgh with pure water, but were restrained by injunction from diverting a water-course, as authorized by the statute, until compensation was made to the owners of the land through which it ran, although the Act made no provision for such compensation to them; and Kent, Ch., observed, that the owner of the lands "would be entitled to his action at law, for the interruption of his right, and all his remedies at law, and in that court, remained equally in force."

The case of *Crittenden* v. *Wilson*, 5 Cowen, 166, is in point. In this case, the court held that the right of the legislature to grant the privilege of making a dam over the Otselic River, which was a public highway, was too clear to be disputed, but the grantee took it subject to the restriction, *sic utere tuo, ut alienum non lædas.* That if no provision for the payment of damages done to individuals, by reason of the dam, had been made by statute, the defendant would still be liable to pay them.

It is true that in *Rogers* v. *Bradshaw*, 20 J. R. 735, it is intimated that an exception to this rule may exist in the case of public commis-

sioners acting under direction of the statute, as the direct agents of the State in the execution of a great public improvement, and not as volunteers for their own benefit.

In the case of *Stephens* v. *Proprietors of the Middlesex Canal*, 12 Mass. R. 466, it is said that should the legislature authorize an improvement (as cutting a canal) the execution of which would require or produce the destruction, or diminution of private property, without at the same time giving relief, the owner would undoubtedly have his action at common law for damages.

These authorities would appear to cover and rule the present case. But it was contended by counsel, that they were decided upon their respective States' bills of rights, which declare that private property shall not be taken for public use, without just compensation, and that as our Constitution contains no such limit or restriction, the cases have no application, or in other words that the Legislature of New Jersey being unrestricted by constitutional provisions, is omnipotent, and may take private property for public use, without compensation, whenever it shall will to do so.

The right to take private property for public use does not depend on constitutional provisions, but is one of the attributes of sovereign power; and the Constitution of the United States recognizes it as such, when it says, the right shall not be exercised without just compensation. This power to take private property reaches back of all constituted provisions; and it seems to have been considered a settled principle of universal law, that the right to compensation is an incident to the exercise of that power: that the one is so inseparably connected with the other, that they may be said to exist not as separate and distinct principles, but as parts of one and the same principle. Puffendorf, b. 8, ch. 5, p. 222; 2 Montesquieu, ch. 15, p. 200; Vattel, 112, 113; 1 Black. C. 139; 2 Kent, C. 339, 340; 2 J. C. C. 168; 1 Peter's Com. R. 99, 111; 3 Story's Com. on Constitution, 661; *Bonaparte* v. *Camden and Amboy Railroad Company*, Bald. R. 220. The language of Judge Baldwin, in the case last cited, is "the obligation" to (make compensation), "attaches to the exercise of the power" (to take the property), "though it is not provided for by the State Constitution, or that of the United States had not enjoined it."

And Story calls the provision on this subject, in the Constitution of the United States, merely "an affirmance of a great doctrine established by the common law." This principle of public law has been made, by express enactment, a part of the Constitution of the United States (*vide* 5th Amendment), but it has been decided that as a *constitutional* provision, it does not apply to the several States. *Barron* v. *Mayor of Baltimore*, 7 Peters, 247; *Livingston's Lessee* v. *Moore*, 7 Peters, 551, 552. Still if the opinions of the above distinguished jurists be correct, it is operative as a principle of universal law; and the legislature of this State can no more take private property for public use, without just compensation, than if this restraining principle were incor-

porated into, and made part of its State Constitution. I have felt it a duty to notice this point, thus far, because of its interest and importance in the abstract, and of the great reliance placed upon it in the argument of the counsel, though I scarcely considered it necessary for the settlement of this case, to pronounce upon it a different opinion.

According to my understanding of the Act in question, the legislature neither intended to take, nor has it taken, private property for public use, in the sense in which these terms are properly to be understood. For the accommodation of John Denn, they authorized him (if he thought proper so to do) to stop up a navigable creek upon condition that he cut a canal at his own expense and upon his own property, as a highway for the public, in lieu of the creek. By the terms of the Act, therefore, I think, the legislature has manifested a clear intent to provide against any interference with private property. It merely agreed to give up its right of passage upon the creek (or in other words, its public property there) for another right of passage equally or more valuable, to be provided by John Denn. The damages which have accrued to the meadow owners have not arisen from cutting the canal, which, in one sense, was for the benefit of the public, but by the stoppage of the creek, which was for the individual benefit, or private emolument of John Denn.

The case therefore is not within the principle laid down in 4 Durn. & E. 796, and *Sutton* v. *Clark*, 6 Taunt. 29, 41, where it was held that public officers acting under the authority of an Act of Parliament, in repairing public streets, were not answerable for damages, unless they were guilty of an excess of jurisdiction; that the maxim applied, *salus populi, suprema est lex*, and that if no satisfaction were given by the Act of Parliament, the party was without remedy. It is not therefore necessary to inquire whether or not these cases conflict in principle with those already cited. Gibbs, C. J., in *Sutton* v. *Clark*, carefully distinguishes the case of a public officer who is bound to execute a duty imposed on him by statute, from that of a mere volunteer, who acts not for public purposes, but private emolument. I think it can hardly be pretended, that John Denn stopped Salem Creek for public purposes under any obligatory directions of the statute. So far from this, it is evident on the face of the act, that it was done voluntarily and for his own accommodation. The most that can be said for him is, that by cutting the canal, he paid a consideration to the public, for the privilege of doing so.

The powers given by the Act to John Denn are such only as he would have had, if the creek in question had been his own. He can build his bridge over it, or dam it up, at his pleasure, and his bridge or dam cannot be complained of by the public, as a nuisance; but if in exercising his rights, he damnifies the property of his neighbors, he is liable, like every other citizen, to respond in damages to the amount of the injury.

Judgment must be entered for the plaintiff on demurrer, with costs.

NEVINS, J. . . . Upon examining this Act I cannot view it in any other light than a private Act and intended for the benefit of John Denn. . . . Does this Act then confer upon John Denn and his assigns the right to take, injure, or destroy private property, without compensation to the owners? If it does, it is unconstitutional and void, and in violation of natural justice, and therefore would not be a defence to the plaintiff's claim. If it does not confer such right, it constitutes no justification, and the plea cannot therefore be sustained. The legislature are to be considered as conferring nothing but what they had a constitutional right to grant. They could not grant to him the right to overflow the land of the plaintiff or in any other way to injure or destroy it without compensation, and if no such compensation is provided for, the plaintiff has a right to seek his remedy through courts of justice by suit. It is no answer to say that the party injured must or may resort to the justice of the legislature. If such be his only remedy, it is of too vague, indefinite, and uncertain a character to be recognized by courts. The Constitution and laws of this State can never leave the citizen such remedy only, for a clear infringement of his private rights. Nor is it an available argument to say that if the defendants, as the assignees of John Denn, are to respond to the plaintiff in this action for the injury to his property by reason of an act authorized by law, the consequences to them may be ruinous, and the work contemplated by the act, absolutely prevented. Suppose it to be so, may it not be answered that in accepting the grant, they acted voluntarily, and should have foreseen and provided against the consequences, and would it not be equally if not more unjust and oppressive upon the plaintiff to ruin, or destroy his property, without the slightest compensation or recompense?

I am of opinion that the plea is no justification to the act complained of, and that the demurrer therefore be sustained.

HORNBLOWER, Ch. J., concurred in sustaining the demurrer. He had not time to prepare a written opinion.

FORD, J., read an opinion sustaining the demurrer.

WHITE, J., was not present at the argument, and gave no opinion.

Judgment for plaintiff, on the demurrer, with costs.

IN *Harvey* v. *Thomas*, 10 Watts, 63, 66 (1840), in holding valid a Pennsylvania statute of May 5, 1832, for the construction of lateral railroads to connect private property with certain public improvements, the court (GIBSON, C. J.) said: "The most material point in the cause is that which involves the constitutionality of the statute on which the defendant's right is founded; but it is one about which little need be said. If there is an appearance of solidity in any part of the argument, it is that the legislature have not power to authorize an application of another's property to a private purpose even on compensation made, because there is no express constitutional affirmance of such a power. But who can point out an express constitutional disaffirmance of it?

The clause by which it is declared that no man's property shall be taken, or applied to *public* use, without the consent of his representatives, and without just compensation made, is a disabling, not an enabling one; and the right would have existed in full force without it. Whether the power was only partially restrained for a reason similar to that which induced an ancient lawgiver to annex no penalty to parricide, or whether it was thought there would be no temptation to the act of taking the property of an individual for another's use, it seems clear that there is nothing in the Constitution to prevent it; and the practice of the legislature has been in accordance with the principle, of which the application of another's ground to the purpose of a private way is a pregnant proof. It is true that the title of the owner is not divested by it; but in the language of the Constitution, the ground is nevertheless 'applied' to private use. It is also true, that it has usually, perhaps always, been so applied on compensation made; but this has been done from a sense of justice, and not of constitutional obligation. But as in the case of the statute for compromising the dispute with the Connecticut claimants, under which the property of one man was taken from him and given to another, for the sake of peace, the end to be attained by this lateral railroad law is the public prosperity. Pennsylvania has an incalculable interest in her coal mines; nor will it be alleged that the incorporation of railroad companies, for the development of her resources, in this or any other particular, would not be a measure of public utility; and it surely will not be imagined that a privilege constitutionally given to an artificial person, would be less constitutionally given to a natural one. . . . *Judgment affirmed.*" [1]

[1] In affirming this point, in *Hays* v. *Risher*, 32 [illegible]9, 177, the court (WOODWARD, J.) said. "The truth is, when a lateral railroad is laid upon intervening lands, private property is not taken for private use, and there was no occasion for Judge Gibson's remark in *Harvey* v. *Thomas*, 10 Watts, 63, that the Constitution does not forbid such taking. The private property is taken for public use — for clear and definite objects of a public nature which are of sufficient importance to attract the sanction of the sovereign. That an individual expects to gain thereby, and has private motives for risking the whole of the necessary investment, and acquires peculiar rights in the work, detracts not a whit from the public aspects of it. The same thing can be said of every railway corporation and of almost every public enterprise."

The statute as to lateral railroads provided that, any owner of land, mills, quarries, coal mines, lime-kilns or other real estate, not over three miles from any railroad, canal, or slack water navigation made by the State or any corporation, who wishes to make a railroad thereto over any intervening land, may enter and survey, and on petitioning the court of common pleas of the county, have six commissioners appointed, and on the report of any four of these that such railroad is necessary and useful "for public or private purposes," and after certain other judicial proceedings, may have a final order authorizing the road. The petitioners are to own the road. Anybody may use it, but only in the proprietors' wagons, at specified rates. The Commonwealth may at any time take the roads on repaying the owners their outlay. *Dunl. Laws Pa.* (ed. 1847) 487.

Compare 6 Am. Law Rev. 197, *Taylor* v. *Porter et al.*, 4 Hill, 140, 148, NELSON, C. J., dissenting; and many cases holding the laying out of so-called "private roads" constitutional; *e. g. Sherman* v. *Binck*, 32 Cal. 241 (1867), affirmed in *Monterey Co.* v. *Cushing*, 83 Cal. 507, 511 (1893), and *Los Angeles Co.* v. *Reyes*, 32 Pac. Rep. 233 (Cal. Feb. 1893). Compare also *Matter of Split Rock Cable Co.*, 128 N. Y. 408. — ED.

RALEIGH & GASTON RAILROAD COMPANY *v.* DAVIS.

SUPREME COURT OF NORTH CAROLINA. 1837.

[2 *Dev. & Bat.* 451.]

THE plaintiffs were incorporated by an Act of the General Assembly passed in December, 1835 (2 Rev. Stat. 299), "for the purpose of effecting a communication by a railroad from some point, in or near the city of Raleigh, to the termination of the Greensville and Roanoke Railroad, at or near Gaston, on the Roanoke River." After providing for the organization of the company, with the usual faculties of pleading and being impleaded, and purchasing and holding estates real and personal, as far as may be necessary for the purposes of the Act, it proceeds in the seventh section, "to invest the president and directors with all the rights and powers necessary for the construction, repair, and maintaining a railroad, to be located as aforesaid, and to make and construct all such works as may be necessary and expedient to the proper completion of the road." By the 12th section, the company have immediately "full power to enter upon all lands through which they may wish to construct the road, to lay out the same," not invading dwelling-houses, etc., and with other restrictions, particularly mentioned. And by the 17th and 21st sections, entry may be made upon the lands thus laid off for the purpose of constructing the road, and upon adjacent lands for the purpose of getting the necessary materials, with a provision in the 22d section for redress by action and double damages, for any wanton or wilful injury to the land, crops, or other property, by an entry for either of these purposes.

To provide for the condemnation of the land thus laid off for the road, or entered upon after having been thus laid off, and also to provide for a compensation to the owner of the land, is the subject of nine sections of the Act — beginning with the 12th and ending with the 20th section. The material provisions of those parts of the Act are, that if the company and the owner of the land cannot agree as to the terms of purchase, the former is authorized, after notice to the owner, to apply to the Court of Pleas and Quarter Sessions, and the court is thereupon required to "appoint five disinterested and impartial freeholders, to assess the damages to the owner from the condemnation of the land for the purpose aforesaid, any three of whom, after being sworn and viewing the premises and hearing such evidence as either party may offer, may ascertain those damages and certify the same" in a form given in the Act: and in making the assessment, "they shall consider the proprietor of the land as the owner of the whole fee-simple interest therein, and take into consideration the quality and quantity of the land condemned, the additional fencing that will be required thereby, and all the inconveniences that will result to the proprietor from the condemnation thereof." The report of the freeholders,

when thus made, is to be returned by them forthwith to the court, and "unless some good cause be shown against the report, it shall be confirmed by the court, and entered of record; whereupon, upon payment or tender of the damages," the land reviewed and assessed as aforesaid shall be vested in the Raleigh and Gaston Railroad Company, and they shall be adjudged to hold the same in fee simple, in the same manner as if the proprietor had sold and conveyed it to them. "If the company shall take possession of any land, and fail for forty days to institute proceedings for its condemnation as aforesaid, or shall not prosecute them with diligence, the proprietor of the land may apply to the court to appoint the freeholders with the same duties and powers in all respects as before, and the court shall in like manner affirm or disaffirm the report;" and "when any such report, ascertaining the damages, shall be confirmed, the court shall render judgment in favor of the proprietor for the damages so assessed and double costs, and when the damages and costs shall be satisfied, the title of the land for which such damages are assessed shall be vested in the company in the same manner as if the proprietor had sold and conveyed it to them."

By other parts of the Act, the company is required, under pain of forfeiture, to begin the work within two, and finish it within ten years; and is vested with the exclusive right of transportation on the road, and required to transport all persons and property for certain tolls.

It is a misdemeanor, punishable by fine and imprisonment, to destroy or injure the road, or place any obstruction on it.

By section 25, all machines and vehicles and "all the works of the said company constructed, or property acquired under the authority of the Act, and all profits which shall accrue from the same, shall be vested in the respective stockholders of the company forever, in proportion to their respective shares; and the same shall be deemed personal estate, and shall be exempt from any public charge or tax for fifteen years."

By the last section, "the corporate powers granted by the Act are to enure for ninety years and no longer, unless renewed by competent authority."

The road, as laid out, passes over the land of Mr. Davis, situate in Warren County, and, at November Term, 1836, the company moved the court of that county to appoint five freeholders to make the assessment, according to the Act. Mr. Davis appeared and made known to the court, that he and the company had been unable to agree touching the price to be paid to him for the land sought to be condemned, or touching the compensation for the inconveniences he must be subjected to by the proposed location of the road. And he refused his assent to the mode of proceeding for settling the controversy touching the said price and compensation then and there prosecuted by the company, but objected to the same — first, as a violation of the right of private property secured by the 12th section of the Bill of Rights; and, secondly, as depriving him of the right to a trial by jury, which is made inviolable

by the 14th section of the same instrument. The court, nevertheless, appointed the freeholders, and made the order specifying their duties in the words of the statute. At the next term, three of them returned their report in the form prescribed in the 14th section, together with the certificate of the justice of the peace who administered the oath to them.

The company thereupon moved to confirm the report and have it entered of record; but the other party opposed the motion, and prayed the court to dismiss the proceedings. Upon consideration thereof, the County Court refused the motion of the company, and granted that of Mr. Davis; from which an appeal was prayed, which was also refused, upon the ground that no appeal is given in the charter.

The case was then brought into the Superior Court by a *certiorari*, and was there heard on the last Spring Circuit, before his Honor JUDGE BAILEY, when the order of the County Court, dismissing the proceedings, was held to be erroneous, and reversed with costs, and a writ of *procedendo* ordered, commanding the County Court to proceed further in the case according to the said Act of the General Assembly and the law of the land. From that judgment Mr. Davis appealed to this court.

The case was argued at the last term, by *Badger*, for the plaintiffs, and the *Attorney-General* and *W. H. Haywood*, for the defendants. The court continued the case under advisement until the present term, when their opinion was delivered by RUFFIN, CHIEF JUSTICE; who, having stated the case as above, proceeded as follows: — As no objection was made in either of the courts below, that the road was laid out so as to cover more land or in a different form than the charter authorizes; or that the freeholders acted irregularly; or that the damages assessed are not a fair and adequate compensation for the fee-simple of the land taken and all incidental damages, it must be assumed, that there is no ground for exception in either of those respects. The case is therefore to be decided on the specific constitutional objections made on the part of the defendant.

Upon those questions the court had the benefit of a full argument at the last term. The impressions received were then so decided, as to have warranted the delivering of our judgment immediately, if it had been necessary, but as the prosecution of the work conducted by this company could not be impeded by the delay, and some of the points made are novel and of much magnitude, in reference to a class of subjects on which there has been recently and probably will be copious legislation, it seemed discreet, before announcing a decision, to give to the argument, and to the whole subject, the deliberation for which the vacation offered the opportunity.

The right of the public to private property, to the extent that the use of it is needful and advantageous to the public, must, we think, be universally acknowledged. . . . This, too, is not only the right of the nation, constituted by the aggregate body of the people, but it is a

right and power of government. It was said at the bar, that it was a sovereign right, and therefore remains with the people of this State, since it is not granted in the Constitution. The position, if true, would destroy the value of the power here and dissolve the government. But it seems to the court wholly untenable. It is true the eminent domain is a political and sovereign power; so is every other power vested in, or exercised by, any government. Before a people institute a government, they are themselves necessarily the possessors of all political power which men, by the natural and divine law, can rightfully exercise over each other. But by the constitution of government, the political powers requisite to the existence of government and to the discharge of those functions for which the community created it, are transferred by the people to the government. From the people, the government derives the power to act on and control the people themselves, unless in those points in which the government is restricted by limitations of power. With that exception, the powers of the nation become those of the government, save only that over the constitution of government itself, to abolish or alter it. The government of the United States is an exception to the general principle, from its peculiar construction. To its formation the people of the several States were parties, and they, as the people of several States, have specially delegated to it particular powers for the purpose of making themselves one people, under one government, for particular purposes only. But these incidental powers, derived by a fair, proximate, and natural implication from those enumerated, or from the purposes of forming the Constitution, as declared on its face, have been exercised, and must be yielded. The government of North Carolina, however, is not one of specially delegated powers: it is only one of limited and restricted power.

The Constitution begins by simply "establishing a government for this State," and vests "the legislative power in a Senate and House of Commons." There are no grants of power to the legislature except in a few instances, where the power would not seem naturally to arrange itself under the general class of legislative powers, according to precedent usage, as the election of the Governor and other high officers. It does not even confer the revenue power, nor that of granting the vacant lands; yet the legislature has always exercised both powers, by levying taxes, and by authorizing dispositions of the public domain, although "the right to the unappropriated soil is declared to be, in a free government, one of the essential rights of the collective body of the people," which means nothing more than that it shall not be seized on by any individual or particular class, but shall be kept or disposed of for the common benefit of the whole people. This power, or right of eminent domain, is likewise possessed by the government, and may be exercised by the legislature or under its authority. Unless vested there, it cannot be called into action, and without it neither the government nor the State could hold together. It is peculiarly fit to be wielded by the legislature — it is a power founded on necessity. But it is a neces-

sity that varies in urgency with a population and production increasing or diminishing, and demanding channels of communication, more or less numerous and improved, and therefore to be exercised according to circumstances, from time to time. The Legislature of North Carolina, when it was a province, and since it became a State, have always exercised it, either directly or through the intervention of the courts that administer the domestic police of the several counties. It is a power which the government is bound to the people to exercise, limited only by a sound discretion as to the number and nature of the roads, and restricted as to the mode of exercising it by the provisions in the Constitution, if any such there be. It is contended that there are such provisions, and that the Act before us is in violation of them in several respects.

It is said — first, that the right of property involves the right to precedent compensation for it, when taken for public use. It is thence deduced as a corollary, that the questions whether the property shall be taken, and what compensation shall be paid for it, do constitute a question at law respecting property, and must be tried by a jury, according to the 14th section of the Bill of Rights.

If the government can lawfully take private property for public use, without compensation, then, confessedly, there is no controversy to be tried by a jury. But the government may prescribe such terms as may be deemed befitting its own character and the justice of the State. So, though there be a constitutional obligation on the government to make compensation, yet if the compensation need not precede the taking of the property, the condemnation of the defendant's land is not illegal, because he may refer to the constitutional mode of ascertaining and enforcing payment of its value and other damages. It behooves the counsel for the defendants, therefore, to establish both parts of the proposition.

The right to compensation, as an absolute and legal right, was contested by the counsel for the plaintiffs, and strenuously asserted on the other side. The court do not decide it, but in this case will assume it to exist as contended on the part of the defendant, though not on all the grounds on which his counsel placed it. The court cannot adopt some of the several distinct sources from which it was derived.

One of them was the Fifth Amendment of the Constitution of the United States, providing that "no person shall be deprived of his life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation." That has always been understood to be a limitation of the power of the Federal government, and not of that of the States. It was authoritatively so held by the Supreme Court of the United States, in *Barron* v. *The Mayor of Baltimore*, 7 Peters's Rep. 243, which dispenses with further observations from this court.

The natural right and justice of compensation, and the nature of our free institutions, were also relied on as sufficient in themselves to create

the supposed restriction on this power. But the sense of right and wrong varies so much in different individuals, and the principles of what is called natural justice are so uncertain, that they cannot be referred to as a sure standard of constitutional power. It is to the Constitution itself we must look, then, and not merely to its supposed general complexion. There must be words in it which, upon a fair interpretation, and in reference to the subject-matter, and to direct consequences, are incompatible with the enactments of the legislature, before a court can pronounce such enactments null. The principle is, however, so salutary to the citizen, and concerns so nearly the character of the State, that it may well be urged that it must be consecrated by its adoption in some part of the free Constitution of this State. We should be reluctant to pronounce judicially our inability to find it in that instrument. If it be not incorporated therein, the omission must be attributed to the belief of the founders of the government that the legislature would never perpetrate so flagrant an act of gross oppression, or that it would not be tolerated by the people, but be redressed by the next representatives chosen. There is no doubt that, while the legislature and the people of this State expressly restrict the action of the general government on this subject, it must have been supposed by the people that their own local government was in like manner restrained, or would never act in a manner to make such a restraint necessary. There is, however, no clause in that instrument which seems to bear on the point, unless it be that which is relied on in the argument for the defendant. It is the twelfth section of the Bill of Rights, which declares, "that no freeman shall be disseised of his freehold, or deprived of his life, liberty, or property, but by the law of the land." Under the guaranty of this article, it has been held, and in our opinion properly held, that private property is protected from the arbitrary power of transferring it from one person to another. We doubt not that it is also protected from the power of despotic resumption, upon a legislative declaration of forfeiture, or merely to deprive the owner of it, or to enrich the treasury, unless as a pecuniary contribution by way of tax. Such Acts have no foundation in any of the reasons on which depends the power, in virtue of the right of eminent domain, to take private property for the public use, and they could not be sustained by the offer of the fullest compensation. Though not so obvious, it may also be true that the clause under consideration is restrictive of the right of the public to the use of private property, and impliedly forbids it, without compensation. But it is a point on which the court is not disposed, nor at liberty, to give a positive opinion on this occasion. It is not required as a preventive warning against unjust legislation. For it is more inadmissible to suppose that the legislative Acts will be designed to work oppression and wrong than to violate the Constitution directly. It is not deemed probable, and with difficulty conceived to be possible, that the legislature will at any time take the property of the citizen for public use, without at the same time providing some reasonable method of ascertaining a

just compensation, and some certain means of paying it. Moreover, it is not open to the court to give the definitive opinion demanded, because it does not, in our judgment, necessarily arise here, and it is indecent to decide so grave a question extrajudicially. Here the statute does give compensation fair and liberal, embracing not only the direct, but all incidental and consequential damages. For the purpose of this cause, therefore, it may be taken for granted that compensation is in all cases requisite, as no doubt it will in all cases be made. But with this admission, the court is of opinion that the proposition of the defendant's counsel, as to the mode of ascertaining it, and the period of payment, is not sound.

Unless the compensation must precede the seizure of the property, it is true that in many cases one of the principal securities for it is impaired, and by possibility may be lost, — that of the judicial enforcement of the right. When the property is taken for the public directly, and the payment is to be made out of the treasury, the compensation cannot be made the subject of litigation against the State, but the party must rely on the integrity of the legislature and the general will to have equal right done to all. Yet it seems impossible to lay it down as a principle that compensation is indispensably a condition precedent; and this must be added to the examples already known, in which an injunction of the Constitution cannot be made the subject of judicial cognizance, but finds its only sanction in the understanding and conscience of the legislator. The exigencies of the public may be too urgent to admit of the delay requisite to the simplest mode of previous investigation. In time of war, for example, an army must have food, or ammunition, or quarters, a field for encampment, or an intrenchment for defence, and the necessity is pressing and immediate. Other instances suggest themselves, in which a previous assessment cannot be had with any reasonable hope of doing justice. The Act before us supplies one such in the 21st section. It authorizes an entry into lands adjacent to the road, to cut, quarry, dig, and carry away wood, stone, gravel, or earth for the construction or repair of the road. And for those materials, and for all incidental damages done in taking or carrying them away, reasonable compensation is to be assessed by three freeholders, upon view and on oath. In the like manner, our public road law directs the overseer to cut timber and dig earth for bridges and causeways, and gives the owner a petition to the County Court for adequate compensation, to be fixed by the justices, out of the county funds. Antecedent assessments, in such cases, must be made entirely at a venture, for it is uncertain what quantity of materials will be requisite or can be procured at a particular place, or how many tracks may be broken on the owner's land, and even the weather and season of the year may materially vary the damage. Therefore the Acts must almost necessarily provide for payment for injuries done which can be seen, known, and truly estimated. The compensation to be adequate must be subsequent.

It may be observed that in this we only adopt the established course of legislation and adjudication in that country from which we derive Magna Charta and most of the other free principles declared in our Bill of Rights. The case of *Boyfield* v. *Porter*, 13 East, 200, is a decision upon a similar Act of Parliament, which confines the owner of the land to the remedy given by the Act. The case is cited with an acknowledgment that it is not an authority upon the question of legislative power in America; for that in England is unquestionably transcendant, and ours is as certainly limited. But when it is recollected with what reverence the great charter has ever been held by both branches of that legislature, and especially by that which is popular; and when, moreover, it is called to mind that the rights of private property have never been more respected than in that country, where it is carried to the extent, perhaps injurious, of successfully opposing great political reforms, and generally prevents the abolition of even a public office without compensation to the incumbent, it may reasonably be inferred that neither the Parliament, nor the courts, nor the people of that country perceived an infraction of the Magna Charta in those statutes. As practical evidence of the true sense of that clause in it, which has been transferred into our Bill of Rights, those legislative and judicial proceedings, though not authority, are entitled to much respect. In a still greater degree does the legislation of our own country, commencing at an early period of our provincial State, and continued up to the present time, upon the subject of laying out roads and making compensation, claim our attention as an authoritative exposition of the general sense, through a long course of time, of the relative rights of the public and of individuals. It establishes or recognizes, on the one hand, the obligations of the public to pay a fair remuneration for injuries to individuals for the public service; but, on the other, it evinces the settled usage, and thence the legality of providing that the compensation may be antecedent, or subsequent to the injury, as the necessities of the public for the property may be immediate or otherwise, and according to the convenience of both parties for truly estimating the amount. In the Constitution of New York is contained an express clause for compensation for private property taken for public use; and it is there settled also that neither the payment nor the assessment need precede the opening of a road over the land of an individual. *Core* v. *Thompson*, 6 Wendell, 634. Indeed, the principle applies alike to every entry on the land, and would exclude one even for examination and survey, if correct. The court concludes, therefore, that it is competent to the legislature to take private property, for the public use, without a previous or cotemporaneous payment of its value.

If the foregoing reasoning be just to establish the result declared, it seems to go far also to show that it is in the discretion of the legislature to appoint the tribunal by which the compensation shall be assessed. If the obligation on the legislature to make compensation be perfect

and constitutional, it may be competent to the judiciary to declare that the title of the individual was never divested if the legislature were to refuse, or for a long time delay, to make any compensation. Yet, if that which appears to be just, or does not appear to be insufficient, be provided and offered by the legislature, however it may have been fixed on, there is no ground for the interposition of the courts. It is said, if this be true, the party to the controversy nominates the judges to decide, and might, indeed, make the decision directly without a reference to any other person. Perhaps the Act might be found so nearly allied to the judicial functions as to be forbidden to the legislature. If it be not, the court is not aware of anything to prevent a legislative assessment, except propriety and the unfitness of large bodies for the impartial and minute investigations necessary to the justice of such cases. It is not likely that the attempt will ever be made, even in point of form, unless to carry into effect a previous agreement of parties. At all events, it was not done in this instance, but the decision was referred to persons judicially selected, impartial, and acting under oath, with opportunities for full information from evidence and from view. To such a tribunal no objection seems to be furnished by the principles of justice or by the provisions of the Constitution.

It was, however, contended at the bar that it is an evasion of the spirit, if not a violation of the express words, of the fourteenth section of the Bill of Rights, by which, "in all controversies at law respecting property, the ancient mode of trial by jury is to remain sacred and inviolate."

This is a controversy *at law*. Is it also one *respecting property?* In what sense is it so? The necessity for the road between different points is a political question, and not a legal controversy; and it belongs to the legislature. So, also, does the particular line or route of the road, whether it shall or shall not be laid out so as to pass over the lands of particular persons; and that has also been decided by the legislature or referred to scientific engineers. The only subject for the consideration of the jury is, therefore, the quantum of compensation. Reduced to that point, the case of *Smith* v. *Campbell*, 3 Hawks, 590, is a decision that it is not a controversy "respecting property," within the sense of the Bill of Rights. But the remaining words of the clause yet more clearly exclude this case from its operation. "The ancient mode of trial by jury" is the consecrated institution. This expression has a technical, peculiar, and well-understood sense. It does not import that every legal controversy is to be submitted to and *determined* by a jury, but that the trial by jury shall remain as it anciently was. Causes may yet be determined on demurrer, and that being an issue of law is determined by the court. Final judgment may also be taken on default, when the whole demand in certainty is thereby admitted; as is provided for actions of debt by the Act of 1777, which was passed by nearly the same persons who composed the Congress of 1776. Interest at a certain rate, fixed by law upon notes as well as bonds, and in

actions of assumpsit, is computed by the clerk; and costs, in all cases, taxed by him. These are all controversies respecting property in the same sense with the present, but they are none of them trials, or cases for trials, by jury. There is no trial of a cause, standing on demurrer or default. Trial refers to a dispute and issue of fact, and not to an issue of law, or inquisition of damages. The terms of this section are with respect to the controversies mentioned in it, analogous to those in the ninth section with respect to criminal prosecutions. That provides that "no freeman shall be convicted of any crime but by the unanimous verdict of a jury." Judgments may be undoubtedly given in indictments on demurrer, on the prisoner's standing mute and refusing to plead, upon submission, and upon *cognovit*. When, therefore, a conviction by verdict is spoken of, it has in view only the case of a plea by the accused and issue on it. That raises a question which can be tried only by jury, and determined against the accused only by the unanimous consent of the jury. "Trial by jury," in civil cases, is equivalent to "conviction by verdict" in criminal proceedings. They do not include, by force of those terms, any case in which there is not an issue of fact. It is the course, both in England and this country, to resort to this favorite Anglo-Saxon mode of determining all legal controversies, as well as trying issues, civil and criminal, where it can be used without great inconvenience. It might have been adopted in this instance, and probably would have been prescribed in the Act, but for the delay, expense, and difficulty of proceeding by writ of *ad quod damnum* on so long a road, passing over the lands of so many proprietors. But it is not indispensable in such a case, because it is not embraced in the words used in the Bill of Rights. Many of the State legislatures, to whose codes we have had access, have proceeded in a similar way; and it has received judicial approbation. In New York, it was held by Chancellor Walworth, in *Beekman* v. *The Saratoga and Schenectady Railroad*, 3 Paige's Rep. 45, that the ascertaining the damages by commissioners was not repugnant to that part of the Constitution of that State which preserves the trial by jury. In *Livingston* v. *The Mayor of New York*, 8 Wendell, 85, the same point was ruled unanimously, both in the Supreme Court and in the Court of Errors. In *Livingston* v. *Moore*, 7 Peters, 469, the distinction upon the words "trial by jury" is explicitly expressed by the Supreme Court of the United States. It arose upon these words in the Constitution of Pennsylvania: "Trial by jury shall remain as heretofore." The court say, "the distinction between trial by jury and inquest of office is so familiar to every mind as to leave no sufficient ground for extending to the latter that inviolability which could have been intended only for the former." In the same light does the subject seem to have been viewed by our legislature in passing a variety of Acts. Not to mention the numerous charters for roads and canals, with provisions similar to that now before us, the first Mill Act and those for partition and others, substitute commissioners for a jury to assess the value in the one case,

and to make the division in the other, with power to charge one lot with money to be paid to the other.

The opinion of the court is, that it was competent to the legislature to adopt the mode it did for the assessment of the damages to the defendant.

It is further objected, that the charter takes more than the right of eminent domain authorizes. It is said that the public is only entitled to the use of private property, leaving the property and right of soil in the proprietors; and that here the whole fee is taken, and not for the public, but for the company, which is but a private corporation.

The doctrine of the common law is, that the public has only an easement in the land over which a road passes, and that the right of soil is undisturbed thereby. The reason is, that ordinarily the interest of the public requires no more. Every beneficial use is included in the easement, in respect, at least, to such highways as existed at the time the principle was adopted, and to which it had reference. But if the use requisite to the public be such an one as requires the whole thing, the same principle which gives to the public the right to any use gives the right to the entire use, upon paying adequate compensation for the whole. It is for the legislature to judge, in cases in which it may be for the public interest to have the use of private property, whether, in fact, the public good requires the property, and to what extent. . . .

Upon the supposition that the legislature may take the property to the public use, it is next said that this taking is not legitimate, because the property is bestowed on private persons. It is true that this is a private corporation, its outlays and emoluments being individual property; but it is constituted to effect a public benefit by means of a road, and that is *publici juris*. In earlier times, there seems to have been a necessity upon governments, or at least it was a settled policy with them, to effect everything of this sort by the direct and sole agency of the government. The highways were made by the public, and the use was accordingly free to the public. The government assumed the exclusive direction as well as authority, as if they chose to be seen and felt in everything, and would avoid even a remote connection between private interests and public institutions. An immense and beneficial revolution has been brought about in modern times by engaging individual enterprise, industry, and economy in the execution of public works of internal improvement. The general management has been left to individuals, whose private interests prompt them to conduct it beneficially to the public; but it is not entirely confided to them. From the nature of their undertaking and the character of the work, they are under sufficient responsibilities to insure the construction and preservation of the work, which is the great object of the government. The public interest and control are neither destroyed nor suspended. The control continues as far as it is consistent with the interests granted, and in all cases as far as may be necessary to the public use. The road is a highway, although the tolls may be private property by force of the grant of the

franchise to collect them. It is a common nuisance to allow it to become ruinous, or to obstruct it. The government may, upon sufficient cause, claim a forfeiture of the charter, or compel the execution and repairs of the road by those undertaking them, by any means applicable to other persons charged with the like duties in respect to other highways. The difference is, that the corporation, in lieu of the sovereign, has the custody and property of the road, and the collection of the tolls in reimbursement of the cost of construction and remuneration for labor and risk of capital. As to the corporation, it is a franchise, like a ferry or any other. As to the public, it is a highway, and in the strictest sense *publici juris*. The land needed for its construction is taken by the public for the public use, and not merely for the private advantage of individuals. It is only vested in the company for the purposes of the Act, — that is, to make the road. This case is, therefore, essentially different from that of *Hoke* v. *Henderson*, 4 Dev. Rep. 1, which was so much insisted on at the bar. There, the office, a subject of property to a certain extent, was taken from one and vested in another, exactly in the same state and to the same public purposes as it was held by the first. The public interest was in the service of the officer, being precisely the same, with either person for the incumbent. It was, therefore, taken solely for the benefit of the new appointee, which could not be supported. But in this case, the land is taken from the defendant for a public purpose, to which it had not been applied while in his hands. It is taken to be immediately and directly applied to an established public use, under the control and direction of the public authorities, with only such incidental private interests as the legislature has thought proper to admit, as the means of effecting the work and insuring a long preservation of it for the public use.

It is the opinion of the court that no one of the objections is sufficient to arrest the proceeding for condemnation, and that the judgment of the Superior Court must be affirmed. This will be certified to that court, that a writ of *procedendo* may issue thence to the County Court.

PER CURIAM. *Judgment reversed.*[1]

[1] Compare *Bloodgood* v. *Mohawk, &c. R. R. Co.*, 18 Wend. 9 (1837). — ED.

THE EVERGREEN CEMETERY ASSOCIATION OF NEW HAVEN *v.* BEECHER ET AL.

CONNECTICUT SUPREME COURT OF ERRORS. 1885.

[53 *Conn.* 551.]

ACTION by the plaintiff, a cemetery association organized under the laws of the State, for the purpose of taking lands for the enlargement of its territory, under the provision of Gen. Statutes, p. 293, sec. 4; brought to the Superior Court. The defendants demurred to the complaint, and the case was reserved for the advice of this court. The case is sufficiently stated in the opinion.

J. W. Alling and *J. H. Webb*, for the plaintiff.

S. E. Baldwin and *J. H. Whiting*, for the defendants. . . .

PARDEE, J. This is a complaint asking leave to take land for cemetery purposes by right of eminent domain. The case has been reserved for our advice.

The plaintiff is the owner of a cemetery, and desires to enlarge it by taking several adjoining pieces of land, each owned by a different person, and has made these owners joint defendants. . . .

The safety of the living requires the burial of the dead in proper time and place; and, inasmuch as it may so happen that no individual may be willing to sell land for such use, of necessity there must remain to the public the right to acquire and use it under such regulations as a proper respect for the memory of the dead and the feelings of survivors demands. In order to secure for burial-places during a period extending indefinitely into the future that degree of care universally demanded, the legislature permits associations to exist with power to discharge in behalf and for the benefit of the public the duty of providing, maintaining, and protecting them. The use of land by them for this purpose does not cease to be a public use because they require varying sums for rights to bury in different localities; not even if the cost of the right is the practical exclusion of some. Corporations take land by right of eminent domain primarily for the benefit of the public, incidentally for the benefit of themselves. As a rule, men are not allowed to ride in cars, or pass along turnpikes, or cross toll-bridges, or have grain ground at the mill, without making compensation. One man asks and pays for a single seat in a car; another for a special train; all have rights; each pays in proportion to his use; and some are excluded because of their inability to pay for any use; nevertheless it remains a public use as long as all persons have the same measure of right for the same measure of money.

But it is a matter of common knowledge that there are many cemeteries which are strictly private; in which the public have not, and cannot acquire, the right to bury. Clearly the proprietors of these cannot

take land for such continued private use by right of eminent domain. The complaint alleges that the plaintiff is an association duly organized under the laws of this State for the purpose of establishing a burying-ground; that it now owns one; that it desires to enlarge it; and that such enlargement is necessary and proper. There is no allegation that the land which it desires to take for such enlargement is for the public use in the sense indicated in this opinion.

Therefore the Superior Court is advised that for the reason that the complaint does not set out any right in the plaintiffs to acquire title to the land of the defendants otherwise than by their voluntary deed, the demurrer must be sustained.

In this opinion the other judges concurred.[1]

BOSTON AND ROXBURY MILL CORPORATION *v.* NEWMAN.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1832.

[12 *Pick.* 467.]

[THE statement of facts is omitted. They will appear sufficiently by reference to *The Bost. W. P. Co.* v. *The Bost. & Worc. R. R. Co.*, *supra*, p. 969.[2]]

Gorham and *C. G. Loring*, for the plaintiffs.

Fletcher and *D. A. Simmons*, for the defendant.

PUTNAM, J., delivered the opinion of the court.[3] The plaintiffs claim an easement over the land of the defendant. It is admitted that he owns the fee. The plaintiffs contend that they have acquired a right to use the defendant's land as a receiving basin, into which the water retained in their full basin may flow, for the purpose of working the various mills which they have built and may erect; and that such a right has been acquired in virtue of the grant of the legislature of this Commonwealth, to establish the Boston and Roxbury Mill Corporation. They contend that the "public exigencies require" that the property of the defendant, as well as of divers other owners of flats ground constituting the receiving basin, should be appropriated to enable the corporation to carry their enterprise into effect, which enterprise they say was of public benefit; that the appropriation is within the provision of the 10th article of the Bill of Rights, an appropriation "to

[1] And so *In the Matter of the Deansville Cemetery Assoc.*, 66 N. Y. 569 (1876), and *B'd of Health* v. *Van Hoesen*, 87 Mich. 533 (1891). Compare *Oury* v. *Goodwin*, 26 Pac. Rep. 376 (Ariz. 1891), *Prop's Mt. Hope Cem.* v. *Boston et al.* 158 Mass. 509 (1893). — ED.

[2] See also a plan of this part of Boston in 7 Pick. 388. — ED.

[3] SHAW, C. J., did not sit in the case.

public uses;" and that a reasonable compensation was provided for the owners of the flats ground in and by the Act of Incorporation.

Those positions are denied by the defendant. He contends that the enterprise of the plaintiffs was and is of a private character, and that the legislature had no authority to take or subject the land of the defendant to any incumbrance or service for the benefit of the plaintiffs. And further, that if it were of a public character within the meaning of the Constitution, no reasonable compensation has been provided for the damage sustained by the defendant.

Let us examine these pretensions. And first, was the enterprise of the plaintiffs so far of a public nature as to come within the meaning of the Constitution, and to require the appropriation of the property of the defendant to carry the undertaking of the plaintiffs into effect?

The design was to construct a dam or dams, for the purpose of obtaining a head and fall of the waters of a navigable arm of the sea, whereby to work grist-mills, iron manufactories, and other mills for other useful purposes, and also to make an avenue or highway over the dams, for the accommodation of all persons, cattle, horses and carriages, for a fixed rate of toll.

To effect these objects, the right to obstruct the navigable water or arm of the sea, by the dams, and the right to pen up the tide-water in a full basin, and so to raise a head of water, must be obtained. And the right to exclude the tide-waters from the empty basin, into which the waters of the full basin should run, must also be obtained. The receiving basin would be emptied at low water, and the gates shut against the sea; the pond would be filled by the flow of the tide, and kept in by the gates; and thus a perpetual mill-power of great extent would be acquired. Connected with these water-powers, the dam, or avenue from Beacon Street to Sewall's Point in Brookline, made a prominent subject in the consideration of the enterprise and fixing its character, *viz.*, whether it should be considered as one merely of a private nature, or as one involving great objects of public utility.

The owners of the upland owned the flats ground to the extent of one hundred rods. The Commonwealth had the title to the flats beyond. So far as it regarded the right of the public, it is not contended but that the corporation acquired it by the act of the legislature. But the flats between the upland and those belonging to the Commonwealth must be subjected to the control of the corporation, or they could not carry their undertaking into effect.

Here was a creation of an immense perpetual mill-power, as well as a safe and commodious avenue, in and over the waste waters of the ocean and adjoining to a great city.

We should be at a loss to imagine any undertaking of an individual or association of persons with a view to private emolument, in which the public had a more certain and direct interest and benefit.

It was conceded in the able argument for the defendant, that the toll-bridge or avenue might be sustained, so far as it affected the prop-

erty of individuals, upon the same principles that are applicable to turnpike roads, where the lands of individuals are taken by the road proprietors (with a view indeed to the tolls), because there is a right in the public to pass on the avenue, paying toll, as on a highway. But it is said that the analogy fails, when applied to laying bare the flats, in order to get the water-power for mills, because the public have no right in respect to the manufactories, as they have to travel upon the turnpike roads. But the public may be well said to be paid or compensated in the one as well as in the other case, and are benefited by the one improvement as well as by the other. Take the grist-mill established in this city, as an example. Is it of no benefit to have the corn ground near to the inhabitants, rather than at a distance? "But you cannot compel the miller to grind your corn for the toll, as you may the proprietors of the turnpike to let you travel over the road for a toll." If there be not an actual, there is a moral necessity imposed upon the owner of the mill, to accommodate the public to the extent of his power. Who ever heard of a refusal? And in regard to the manufacturing establishments, is it nothing to the public that great numbers of citizens have the means of employment brought to their homes? and are not the proprietors obliged to give employment? They cannot carry their works on without labor, and who that is disposed to industry and to that kind of employment is prevented from its exercise? This becomes a matter of interest, which will certainly direct and govern the parties. And it is among the most pleasant considerations attending this branch of the subject, that the interest or benefit arising from manufacturing establishments is distributed quite as much, and oftentimes more, among the laborers and operatives, than among the proprietors of the works.

But it is no sure test of the public exigency, that the land-owner shall have a certain right to use the thing thus brought into operation. Take an aqueduct, for example, brought by the enterprise and capital of individuals through lands of others for the use of a city, paying all the damages for the taking of the waters at the spring, and for the digging up of the soil of strangers in order to conduct it. Those strangers have no right to the water thus brought into the city, unless the proprietors of the aqueduct shall permit it. And can it be questioned that the legislature might subject the lands of individuals to the control of the associated proprietors, to obtain such a public benefit? Who could say that the public exigencies did not require individuals to grant the necessary privileges, for a proper compensation, to carry such a work into effect? It would be for the interest of the proprietors to furnish the water at a reasonable price.

The plaintiffs are an authorized association to procure water-power to drive mills of various kinds by tide-waters. How does it differ in principle, from the effecting of such an intent by fresh water, and thereby subjecting the lands of others to the service of the mill-owner? For more than a century the mill-owner has had the right to raise a

head or pond of water by flowing the lands of others, paying the damage. In many such cases valuable meadows have been inundated, and thus private property has been taken, without the consent of the owners, excepting only as they may be supposed to have consented to the laws made by the legislature.* But for those Mill Acts, as they are called, the mill-owner would have been liable for the damages at common law, or the owner of the land might have removed the dam as a private nuisance. But under and in virtue of those Acts, the dam is protected; it is no longer removable as a nuisance; and the owner of the land is thereby deprived of the entire dominion of the soil, because the public good required the sacrifice at his hands, for a reasonable price.

The old statutes speak of mills as greatly beneficial to the public. The preamble of Prov. St. 8 Anne, c. 1, an Act for the upholding and regulating of mills, recites that they sometimes fall into disrepair and are rendered useless and unserviceable, if not totally demolished, to the hurt and detriment of the public, as well as the loss to the partners who are ready to rebuild, etc. So the Prov. St. 12 Anne, c. 8, speaks of "mills serviceable to the public good and the benefit of the town;" and gives to the mill-owners liberty to continue and improve the pond for their best advantage without molestation, paying damages for raising the water, etc. The Prov. St. 1 Geo. II. c. 4, gave treble damages for the trespass of taking up, breaking down, or damnifying any dam made use of for the enclosing of water improved for the benefit of any mill, etc.

These Acts were revised by the St. 1795, c. 74, which provides that the mill-owner may flow any lands not belonging to him (not merely a small quantity, as in the St. 12 Anne), which shall be found necessary to raise a suitable head of water to work his mill, paying damages, etc. The jury however are to determine how far the public convenience and the circumstances of the case do justify such flowing.

The St. 1824, c. 153, provides for the recovery of damages sustained by the owner of the land either above or below the mill. And the St. 1825, c. 109, gives the mill-owner a right of tendering the amount of the damages; thus putting trespass and contract upon the same footing; and it further limits the claim to two years before the process, etc.

Now we have nothing to do with the expediency of those various Mill Acts, but it is certainly apparent, that the legislature have considered it for the public good to encourage the erection of mills, and have subjected the property of the citizens to the control of the mill-owners, they paying the damage. In these cases the damage has been sustained by reason of the flowing of the lands. But in the case at bar, the damage is in laying bare the flats of the tide-water, so as to make a fall for the water in the pond or full basin. But we do not perceive that there is any difference in the principles applicable to the two cases. The object in each is to get a head and fall, for mill purposes. In one case, having a fall, you flow meadows and upland to

get a head; in the other, having a head, you empty or lay bare the flats to make a fall. In each case a head and fall are obtained for the water power. In each case the mill-owner operates on the lands of other persons, and the damage, it should seem, cannot be greater where the land is made bare, than where it is overflowed. The soil in each case is in the owner, and he may use it in any way which is not inconsistent with the rights granted to the mill-owner. But he may do nothing more; for we cannot accede to the position of the learned counsel for the defendant, that he has a right to fill up his flats ground, and so to diminish the reservoir. The fallacy, we think, consists in taking it for granted, that the legislature had no authority to make the grant to the corporation, and to subject the lands of the defendant to the service claimed. If it were not necessary thus to affect the property of the defendant for public uses, the argument would be sound; but if the public exigencies required the appropriation of the defendant's property to the extent defined in the grant to the corporation, they being accountable in damages, then it would seem clearly to follow, that the defendant cannot lawfully do any act or thing which shall counteract the grant. It should be, so far as regards these parties, just as if the defendant had, for a consideration paid, granted to the plaintiffs the right which they now claim under the legislative grant. To recur again to the example of the aqueduct; — would it be lawful for one through whose lands it has been conducted by the authority of the legislature, and who has been paid his damages, would it be lawful for him to cut off the pipes, under the claim to dig upon his own land to any depth he pleased?

The principle is, that the lands of individuals are holden subject to the requisitions of the public exigencies, a reasonable compensation being paid for the damage. It is not taking the property of one man and giving it to another. At most, it is a forced sale, to satisfy the pressing want of the public. Now this is as it should be. The will or caprice of an individual would often defeat the most useful and extensive enterprises, if it were otherwise. Property is nevertheless sufficiently guarded by the Constitution. The individual is protected in its enjoyment, saving only when the public want it, not merely for ornamental, but for some necessary and useful purposes. Then indeed the owner must part with it for an equivalent.

It was argued for the defendant, that here was no jury to ascertain the extent to which the plaintiffs might flow, or lay bare the flats. And it seems to us that a jury was altogether unnecessary, because the legislature for themselves, being upon the spot, upon a full view and consideration of the matter, determined and ascertained the extent, as well as the public exigency of the grant.

It has been argued, that the legislature expected the plaintiffs would obtain the consent of the owners of the flats ground. If that were so, and the expectation were not realized, it would become necessary that the legislative power should enable the plaintiffs to effect their enter-

prise. And besides, by providing for damages which might be sustained, the legislature must have contemplated the case which might happen, of a dissent of some persons whose property might be injured.

The contracts which were made between the petitioners and the town of Boston, were ratified by the legislature, as if they had been made by the corporation and the town. But the defendant did not come into any contract with the petitioners or the corporation, affecting his own private property. He is not to be affected by those contracts, in any way, advantageously or injuriously; but he stands upon his own rights as regulated by the law.

It was said that it was not necessary that the plaintiffs should have the whole of the flats, to give effect to the legislative grant; though it seemed to be admitted that the whole was necessary for the completion of the plaintiffs' enterprise. But the grant seems to us to embrace the whole which the plaintiffs claim. They were authorized "effectually to exclude the tide-water, and to form a reservoir or empty basin of the space between the dam [from Charles Street] and Boston Neck." The defendant's land is between those termini.

We are clearly of opinion, that the grant to the Boston and Roxbury Mill Corporation was well warranted by the public exigencies, and that the undertaking, although commenced with a view to the private advantage of the stockholders, promised to be of immense and certain utility to the State. That anticipation has been fully realized, so far as it related to the public. We regret that it did not prove beneficial to the enterprising projectors.

But it is contended, that there was no reasonable compensation provided for the injury which the defendant has sustained.

Let us examine the Act in that respect. By the sixth section it is provided, that any person or corporation sustaining any damage by the building of the dams, etc., "or from the exercise of any of the rights and powers given to the corporation," may have the same ascertained (if there be any), in the first place by a committee to be appointed by the Court of Common Pleas, and if their report should not be satisfactory, then may have the same tried and determined by a jury. The committee are to inquire, "whether any damage has been sustained from the causes aforesaid, and if any, they shall estimate the same, and where the damage is annual they shall so declare the same in their report." It is said by the counsel for the defendant, that this provision was wholly inadequate; that the defendant was benefited by having his land relieved from the tide-water; that there was no present damage, and no provision for damage which should thereafter arise. And it said further, that the corporation had done no act in taking the defendant's land, so as to enable him to make any claim for damages.

These suggestions are more ingenious than sound. The depriving one of the beneficial use of his lands is, in the sense of the law, a taking of his lands. It would be very clear in the case of flowing. But the principle is the same in laying bare the lands. In each case,

the absolute, unqualified use of the soil is taken away. The owner cannot (as we have seen) counteract the effect of the grant, by filling up his land, in the one case, any more than in the other. He has the fee remaining in him, subject only to the right of the mill-owner to flow, or to lay bare the land, in order to obtain the water-power for mill purposes. When therefore the plaintiffs had built their dams, and excluded the water from the defendant's flats, for an empty basin, there was in one sense a taking of the defendant's land. He thenceforward might claim any damage which he sustained from the diminished right to use his land as he pleased. Before the legislative grant, the defendant might have filled up his flats ground to a certain extent, not interfering with the rights of others. After the grant, he could not lawfully do it. He was deprived of the complete dominion and use which he enjoyed before. If he sustained any damage from that interference with his land, it accrued presently. If it were waste property, and no real injury was sustained, that might well operate with a reasonable man to prevent any claim for damage. The corporation then asserted their right to lay bare the defendant's flats forever. They took the defendant's land for their mill operations, as effectually as the mill-owner upon a fresh-water stream takes the land above by flowing. The mill-owner, in each case, claims an easement in the soil of another. To that extent the owner of the land may claim damage, and a present damage, for any injury or diminution in the value of his estate, which may be redressed in the mode pointed out in the Act of the Legislature.

These views of the case have led us to a clear opinion, that the judgment should be for the plaintiffs, with damages (by consent in such event) at one dollar and full costs of suit.[1]

[1] Compare *Olmstead* v. *Camp*, 33 Conn. 532, 545 (1866), a petition under a statute of 1864, for the right to flood certain land with the mill-pond of a grist-mill. McCURDY, J., for the court, said: "The Constitution declares that 'the property of no person shall be taken for public use without just compensation.' This is indeed a principle of natural law. The decision of the case turns upon the meaning and effect of this provision. The defendant insists that, in favor of private rights, the construction should be strict, and that the term 'public use' means possession, occupation, direct enjoyment, by the public. Or in other words that the property must be literally taken by the public as a body into its direct possession and for its actual use, as in the instances of a State house, a court house, a fort, an arsenal, a park, &c.

"It seems to us that such a limitation of the intent of this important clause would be entirely different from its accepted interpretation, and would prove as unfortunate as novel. One of the most common meanings of the word 'use' as defined by Webster, is 'usefulness, utility, advantage, productive of benefit.' 'Public use' may therefore well mean public usefulness, utility or advantage, or what is productive of general benefit; so that any appropriating of private property by the State under its right of eminent domain for purposes of great advantage to the community, is a taking for public use. Such, it is believed, is the construction which has uniformly been put upon the language by courts, legislatures, and legal authorities. . . .

"The question is asked with great pertinence and propriety, what then is the limit of the legislative power under the clause which we have been considering, and what is the exact line between public and private uses? Our reply is that which has heretofore been quoted. From the nature of the case there can be no precise line. The

HAZEN v. THE ESSEX COMPANY.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1853.

[12 *Cush.* 475.]

SHAW, C. J.[1] This is an action of tort at common law, in the nature of an action on the case, for raising a dam across the Merrimack River, by which a mill-stream emptying into that river, above the site of said dam, was set back and overflowed, and a mill of the plaintiff situated thereon, and the mill privilege, were damaged and destroyed. To this declaration the defendants demurred, and the plaintiff joined in demurrer.

The defendant company were chartered by an Act of Incorporation. St. 1845, c. 163. They were incorporated for the purpose of constructing a dam across the Merrimack River, and constructing one or more locks and canals in connection with said dam, to remove obstructions in said river by falls and rapids, and to create a water-power, to be used for mechanical and manufacturing purposes.

The plaintiff states in his declaration that he owns a mill situated in Andover, on a small stream flowing into the river on the south side, half a mile above the place of the defendants' dam, and that he had a right to the use of this stream at the level, at which it naturally flowed, but that the defendants, by color of an Act of March 20, 1845 (the statute above mentioned), erected a dam in the town of Lawrence, within the limits mentioned in said Act, that said river was a navigable river, that by means of said dam, the defendants flowed back the waters on the wheel of the plaintiff's mill, prevented said stream from passing into Merrimack River at its natural height, &c.

power requires a degree of elasticity to be capable of meeting new conditions and improvements and the ever increasing necessities of society. The sole dependence must be on the presumed wisdom of the sovereign authority, supervised, and in cases of gross error or extreme wrong, controlled, by the dispassionate judgment of the courts. In the case of *Fletcher* v. *Peck*, 6 Cranch, 128, Chief Justice Marshall says: 'The question whether a law is repugnant to the Constitution is at all times a question of great delicacy, which ought seldom if ever to be decided in the affirmative in a doubtful case.' It may be remarked that the justice and propriety of a flowage law is peculiarly a question for legislative rather than judicial determination, although we have briefly discussed the subject on its merits.

"But the defendant claims that, according to the facts found by the court, the use in this particular case is not of a public nature. Upon this point we can entertain no doubt. From the first settlement of the country grist-mills of this description have been in some sense peculiar institutions, invested with a general interest. Towns have procured them to be established and maintained. The State has regulated their tolls. In many instances they have been not merely a convenience, but almost a necessity in the community. . . .

"The report should be accepted and the doings of the committee established."

The reporter adds that, "In this opinion the other judges concurred, except HINMAN, C. J., who dissented." — ED.

[1] BIGELOW, J., did not sit in this case.

The demurrer admits all the material facts that are thus set out in the declaration. In general, an Act of Incorporation of this description is held to be a public law, to be taken notice by the court without being specially set out. But independently of that rule, in the present case, the Act of Incorporation is referred to in the declaration, as the authority under color of which the defendants claimed title, and, therefore, its construction and validity are put in issue and brought before the court by the demurrer.

As the owner of land through which a watercourse passes, has a right to the reasonable use of such current as it passes through his land, the plaintiff would have a good right of action, were not the erection of the dam justified by their Act of Incorporation. The defendants maintain that they are so justified, by an Act of the Legislature, exercising, as they may, the sovereign power of the State, in the right of eminent domain, to take and appropriate private property for public use; that the plaintiff's property in the mill and mill privilege was so taken, and that his remedy is by a claim for damages under the Act, and not by action at common law, as for a wrongful and unwarrantable encroachment upon the plaintiff's right of property.

The plaintiff denies this right under the said charter and Act of Incorporation.

1. It is said it was not necessary to take this land and this mill-site of the plaintiff, because within the terms of the Act, the dam might have been placed above the outlet of the particular tributary, and so it was not necessary to flow out the plaintiff's mill. But there is nothing to show that it might have been so placed, without flowing other mills, as much privileged as the plaintiff's, or that it might have been placed so much higher up, with the advantages to navigation and the much larger mill-power of the river, for manufacturing purposes contemplated by the Act.

But we think it is a fallacy to suppose that a mill or mill privilege is, in principle, exempted from being taken under the power of eminent domain over any other private property. An impression of that kind may have arisen from the rule applicable to the general Mill Acts. It stands on a different principle. Thus, each successive proprietor on the watercourse has an equal right to use the power of the stream through his own land, to erect a mill, which is for the general benefit; he, therefore, who first appropriates it by erecting a mill, shall be held secure against the claims of another who has not so appropriated the stream. It would afford no encouragement to the building of mills generally, if one which had been so built, could be superseded and destroyed by any other proprietor who should simply propose to build another mill. This is the sole ground on which, in the administration of the Mill Acts, a mill-proprietor, under a general right to erect and maintain a dam on his own land, although it may flow the land of another, cannot flow a mill already erected. But this principle can have no influence on the legislature, in determining what is necessary

to be taken for public use; the value of a mill can as well be compensated in money, as that of any other property so taken. The case cited, *Springfield* v. *Connecticut River Railroad Company*, 4 Cush. 63, has no bearing on the present case.

2. It is then contended that if this Act was intended to authorize the defendant company to take the mill-power and mill of the plaintiff, it was void, because it was not taken for public use, and it was not within the power of the government, in the exercise of the right of eminent domain.

This is the main question. In determining it, we must look to the declared purposes of the Act, and if a public use is declared, it will be so held, unless it manifestly appears, by the provisions of the Act, that they can have no tendency to advance and promote such public use. The declared purposes are, to improve the navigation of Merrimack River, and to create a large mill-power for mechanical and manufacturing purposes. In general, whether a particular structure, as a bridge, or a lock, or canal or road, is for the public use, is a question for the legislature, and which may be presumed to have been correctly decided by them. *Commonwealth* v. *Breed*, 4 Pick. 463. That the improvement of the navigation of a river is done for the public use, has been too frequently decided and acted upon, to require authorities. And so to create a wholly artificial navigation by canals. The establishment of a great mill-power for manufacturing purposes, as an object of great public interest, especially since manufacturing has come to be one of the great public industrial pursuits of the Commonwealth, seems to have been regarded by the legislature and sanctioned by the jurisprudence of the Commonwealth, and, in our judgment, rightly so, in determining what is a public use, justifying the exercise of the right of eminent domain. See St. 1825, c. 148, incorporating the *Salem Mill-Dam Corporation; Boston and Roxbury Mill-Dam Corporation* v. *Newman*, 12 Pick. 467. The Acts since passed, and the cases since decided on this ground, are very numerous. That the erection of this dam would have a strong and direct tendency to advance both these public objects, there is no doubt. We are, therefore, of opinion, that the powers conferred on the corporation by this Act, were so done within the scope of the authority of the legislature, and were not in violation of the Constitution of the Commonwealth.

3. Another objection is taken to this Act, that it provides no adequate means of making compensation to private individuals, for the damage done to their property, by the erection and maintenance of the defendants' dam, and the necessary consequences thereof, in flowing their lands. If it were so, it would certainly be a very serious objection to the validity of the Act. *Chadwick* v. *Proprietors of Haverhill Bridge*, 2 Dane Ab. 687; *Callender* v. *Marsh*, 1 Pick. 430. We are, then, to look at the statute, to see whether it is obnoxious to this objection. It is said that compensation for property appropriated, is a common-law right, independent of the declaration of rights. If by

this it is intended to say that compensation in such case is required by a plain dictate of natural justice, it must be conceded. But this right may be regulated, and the remedy made certain and definite by law. The bill of rights declares a great general principle; the particular law prescribes a practical rule, by which the remedy for the violation of right is to be sought and afforded. . . . [It is then held that the statute provides only compensation.]

Demurrer sustained and judgment for the defendants.

G. Minot, for the plaintiff; *E. Merwin*, for the defendants.[1]

[1] Compare *Williams* v. *Nelson*, 23 Pick. 141, *Head* v. *Amoskeag Man. Co.*, 113 U. S. 9; s. c. *ante*, p. 760, and *Lowell* v. *Boston*, 111 Mass. 454, 464; s. c. *infra*, p. 1224; *Turner* v. *Nye*, 154 Mass. 579, s. c. *supra*, p. 893. Compare also *Cary* v. *Daniels*, 8 Met. 466, 476–478, with *Occum Co.* v. *Sprague Mfg. Co.*, 35 Conn. 496, and *Elting Woollen Co.* v. *Williams*, 36 Conn. 310.

See *Holyoke Water-Power Co.* v. *Conn. Riv. Co.*, 22 Blatchf. C. C. Rep. 131 (1884); s. c. 52 Conn. 570, as to a dam affecting property rights in another State. Compare *Mannville Co.* v. *Worcester*, 138 Mass. 89. Randolph, *Em. Dom.* ss. 28, 29.

In the *Watuppa Reservoir Co.* v. *Fall River*, 147 Mass. 548 (1888), it was held that the legislature might appropriate to the use of a city the waters of a "great pond" without providing for compensation to the owners of land on either the pond or its outlet. The court (MORTON, C. J.) said: "Under the ordinance [of 1647] the State owns the great ponds as public property, held in trust for public uses. . . . As this case depends upon the effect of the Colony ordinance, the decisions in England cannot be of assistance to us. They depend upon the common-law, which, as we have said, is changed by the ordinance. The same may be said of the decisions in the other States of this country, most of which are governed by the rules of the common-law. In New York and Pennsylvania, it has been held that the rules of the common law do not apply to such great navigable streams as the Hudson, Mohawk, and Delaware Rivers, though they may not be tidal rivers throughout; that the title of such streams is in the government in trust for the people; and that the State may use the waters, or authorize their use, for the purposes for which they are held in trust, without any compensation to riparian proprietors who are damaged by such use. *People* v. *Canal Appraisers*, 33 N. Y. 461; *Varick* v. *Smith*, 9 Paige, 547; *Carson* v. *Blazer*, 2 Binney, 475; *Shrunk* v. *Schuylkill Navigation Co.*, 14 S. & R. 71; *Rundle* v. *Delaware & Raritan Canal Co.*, 14 How. 80.

"The industry of counsel has furnished us with references to between two and three hundred water Acts passed by the legislature, including some in which the right to use the waters of great ponds is granted, in most of which provision is made for compensation to those whose mill privileges or water rights are impaired. These show that the policy of the State has heretofore been to provide such compensation, but they do not show that the State has not the power to use the waters without compensation. The Act we are considering seems to mark a change in the public policy in regard to the waters of the great ponds, as since its enactment several other Acts have been passed containing the same provisions as to damages."

For a good statement of the common-law doctrine, in such a case, apart from the Ordinance of 1647, see *Lord* v. *Meadville Water Co.*, 135 Penn. 122 (1890). See also *Smith* v. *Rochester*, 92 N. Y. 463 (1883). For the Ordinance itself, see *supra*, p. 696.

Compare *Wat. Res. Co.* v. *Fall River*, 154 Mass. 305 (1891). See also "The Watuppa Pond Cases," 2 Harv. Law Rev. 195; "Great Ponds," *Ib.* 316, and "The Law of Ponds," 3 Harv. Law Rev. 1. — ED.

TALBOT ET AL. v. HUDSON ET AL.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1860.

[16 *Gray*, 417.]

B. F. Thomas & J. G. Abbott (*G. H. Preston* with them), for the plaintiffs, and *S. H. Phillips* (Attorney-General) *& J. S. Keyes*, for the defendants.

BIGELOW, C. J. This case comes before us for a hearing upon the bill and answer, somewhat out of the regular course of proceedings in chancery. A preliminary injunction was heretofore issued *ex parte* by a justice of this court on the filing of the bill. Upon the return of the subpœna, a motion to dissolve this injunction was made by the defendants. This motion should properly have been heard, in the first instance, by a single judge. But as the case of the plaintiffs, as stated in the bill, mainly depends on the determination of certain questions of law which can in no way be affected by proof, and as the case is one of great importance, involving large interests both of a public and private nature, it was agreed by the parties, with the assent of the court, that these questions should now be heard and finally determined.

The case, so far as is necessary to an understanding of these questions, may be briefly stated thus: The plaintiffs allege that they are owners by purchase of a valuable mill privilege, water rights, and dam, situated in the northern part of the town of Billerica upon the falls of the Concord River, with land in, upon and adjoining the same; that they have erected on said river, at great cost, large mills and other buildings, used and improved by them for the manufacture of various articles; that these mills are carried on and operated by the water power created by said dam and river, and are entirely dependent thereon. They further aver that the defendants, assuming to act as commissioners under and by virtue of the authority conferred by a certain Act of the Legislature, passed on the 4th of April, 1860, entitled "an Act in relation to the flowage of the meadows on Concord and Sudbury rivers," propose to take down and remove said dam to a level thirty-three inches below the top thereof, by which the water power, dam, and mills of the plaintiffs will be destroyed, or rendered of little or no value, and that they will thereby be subjected to serious and irreparable loss, for which the defendants would be unable to recompense them, and of such a nature that they are remediless except by relief in equity. They then aver that said Act of the Legislature is unconstitutional and void, and furnishes no real authority for the threatened action of the defendants as commissioners under its provisions. The defendants, in their answer, admitting that the plaintiffs are owners of the dam, water rights, mill privileges, and mills, as stated by the bill, and alleging their due appointment and qualification to act as commissioners under the Act of the Legislature aforesaid, aver, among other things, that said Act is valid and constitutional, and well

authorizes them to proceed in removing a portion of said dam in pursuance of its provisions; and they demur to the bill on the ground that the plaintiffs do not state a case which entitles them to relief in equity.

It is manifest from these averments and denials that the right of the plaintiffs to the relief which they seek depends chiefly on the allegation of the invalidity of the Act of the Legislature under which the defendants claim to derive their authority to reduce the height of the dam in the manner set out in the bill. This question has been very fully and elaborately discussed at the bar, and we have endeavored to bestow upon it very careful and deliberate consideration, not only on account of the important nature of the interests involved in our decision, but also because it requires us to determine whether the legislative department of the government has not exceeded the constitutional limits of its authority.

It is quite obvious that the first step in this inquiry is to ascertain, if we can, under what head or branch of legislative power or authority the Act in question falls. The intention of the legislature in this respect must be gathered mainly from the terms of the statute. There is no express declaration of the objects contemplated by it, but they are left to implication. Looking to the general structure of the act and the nature of its provisions, we cannot doubt that it was intended as an exercise of the right of eminent domain. It is similar to other legislative acts which authorize the taking of private property for a public use. It expressly authorizes the taking and removal of the dam by a board of public officers appointed for this specific purpose; it provides the same remedy in behalf of persons injured by such taking and removal as is given in case of damages occasioned by the laying out of highways; it affords to the party aggrieved by the award of the commissioners a trial by jury, and confers on this court the power to hear and determine all questions of law arising in the proceedings, and to set aside the verdict of the jury for sufficient cause. These provisions are inconsistent with the idea that the act was framed for the purpose of exercising the general police or superintending power over private property, which is vested in the legislature, or in order to prohibit a use of it which was deemed injurious to or inconsistent with the rights and interests of the public. If such were the object of the statute, there would be no necessity for the appointment of commissioners to take down and remove the dam, or for the provisions making compensation to those injured in their property thereby. Such enactments would be unusual in a statute intended only for a prohibition and restraint upon the appropriation or use of private property by its owners; but are the necessary and ordinary provisions when the legislature intend to exercise the right to take it for a supposed public use. *Thacher* v. *Dartmouth Bridge*, 18 Pick. 501. *Commonwealth* v. *Tewksbury*, 11 Met. 55.

Such being the manifest design of the legislature in passing the Act

in question, we are brought directly to a consideration of the objections urged by the plaintiffs against its validity. The first and principal one is that it violates the 10th article of the Declaration of Rights, because it authorizes the taking and appropriation of private property to a use which is not of a public nature.

In considering this objection, we are met in the outset with the suggestion, that it is the exclusive province of the legislature to determine whether the purpose or object for which property is taken is a public use, and that it is not within the province of the judicial department of the government to revise or control the will or judgment of the legislature upon the subject, when expressed in the form of a legal enactment. But this position seems to us to be obviously untenable. The provision in the Constitution, that no part of the property of an individual can be taken from him or applied to public uses without his consent or that of the legislature, and that when it is appropriated to public uses he shall receive a reasonable compensation therefor, necessarily implies that it can be taken only for such a use, and is equivalent to a declaration that it cannot be taken and appropriated to a purpose in its nature private, or for the benefit of a few individuals. In this view, it is a direct and positive limitation upon the exercise of legislative power, and any act which goes beyond this limitation must be unconstitutional and void. No one can doubt that if the legislature should by statute take the property of A and transfer it to B, it would transcend its constitutional power. In all cases, therefore, where this power is exercised, it necessarily involves an inquiry into the rightful authority of the legislature under the organic law. But the legislature have no power to determine finally upon the extent of their authority over private rights. That is a power in its nature essentially judicial, which they are by Article 30 of the Declaration of Rights expressly forbidden to exercise. The question whether a statute in a particular instance exceeds the just limits prescribed by the Constitution must be determined by the judiciary. In no other way can the rights of the citizen be protected, when they are invaded by legislative acts which go beyond the limitations imposed by the Constitution.

But it is to be borne in mind, that in determining the question whether a statute is within the legitimate sphere of legislative action, it is the duty of courts to make all reasonable presumptions in favor of its validity. It is not to be supposed that the lawmaking power has transcended its authority, or committed under the form of law a violation of individual rights. When an act has been passed with all the requisites necessary to give it the force of a binding statute, it must be regarded as valid, unless it can be clearly shown to be in conflict with the Constitution. It is therefore incumbent on those who deny the validity of a statute, to show that it is a plain and palpable violation of constitutional right. If they fail to do so, or leave room for a reasonable doubt upon the question whether it is an infringement of any of the guaranties secured by the Constitution, the presumption in favor of

the validity of the Act must stand. *Opinion of Justices*, 8 Gray, 21. Besides, it is a well settled rule of exposition that in considering whether a statute is within the limits of legislative authority, if it may or may not be valid according to circumstances, courts are bound to presume the existence of those circumstances which will support it and give it validity. *Wellington, Petitioner*, 16 Pick. 96.

The ultimate purpose which the legislature had in view in passing the Act under consideration does not distinctly appear by the terms of the Act itself. But it may be inferred from the title of the Act and the general scope of its provisions, that it was intended to relieve the meadows lying on the borders of Concord and Sudbury rivers, chiefly in the towns of Lincoln, Concord, Sudbury, and Wayland, from large quantities of water with which they are constantly overflowed, and which are supposed to be set back by the dam owned by the plaintiffs. This purpose is quite clearly indicated by the provisions in the fourth section of the Act, by which the removal of the dam under the Act is made to operate as a bar to any suits by the proprietors of lands flowed thereby for damages sustained in consequence of such flowage. And indeed it is conceded by the parties that such was the main purpose of the statute.

In many cases, there can be no difficulty in determining whether an appropriation of property is for a public or private use. If land is taken for a fort, a canal, or a highway, it would clearly fall within the first class; if it is transferred from one person to another or to several persons solely for their peculiar benefit and advantage, it would as clearly come within the second class. But there are intermediate cases where public and private interests are blended together, in which it becomes more difficult to decide within which of the two classes they may be properly said to fall. There is no fixed rule or standard by which such cases can be tried and determined. Each must necessarily depend upon its own peculiar circumstances. In the present case there can be no doubt that every owner of meadow land bordering on these rivers will be directly benefited to a greater or less extent by the reduction of the height of the plaintiffs' dam. The Act is therefore in a certain sense for a private use, and enures directly to the individual advantage of such owners. But this is by no means a decisive test of its validity. Many enterprises of the highest public utility are productive of great and immediate benefits to individuals. A railroad or canal may largely enhance the value of private property situated at or near its termini; but it is not for that reason any less a public work, for the construction of which private property may well be taken. We are therefore to look further into the probable operation and effect of the statute in question, in order to ascertain whether some public interest or benefit may not be likely to accrue from the execution of the power conferred by it upon the defendants. If any such can be found, then we are bound to suppose that the Act was passed in order to effect it. We are not to judge of the wisdom or expediency of exercising the

power to accomplish the object. The legislature are the sole and exclusive judges whether the exigency exists which calls on them to exercise their authority to take private property. If a use in its nature public can be subserved by the appropriation of a portion of the plaintiffs' dam in the manner provided by this Act, it was clearly within the constitutional authority of the legislature to take it, and in the absence of any declared purpose, we must assume that it was taken for such legitimate and authorized use.

The geographical features of the Concord and Sudbury rivers are properly within the judicial cognizance of the court. They are stated in detail in the opinion of the court in *Sudbury Meadows* v. *Middlesex Canal*, 23 Pick. 45. From that case and an inspection of the map, it appears that these two rivers, forming parts of the same stream, pass for a distance exceeding twenty miles through a tract of country, forming their banks or borders, consisting chiefly of meadows comprising many hundreds of acres; that throughout this extent the waters are very sluggish, having only a slight fall, until they reach the plaintiffs' dam. It might well be supposed that the necessary effect of an obstruction in a stream of this nature would be to cause the waters to flow back in the bed of the rivers, to fill up their courses or channels, to overflow their sides, and to inundate to a great extent the adjacent land, which is naturally low and level, and thus to render it unfit for agricultural purposes and deprive it of its capacity to produce any profitable or useful vegetation. The improvement of so large a territory, situated in several different towns and owned by a great number of persons, by draining off the water and thereby rendering the land suitable for tillage, which could not otherwise be usefully improved at all, would seem to come fairly within the scope of legislative action, and not to be so devoid of all public utility and advantage as to make it the duty of this court to pronounce a statute, which might well be designed to effect such a purpose, invalid and unconstitutional. The Act would stand on a different ground, if it appeared that only a very few individuals or a small adjacent territory were to be benefited by the taking of private property. But such is not the case here. The advantages which may result from the removal of the obstruction caused by the plaintiffs' dam are not local in their nature, nor intended to be confined to a single neighborhood. They are designed to embrace a large section of land lying in one of the most populous and highly cultivated counties in the State, and by increasing the productive capacity of the soil to confer a benefit, not only on the owners of the meadows, but on all those who will receive the incidental advantage arising from the development of the agricultural resources of so extensive a territory.

It has never been deemed essential that the entire community or any considerable portion of it should directly enjoy or participate in an improvement or enterprise, in order to constitute a public use, within the true meaning of these words as used in the Constitution. Such an

interpretation would greatly narrow and cripple the authority of the legislature, so as to deprive it of the power of exerting a material and beneficial influence on the welfare and prosperity of the State. In a broad and comprehensive view, such as has been heretofore taken of the construction of this clause of the Declaration of Rights, everything which tends to enlarge the resources, increase the industrial energies, and promote the productive power of any considerable number of the inhabitants of a section of the State, or which leads to the growth of towns and the creation of new sources for the employment of private capital and labor, indirectly contributes to the general welfare and to the prosperity of the whole community.

It is on this principle, that many of the statutes of this Commonwealth by which private property has been heretofore taken and appropriated to a supposed public use are founded. Such legislation has the sanction of precedents, coeval with the origin and adoption of the Constitution, and the principle has been so often recognized and approved as legitimate and constitutional that it has become incorporated into our jurisprudence. One of the earliest and most familiar instances of the exercise of such power under the Constitution is to be found in St. 1795, c. 74, for the support and regulation of mills. By this statute the owner of a mill had power, for the purpose of raising a head of water to operate his mill, to overflow the land of proprietors above and thereby to take a permanent easement in the soil of another, to the entire destruction of its beneficial use by him, on paying a suitable compensation therefor. Under the right thus conferred, the more direct benefit was to the owner of the mill only; private property was in effect taken and transferred from one individual for the benefit of another; and the only public use, which was thereby subserved, was the indirect benefit received by the community by the erection of mills for the convenience of the neighborhood, and the general advantage which accrued to trade and agriculture by increasing the facilities for traffic and the consumption of the products of the soil. Such was the purpose of this statute, as appears from the preambles to the provincial Acts of 8 and 13 Anne, from which the statute of 1795 was substantially copied. It is thereby declared that the building of mills has been "serviceable for the public good and benefit of the town or considerable neighborhood." Anc. Chart. 388, 404.

In like manner, and for similar purposes, acts of incorporation have been granted to individuals with authority to create large mill powers for manufacturing establishments, by taking private property, even to the extent of destroying other mills and water privileges on the same stream. *Boston & Roxbury Mill Dam* v. *Newman*, 12 Pick. 467. *Hazen* v. *Essex Co.*, 12 Cush. 478. *Commonwealth* v. *Essex Co.*, 13 Gray, 249. The main and direct object of these Acts is to confer a benefit on private stockholders who are willing to embark their skill and capital in the outlay necessary to carry forward enterprises which indirectly tend to the prosperity and welfare of the community. And

it is because they thus lead incidentally to the promotion of "one of the great public industrial pursuits of the Commonwealth," that they have been heretofore sanctioned by this court, as well as by the legislature, as being a legitimate exercise of the right of eminent domain justifying the taking and appropriation of private property. *Hazen* v. *Essex Co.*, 12 Cush. 475.

It is certainly difficult to see any good reason for making a discrimination in this respect between different branches of industry. If it is lawful and constitutional to advance the manufacturing or mechanical interests of a section of the State by allowing individuals acting primarily for their own profit to take private property, there would seem to be little, if any, room for doubt as to the authority of the legislature, acting as the representatives of the whole people, to make a similar appropriation by their own immediate agents in order to promote the agricultural interests of a large territory. Indeed it would seem to be most reasonable, and consistent with the principle upon which legislation of this character has been exercised and judicially sanctioned in this commonwealth, to hold that the legislature might provide that land which has been taken for a public use and subjected to a servitude or easement by which its value has been impaired and it has been rendered less productive, should be relieved from the burden, if the purpose for which it was so appropriated has ceased to be of public utility, and its restoration to its original condition, discharged of the incumbrance, will tend to promote the interest of the community by contributing to the means of increasing the general wealth and prosperity. If the right of a mill owner to raise a dam and flow the land of adjacent proprietors has ceased to be of any public advantage, and tends to retard prosperity and to impoverish the neighborhood, and the withdrawal of the water from the land by taking down the dam and rendering the land available for agricultural purposes would be so conducive to the interests of the community as to render it a work of public utility, there is no good reason why the legislature may not constitutionally exercise the power to take down the dam on making suitable compensation to the owner. It would only be to apply to the mill-owner for the benefit of agriculture the same rule which had been previously applied to the land-owner for the promotion of manufacturing and mechanical pursuits.

Nor are we without precedent for acts of legislation by which private property has been taken for the purpose of improving land and rendering it fertile and productive. The St. of 1795, c. 62, for the improvement of meadows, swamps, and low lands, recognizes the right of taking private property for the purpose of redeeming lands from the effects of stagnant water and of being overflowed by obstructions in brooks and rivers. This statute, re-enacted by the Rev. Sts. c. 115, has been long in use, and many proceedings under it have taken place, some of which have passed under the judicial cognizance of this court. But in none of these has the validity of the statute been doubted or

denied. *Coomes* v. *Burt*, 22 Pick. 422. *Day* v. *Hulburt*, 11 Met. 321. Under the provisions of this Act, not only is it competent to drain or overflow the land of a proprietor without his assent, and to compel him to pay a portion of the expense attendant on the proposed improvement, but also to open the flood-gates of any mill or make needful passages through or round the dam thereof and erect temporary dams on the land of any person who is not a proprietor or a party to the proceedings. For the injury thus occasioned to private property, a remedy is provided by the statute. But it is clearly an appropriation of private property primarily for the benefit of the owners of the meadows or low lands which are intended to be improved, and where the public use or benefit which justifies such appropriation consists in the indirect advantage to the community, derived from the increase of the productive capacity of the soil and the promotion of the agricultural interests of the owners of the land.

It was suggested at the argument, that there was an essential difference between the provisions of statute for the improvement of meadows and low lands and that under consideration, because by the former it was provided that the damages should be paid by the parties benefited, whereas by the latter they are to be paid out of the public treasury. But we cannot see the force or bearing of this suggestion. The mode of compensating the party whose property is taken cannot affect the validity of the appropriation, so far as it depends on the question, whether it was taken for a public use. If the use is not in its nature public, the appropriation is invalid and unconstitutional, and the mode by which compensation to the owners of land taken is to be made is wholly immaterial. It is only when property is taken for a purpose for which it may be constitutionally appropriated, that it becomes necessary to determine whether provision is made for compensation, suitable and adequate to furnish a remedy to the party injured.

But if there were no precedent for such legislation, and if we were unable to see that any use in its nature public could be effected by the exercise of the power conferred on the commissioners by the terms of the Act under consideration, we should be slow to decide, on the case as stated in the bill, that the statute was invalid, and that the legislature in passing it transcended their constitutional authority. The burden of establishing this proposition is on the plaintiffs. They are bound to make such averments in their bill, either by way of allegations of fact or conclusions of law, as *prima facie* to make it appear that the Act has no force or validity. . . . The bill contains no such allegation. Certainly in a hearing on bill and answer, the court cannot assume the Act to be unconstitutional, in the absence of any statement of facts or other averments to sustain the allegation that it takes property "for uses and purposes which are in violation of the tenth article of the Bill of Rights of the Constitution of the Commonwealth of Massachusetts." Nor is it to be overlooked in this connection, that the ordinary presumption in favor of the validity of an Act of the Legislature is greatly

strengthened in the present case by the consideration that the power to take the property of the defendants is not delegated to any persons or corporation for their private advantage and emolument, who are to make compensation for the property taken out of their private capital or stock. But it is an exercise of the power of eminent domain directly by the State itself through agents specially appointed for the purpose, and the compensation provided for those whose property may be taken or injured by the reduction of the dam is to be paid from the public treasury. An Act thus framed clearly indicates that in the judgment of the legislature it was designed to subserve some important public use, so necessary that it ought not to be left to private enterprise, and so universal that the burden of accomplishing the object should be borne, not by individuals, or corporations, or towns, but by all the people of the Commonwealth. We know of no instance in the jurisprudence of this country, where an Act, so clearly intended to effect a purpose which was deemed by the legislature to be of public utility, has been adjudged unconstitutional and void. Every reasonable presumption is against such a conclusion, and it would require very strong circumstances to lead the court to overrule the judgment of a co-ordinate branch of the government, so unequivocally expressed in a matter primarily within their province to determine.

The validity of the statute is called in question by the plaintiffs on the further and distinct ground that it contains no reasonable, certain, and adequate provision for compensation to those whose property may be taken and appropriated in carrying out the purposes of the Act. But it seems to us that there is an obvious and decisive answer to this objection. By the third section of the Act, it is provided that the damages which may be recovered on due proceedings had by the parties injured shall be paid out of the treasury of the Commonwealth, and the governor is authorized to draw his warrant therefor. This is clearly an appropriation of so much money as may be necessary to pay the damages which may be assessed under the Act. The provision could not be more explicit or definite as to the amount appropriated. Until the damages are ascertained and adjudicated, the sum which will be required to pay them is necessarily uncertain. There is no provision of law, which makes it requisite to the validity of an appropriation from the treasury of the Commonwealth that a specific sum should be named and set apart as a fund to meet a particular exigency. It is sufficient if by an Act or resolve passed during the same or the preceding political year the payment is authorized. St. 1858, c. 1, §§ 1, 2. Gen. Sts. c. 15, §§ 30, 31. That such an appropriation affords a remedy sufficiently adequate and certain is too clear to admit of doubt. It is a pledge of the faith and credit of the Commonwealth, made in the most solemn and authentic manner, for the payment of the damages as soon as they are ascertained and liquidated by due process of law. Unless we can say that such a provision affords no reasonable guaranty that the persons injured will receive compensation, we cannot adjudge the

statute to be unconstitutional. We certainly cannot assume that the Commonwealth will not fulfil its obligations. The presumption is directly the other way. Indeed the plaintiffs do not aver in their bill that the damages which may be awarded to them under the Act will not be duly paid. How then can it be said that no suitable and adequate provision is made in the Act, by which the plaintiffs can receive the compensation to which they may be entitled? The answer to the argument that no process is provided by which the payment can be secured and enforced is, that no such provision is necessary in cases where the power of eminent domain is exercised immediately by the State itself, in pursuance of a statute which enacts that compensation is to be made by a warrant drawn by the governor of the Commonwealth upon the public treasury. We are bound to presume that the chief magistrate of the State will perform his duty by drawing his warrant in conformity with the requirements of law, and that payment of a public debt thus created will be duly made in like manner as all public dues and liabilities are paid out of the treasury of the State. The elementary principle that the sovereign can do no wrong is the foundation on which rests the rule, recognized in our jurisprudence, by which the State is exempted from being subject to process at the suit of a creditor. The presumption of law is, that the State will keep its faith inviolate, and honestly fulfil all its obligations. 3 Bl. Com. 255. 4 Bl. Com. 33. Broom's Max. (3d ed.) 51. *Hill* v. *United States*, 9 How. 386. *Injunction dissolved.*[1]

[1] That the improvement of Boston Harbor is an object of a public nature, and thus that lands taken for this purpose are taken for a public use, can hardly be controverted. It is not necessary that the entire community should directly enjoy or participate in an improvement or enterprise, in order to constitute a public use; and a benefit to the principal harbor of the Commonwealth is much more than a local advantage. Nor when we consider that Acts of Incorporation have been granted, and fully recognized as constitutional, which authorized the taking of private property for the purpose of carrying forward enterprises such as the construction of railroads, or others which tend to the prosperity and welfare of large portions of the community, should we be willing to say, even if no improvement of Boston Harbor formed a part of the purpose, that the legislature might not properly provide for the reclamation of a large body of lands, such as flats, substantially useless in their original condition, for railroad and commercial purposes, by taking, subject to proper compensation, such of them as were necessary for the accomplishment of the object. *Boston & Roxbury Mill Co.* v. *Newman*, 12 Pick. 467. *Talbot* v. *Hudson*, 16 Gray, 417. *Bancroft* v. *Cambridge*, 126 Mass. 438. — DEVENS, J., for the court, in *Moore* v. *Sanford*, 151 Mass. 285, 290. (1890.) Compare *ante*, pp. 893–916; *Kingman et al. Pet'rs*, 153 Mass. 566, 571, s. c. *infra*, p. 1234 n. and *Waterloo Co.* v. *Shanahan*, 128 N. Y. 345 (1891).

In *Com'rs* v. *Moesta*, 91 Mich. 149, 153 (1892), the court (MONTGOMERY, J.) in sustaining proceedings under a statute for taking land for the widening of a "boulevard" in Detroit, said: "Complaint is also made of the definition of 'public necessity' employed. The judge charged as follows: 'The term "necessary" does not mean that it is indispensable or imperative, but only that it is convenient and useful, and therefore, if you find that the improvement is useful, and a convenience and a benefit to the public sufficient to warrant the expense of making it, then you may find it necessary.' The jury must have understood this charge to mean that in order to justify a finding of necessity, it must appear that the improvement was a convenience,

GEORGE HIGGINSON ET AL. v. INHABITANTS OF NAHANT ET AL.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1866.

[11 *Allen*, 530.]

BILL in equity against the inhabitants of Nahant and the selectmen thereof, to restrain them from constructing a way which had been laid out by the selectmen. . . .

The case was reserved for the determination of the whole court.

S. Bartlett and *H. W. Paine* (*F. O. Prince* with them), for the plaintiffs.

W. C. Endicott, for the defendants.

HOAR, J. There are three principal questions presented for adjudication upon this report; the first two requiring a decision of the rights of the plaintiffs, and the third concerning only the remedy.

The first and most important of these is whether, when a town way has been laid out by the selectmen of a town with all the forms pre-

— a benefit to the public of sufficient importance to warrant the public in incurring the expense in making it. This would, under our decisions, constitute a public necessity. *Paul* v. *Detroit*, 32 Mich. 119."

In *Paul* v. *Detroit*, 32 Mich. 108, 113 (1875), the court (CAMPBELL, J.) said: "The Constitution [of Michigan] provides (Art. 18, Sec. 2) that 'when private property is taken for the use and benefit of the public, the necessity for using such property, and the just compensation to be made therefor (except when to be made by the State), shall be ascertained by a jury of twelve freeholders, residing in the vicinity of such property,' or by commissioners appointed by a court of record. An exception was afterwards made of highway commissioners. . . . This provision is not found in constitutions generally, and was never known in Michigan until the adoption of the Constitution of 1851. Before that neither jury nor commissioners had any duty to perform except assessing damages, and the prerogative of taking property on their own estimate of its necessity was exercised by legislatures or those persons or corporations whom they allowed to act in the matter.

"The change was made from a well-founded belief, founded on experience, that private property was often taken improperly and without any necessity, and that the pretence of public utility was often a cloak for private aggrandizement. Ways were forced through private property to enrich the owners of other property, who were enabled by intrigues and sinister influences to induce municipal bodies to use the public authority to subserve their private schemes. The system was abused to the oppression of individuals by corruption and bargaining, and the sacredness of private property, and its immunity from any interference not required by actual public exigencies, ceased to be respected.

"The Constitution has changed this by requiring the whole subject to be determined by a jury of freeholders; so that each case shall be determined by a separate tribunal summoned expressly for the purpose, who must be unanimous in their views before any land can be taken; who must act openly and before all concerned, in hearing and receiving testimony; who cannot listen to private persuasion, and where any attempt to influence them will subject the offender to severe and disgraceful punishment. All these safeguards are implied in the use of the term 'jury;' and no action, by laws, or by proceedings under them, can be maintained, if any of these securities are impaired or disregarded." — ED.

scribed by the statutes of the Commonwealth, and has been duly accepted by the town, it is competent, in order to impeach the validity of these proceedings, to show that the way is wholly on the land of the plaintiffs; that it enters their land from a highway and returns to it at about the same place where it enters; that it leads to no other way or landing-place, and can be used for no purposes of business or duty, or of access to the lands of any other person; but that it was laid out by the selectmen with the design to provide access, not for the town merely, but for the public, to points or places in the lands of the plaintiffs, esteemed by the selectmen, and those who applied to them to lay out the way, as pleasing natural scenery. It is certainly no objection to a town way that it will be serviceable not only to the inhabitants of the town, but also the public generally. Though it is laid out by the officers and constructed and paid for by the inhabitants of the town, all persons have an equal right to use it after it is completed. *Cragie* v. *Mellen*, 6 Mass. 7; *Monterey* v. *County Commissioners*, 7 Cush. 394.

But the position of the plaintiffs is, that in the case presented the way is not intended for the legitimate purposes of a way; that the pretence of laying it out as such is merely colorable; and that private property cannot be lawfully taken and appropriated to such a use.

It has been held that, in laying out a town way, a formal adjudication that the public convenience and necessity require it is not made essential to its legality. *Jones* v. *Andover*, 9 Pick. 154. The reason of this seems to be that the inhabitants of the town, who constitute the public for whose use and advantage the way is principally designed, and who are to bear the expense of constructing it, are to decide by their vote whether it shall be established. The particular community whose convenience is to be consulted determine the matter for themselves. That the town want the road is best settled by the town's voting to have it and pay for it.

But yet the statutes authorizing the laying out of town ways undoubtedly imply the exercise of an independent judgment by the selectmen that the way is needed. A way laid out by them in pursuance of instructions by the town is not warranted by law. *Kean* v. *Stetson*, 5 Pick. 492; *State* v. *Newmarket*, 20 N. H. 519. And the purpose for which the way is laid out may be inquired into, in order to show that it was illegal. Thus it has been decided in New Hampshire that where the object of a town way was merely to avoid a toll-gate upon a turnpike it could not lawfully be made, the reason being that it was an invasion of an existing franchise. *Turnpike Co.* v. *Champney*, 2 N. H. 199. And see *West Boston Bridge* v. *County Commissioners*, 10 Pick. 270. And in *Woodstock* v. *Gallup*, 28 Verm. 587, it was said by the court that, while ornament and the improvement of the grounds about a public building might well be taken into consideration and regarded in connection with the convenience and necessity of a proposed highway, they do not alone constitute a sufficient basis for establishing

it. The doctrine that public ways are for travel, and not for places of amusement, has also been recognized in this Commonwealth. *Blodgett* v. *Boston*, 8 Allen, 237.

But we are not aware of any case in which it has been ever held that, where there is an amount of travel sufficient to warrant the construction of a road which permanently seeks a particular avenue, the purpose for which the public want to travel is to be regarded, if the purpose is lawful. The plaintiffs have contended that the purpose for which a road is wanted must be a purpose of business or duty, in order to create a public exigency. But we think it impossible to go into such refinements. Nahant itself is a town which owes much of its population to its attractiveness for other purposes than business or profit. The passing from place to place is a rightful object of public provision in itself; and the occasions for it are as extensive as the pursuits of life. Pleasure travel may be accommodated as well as business travel. The security against an unreasonable invasion of private rights of property in establishing town ways unnecessarily is to be found, first, in the sense of justice and duty of the board of selectmen; secondly, in the improbability that the inhabitants of a town, with full opportunity for discussion and remonstrance, will vote to accept and construct a way which is not needed, and impose upon themselves the burden of constructing and maintaining it, as well as the damages to the landowners whose property is taken; and thirdly, in the power to apply to the county commissioners for the discontinuance of the way, if the town refuse to discontinue it. But selectmen may lay out and towns may establish such ways as they think necessary for any of the lawful purposes of travel. In *Blodgett* v. *Boston*, before cited, the chief justice uses this language in reference to the obligation of a town to keep a way in repair: "The word 'travellers' may well embrace within its meaning, as applied to the subject matter, every one, whatever may be his age or condition, who has occasion to pass over the highway for any purpose of business, convenience or pleasure. Nor is the motive or object with which a street or way is thus used, if it be not unlawful, at all material in determining whether a person is entitled to an indemnity from a city or town for an injury occasioned by a defect. The highway is to be kept safe and convenient for all persons having occasion to pass over it, while engaged in any of the pursuits or duties of life." And it would seem that roads may be established for the purposes for which they are afterward to be kept in repair. We think, therefore, that the only true test is whether a road is wanted for public travel; which, in the case of town ways, is to be decided by the inhabitants of the town; and that we cannot go into a consideration of the reasons which may induce people to wish to travel upon it, if the travel is for an innocent and lawful purpose.

If the doctrine for which the plaintiffs contend were supported, a road to the top of Mount Washington, to Niagara or Trenton Falls, to the Mammoth Cave of Kentucky, or the Natural Bridge in Virginia, or

even to a public park or common in the cities, would not come within the powers of the officers intrusted with the duty of laying out ways. It would also follow that the legislature would not have the constitutional right to take private property for a public park or pleasure ground, making full compensation to the owner — a conclusion which we should hesitate to arrive at without much farther consideration, in view of the important relations which air, exercise, and recreation bear to the general health and welfare of the community.

Nor is it to be forgotten that, while sufficient public ways are a protection against trespasses upon private property, there may be some reason to expect that a way furnishing access to "pleasing natural scenery" will lead to settlement and habitation, and that, in the plan of a town, it may be well to make some prospective provision for probable future wants of the inhabitants in this respect. . . .

The bill must be dismissed with costs.[1]

[1] This may properly be deemed to be a public purpose, and a statute authorizing the raising of money by taxation for the erection of such a memorial hall may be vindicated on the same grounds as statutes authorizing the raising of money for monuments, statues, gates or archways, celebrations, the publication of town histories, parks, roads leading to points of fine natural scenery, decorations upon public buildings, or other public ornaments or embellishments, designed merely to promote the general welfare, either by providing for fresh air or recreation, or by educating the public taste or by inspiring sentiments of patriotism or of respect for the memory of worthy individuals. The reasonable use of public money for such purposes has been sanctioned by several different statutes, and the constitutional right of the legislature to pass such statutes rests on sound principles. Pub. Sts. c. 27, §§ 10, 11; Sts. 1882, cc. 154, 255, § 5; 1883, c. 119; 1884, c. 42; 1886, c. 76; 1889, c. 21; *Higginson* v. *Nahant*, 11 Allen, 530. — CHARLES ALLEN, J., for the court, in *Kingman* v. *Brockton*, 153 Mass. 255, 256 (1891).

In the case of *In the Matter of the Niagara Falls and Whirlpool Ry. Co.* 108 N. Y. 375 (1888), the court (ANDREWS, J.) in holding that the purpose in view was not one which would justify a resort to the right of eminent domain, said: "The Niagara River, from the foot of the American Falls, flows northerly for several miles with a very rapid current, and the river on either side is faced by precipitous cliffs, the cliff on the American side rising from near the edge of the river to a height of from one hundred and fifty to two hundred feet, to the table land above. The river from the falls to the point known as 'The Whirlpool,' a distance of about three miles, is interesting, and persons visiting the falls have been enabled by means of what is known as an inclined railway to descend from the top of the bank or table land, to the margin of the river. This railway was originally a private enterprise, but is now included in the land taken by the State for a State reservation. The 'Whirlpool' adjoins the lands of De Veaux College. The college has constructed a stairway leading down to the margin of the river at this point for the convenience of visitors, and derives a revenue from its use. The petitioner has located its road along the margin of the river, outside of the cliff, where the space is sufficient between the cliff and the river to permit the track to be laid and at other points where the cliff rises with more abruptness from the margin, the location contemplates cutting into the face of the cliff for the roadway. The proposed road does not connect at either end with a highway. It can be reached only by passing over the lands of the State or the lands of private owners. There can be no habitations along the line of the road, and no traffic, or commerce, or business, except in conveying passengers over the road to see the river and 'The Whirlpool,' and returning them again to the point from which they started. The season for visitors at the Falls is substantially confined to June, July, August, and

IN *Shoemaker* v. *U. S.* 147 U. S. 282, 297 (1893), in considering certain questions relating to an Act of Congress of Sept. 27, 1890, purporting to authorize the establishing of a public park in the District of Columbia and the condemnation of certain land therefor, the court

September. The proposed road cannot be operated during the winter on account of the piling up of the ice, and if its operation was practicable in the winter season it would have nothing to do. It is apparent that the proposed enterprise has been undertaken and is to be carried on for the sole purpose of furnishing sight-seers during about four months of the year, greater facilities than they now enjoy for seeing the part of Niagara River along which the proposed road is to be constructed. . . .

"What is a public use is incapable of exact definition. The expressions *public interest* and *public use* are not synonymous. The establishment of furnaces, mills, and manufactures, the building of churches and hotels, and other similar enterprises, are more or less matters of public concern, and promote, in a general sense, the public welfare. But they lie without the domain of public uses for which private ownership may be displaced by compulsory proceedings. The ground upon which private property may be taken for railroad uses, without the consent of the owner, is primarily that railroads are highways furnishing means of communication between different points, promoting traffic and commerce, facilitating exchanges, in a word they are improved ways. In every form of government the duty of providing public ways is acknowledged to be a public duty. In this State the duty of laying out and maintaining highways has in the main been performed directly by the State or by local authorities, but from an early day the legislature has from time to time delegated to turnpike corporations the right and duty to maintain public roads in localities, and canal companies have been organized with powers of eminent domain. It would be impracticable and contrary to our usages for the State to enter upon the general business of constructing and operating railroads, and, in analogy to the delegation of the power of eminent domain to turnpike and canal companies, it wisely delegates to corporate bodies the right to construct and maintain railroads as public ways for the transportation of freight and passengers, and as incident thereto the right to take private property under the power of eminent domain on making compensation. In considering the question what is a public use for which private property may be taken *in invitum*, Judge Cooley (Const. Lim. 669) remarks 'that can only be considered such when the government is supplying its own needs, or is furnishing facilities for its citizens in regard to these matters of public necessity which on account of their peculiar character, and the difficulty, perhaps impossibility, of making provision for them otherwise, it is alike proper, useful, and needful for the public to provide.' Whatever rule, founded on the adjudged cases may be formulated on this subject, it cannot, we think, be framed so as to include the present case. The fact that the road of the petitioner may enable the portion of the public who visit Niagara Falls, more easily or more fully to gratify their curiosity, or that the road will be public in the sense that all who desire will be entitled to be carried upon it, is not sufficient, we think, in view of the other necessary limitations, to make the enterprise a public one so as to justify condemnation proceedings. The case does not, we think, differ in principle from an attempt on the part of a private corporation, under color of an Act of the Legislature, to condemn lands for an inclined railway, or for a circular railway, or for an observatory, to promote the enjoyment or convenience of those who may visit the Falls. The State has, under recent legislation, taken lands for a park or public place at Niagara Falls. The taking of lands by municipalities for public parks is recognized as a taking for public use. *Brooklyn Park Commissioners* v. *Armstrong*, 45 N. Y. 234; *In re Mayor*, etc., 99 Id. 569. They contribute to the health and enjoyment of the people and are laid out with drives and ways for public use. The proceedings in the case of *The Nahant Road* (11 Allen, 530) and *The Mount Washington Road* (35 N. H. 134), were justified on the ground that they were public highways in the ordinary sense, although primarily intended as pleasure drives. It is, as we have said, difficult to make an exact definition of a public use. It is easier to define it by

(SHIRAS, J.) said: "In the memory of men now living, a proposition to take private property, without the consent of its owner, for a public park, and to assess a proportionate part of the cost upon real estate benefited thereby, would have been regarded as a novel exercise of legislative power.

negation than by affirmation. We are conscious of the serious responsibility which the court assumes in undertaking to declare that not to be a public use, which the legislature has declared to be such. The validity of an Act of the Legislature is not to be assailed for light reasons. It is especially necessary that the question of what constitutes a public use, should not be dealt with in a critical or illiberal spirit, or made to depend upon a too close construction adverse to the public. But having these considerations in mind, we are nevertheless constrained to conclude that the enterprise in question is essentially private and not public, and that private property cannot be taken against the will of the owners for the construction of the road of the petitioner. The order appealed from should, therefore, be affirmed. All concur. Order affirmed."

Compare *Oury* v. *Goodwin*, 26 Pac. Rep. 376 (Ariz. 1891), *In re Rock R. R. Co.* 12 N. Y. Sup. 566 (1890), *In re Buffalo*, 15 N. Y. Sup. 123 (1891).

In *Farist Steel Co.* v. *Bridgeport*, 60 Conn, 278, 291 (1891), the court (SEYMOUR, J.) said: "One other point demands consideration. It is claimed that, even if all the proceedings were legal in form, yet there is a fatal objection to the validity of the assessment, in that the case itself discloses the fact that the harbor lines were established and the appellant's land condemned in order that the new bridge, 'that expensive and sightly structure should not be marred by placing buildings on either side thereof;' and not for any legitimate public use whatever. The appellant says that, except for public uses, private property cannot be taken even upon the payment of just compensation. We presume that no one will question the correctness of that proposition. The taking of private property in the legal establishment of harbor lines is *prima facie* a taking for public use. The legislature so considered it in granting the charter to the city of Bridgeport, and, though that fact is not conclusive, inasmuch as it is held almost universally that whether a particular use is public or not within the meaning of the Constitution is a question for the judiciary, still there can be no question but that property taken in the legal establishment of harbor lines is taken for public use. But the right to establish harbor lines, and to take private property for that purpose, must be exercised in good faith and for a public use naturally connected with their establishment Private property cannot be taken for other than public uses under the guise of taking it for public use. There may be difficulty in many cases in applying this rule, as where nothing appears in the proceedings of the purpose for which the lines were established, and the presumption would be that they were established in the interest of navigation. But where, as in the present case, all the proceedings declare the purpose to be an ulterior one, which no one would claim to be a public one within the meaning of the Constitution, when this purpose is spread upon the very records which are laid before us as containing the authority on which the assessment committee acted, we should be shutting our eyes to the real state of affairs, and permitting property to be taken under the excuse of the right of eminent domain in a case where no public use was contemplated, if we should decide in accordance with the appellee's claim. That would commit us to the doctrine that we are bound by the fact that it was a harbor line that was established, no matter for what purpose it appears to have been established nor how far it is removed from the harbor. We cannot accept that conclusion, but must hold that, whereas it appears from the records themselves, which are introduced to show the facts upon which the legality of the assessment depends, that the harbor lines were laid for the purpose of preventing a new bridge from being marred by the building of structures connected with it which would obscure it, and not in the interests of navigation or any other public use, private property cannot be taken without violating constitutional rights. It is unnecessary to consider the other questions which were discussed. Upon those already considered we advise the Superior Court to render judgment for the appellant, annulling the assessment appealed from."—ED.

"It is true that, in the case of many of the older cities and towns, there were commons or public grounds, but the purpose of these was not to provide places for exercise and recreation, but places on which the owners of domestic animals might pasture them in common, and they were generally laid out as part of the original plan of the town or city.

"It is said, in Johnson's Cyclopædia, that the Central Park of New York was the first place deliberately provided for the inhabitants of any city or town in the United States for exclusive use as a pleasure-ground, for rest and exercise in the open air. However that may be, there is now scarcely a city of any considerable size in the entire country that does not have, or has not projected, such parks.

"The validity of the legislative Acts erecting such parks, and providing for their cost, has been uniformly upheld. It will be sufficient to cite a few of the cases. *Brooklyn Park Commissioners* v. *Armstrong*, 45 N. Y. 234; *In re Commissioners of the Central Park*, 63 Barb. 282; *Owners of Ground* v. *Mayor of Albany*, 15 Wend. 374; *Holt* v. *Somerville*, 127 Mass. 408; *Foster* v. *Boston Park Commissioners*, 131 Mass. 225; also 133 Mass. 321; *St. Louis County Court* v. *Griswold*, 58 Missouri, 175; *Cook* v. *South Park Commissioners*, 61 Illinois, 115; *Kerr* v. *South Park Commissioners*, 117 U. S. 379. In these and many other cases it was, either directly or in effect, held that land taken in a city for public parks and squares, by authority of law, whether advantageous to the public for recreation, health or business, is taken for a public use.

"In the case cited from the Missouri Reports, where the legislature had authorized the appropriation of land for a public park for the benefit of the inhabitants of St. Louis County, situated in the eastern portion of the county, near to and outside of the corporate limits of the city of St. Louis, it was held that this was a public use, notwithstanding the fact that it would be chiefly beneficial to the inhabitants of the city, and that the Act was not unconstitutional.

"The adjudicated cases likewise establish the proposition that while the courts have power to determine whether the use for which private property is authorized by the legislature to be taken, is in fact a public use, yet, if this question is decided in the affirmative, the judicial function is exhausted; that the extent to which such property shall be taken for such use rests wholly in the legislative discretion, subject only to the restraint that just compensation must be made.

"A distinction, however, is attempted in behalf of the plaintiffs in error between the constitutional powers of a State and those of the United States, in respect to the exercise of the power of eminent domain, and this distinction is supposed to be found in a restriction of such power in the United States to purposes of political administration; that it must be limited in its exercise to such objects as fall within the delegated and expressed enumerated powers conferred by the Constitution upon the United States, such as are exemplified by the case of post-offices, custom-houses, court-houses, forts, dockyards, etc.

"We are not called upon, by the duties of this investigation, to consider whether the alleged restriction on the power of eminent domain in the general government, when exercised within the territory of a State, does really exist, or the extent of such restriction, for we are here dealing with an exercise of the power within the District of Columbia, over whose territory the United States possess, not merely the political authority that belongs to them as respects the States of the Union, but likewise the power 'to exercise exclusive legislation in all cases whatsoever over such District.' Constitution, Art. I., Sec. 8, par. 17. It is contended that, notwithstanding this apparently unlimited grant of power over the District, conferred in the Constitution itself, there was a limitation on the legislative power of the general government contained in the so-called Act of Cession by the State of Maryland (Act of 1791, c. 45, § 2), a proviso to which is in the words following: 'Provided, that nothing herein contained shall be so construed to vest in the United States any right of property in the soil, as to affect the right of individuals therein, otherwise than the same shall or may be transferred by such individuals to the United States.' It is said that the acceptance by the United States of the grant constituted a contract between Maryland and the United States, whereby, in view of the foregoing language, the land owner was to be protected against any exercise by the general government of the sovereign power of eminent domain. It is sufficient to say that the history of the transaction clearly shows that the language used in the Maryland Act referred to such persons as had not joined in the execution of a certain agreement by which the principal proprietors of the Maryland portion of the territory undertook to convey lands for the use of the new city, and their individual rights were thus thought to be secured. The provision had no reference to the power of eminent domain, which belonged to the United States as the grantee in the act of cession.

"This position, contended for by the plaintiffs in error, was raised in the case of *Chesapeake & Ohio Canal* v. *Union Bank*, in the Circuit Court of the United States for the District of Columbia, and Cranch, C. J., said: 'The eighth objection is that by the Maryland Act of Cession to the United States, of this part of the District of Columbia (1791, c. 45, sec. 2), Congress are restrained from affecting the rights of individuals to the soil, otherwise than as the same should be transferred to the United States by such individuals; and it is contended that this prohibits the United States from taking private property in this District for public use, and that the right of sovereignty, which Maryland exercised, was not transferred. We think it is a sufficient answer to this objection to say that the United States do not, by this inquisition or by the charter to the Chesapeake & Ohio Canal Company, claim any right of property in the soil. They only claim to exercise the power which belongs to every sovereign, to appropriate, upon just compensation, private property to the making of a highway, whenever the public good requires it.' 4 Cranch, C. C. 75, 80.

it is because they thus lead incidentally to the promotion of "one of the great public industrial pursuits of the Commonwealth," that they have been heretofore sanctioned by this court, as well as by the legislature, as being a legitimate exercise of the right of eminent domain justifying the taking and appropriation of private property. *Hazen* v. *Essex Co.*, 12 Cush. 475.

It is certainly difficult to see any good reason for making a discrimination in this respect between different branches of industry. If it is lawful and constitutional to advance the manufacturing or mechanical interests of a section of the State by allowing individuals acting primarily for their own profit to take private property, there would seem to be little, if any, room for doubt as to the authority of the legislature, acting as the representatives of the whole people, to make a similar appropriation by their own immediate agents in order to promote the agricultural interests of a large territory. Indeed it would seem to be most reasonable, and consistent with the principle upon which legislation of this character has been exercised and judicially sanctioned in this commonwealth, to hold that the legislature might provide that land which has been taken for a public use and subjected to a servitude or easement by which its value has been impaired and it has been rendered less productive, should be relieved from the burden, if the purpose for which it was so appropriated has ceased to be of public utility, and its restoration to its original condition, discharged of the incumbrance, will tend to promote the interest of the community by contributing to the means of increasing the general wealth and prosperity. If the right of a mill owner to raise a dam and flow the land of adjacent proprietors has ceased to be of any public advantage, and tends to retard prosperity and to impoverish the neighborhood, and the withdrawal of the water from the land by taking down the dam and rendering the land available for agricultural purposes would be so conducive to the interests of the community as to render it a work of public utility, there is no good reason why the legislature may not constitutionally exercise the power to take down the dam on making suitable compensation to the owner. It would only be to apply to the mill-owner for the benefit of agriculture the same rule which had been previously applied to the land-owner for the promotion of manufacturing and mechanical pursuits.

Nor are we without precedent for acts of legislation by which private property has been taken for the purpose of improving land and rendering it fertile and productive. The St. of 1795, c. 62, for the improvement of meadows, swamps, and low lands, recognizes the right of taking private property for the purpose of redeeming lands from the effects of stagnant water and of being overflowed by obstructions in brooks and rivers. This statute, re-enacted by the Rev. Sts. c. 115, has been long in use, and many proceedings under it have taken place, some of which have passed under the judicial cognizance of this court. But in none of these has the validity of the statute been doubted or

denied. *Coomes* v. *Burt*, 22 Pick. 422. *Day* v. *Hulburt*, 11 Met. 321. Under the provisions of this Act, not only is it competent to drain or overflow the land of a proprietor without his assent, and to compel him to pay a portion of the expense attendant on the proposed improvement, but also to open the flood-gates of any mill or make needful passages through or round the dam thereof and erect temporary dams on the land of any person who is not a proprietor or a party to the proceedings. For the injury thus occasioned to private property, a remedy is provided by the statute. But it is clearly an appropriation of private property primarily for the benefit of the owners of the meadows or low lands which are intended to be improved, and where the public use or benefit which justifies such appropriation consists in the indirect advantage to the community, derived from the increase of the productive capacity of the soil and the promotion of the agricultural interests of the owners of the land.

It was suggested at the argument, that there was an essential difference between the provisions of statute for the improvement of meadows and low lands and that under consideration, because by the former it was provided that the damages should be paid by the parties benefited, whereas by the latter they are to be paid out of the public treasury. But we cannot see the force or bearing of this suggestion. The mode of compensating the party whose property is taken cannot affect the validity of the appropriation, so far as it depends on the question, whether it was taken for a public use. If the use is not in its nature public, the appropriation is invalid and unconstitutional, and the mode by which compensation to the owners of land taken is to be made is wholly immaterial. It is only when property is taken for a purpose for which it may be constitutionally appropriated, that it becomes necessary to determine whether provision is made for compensation, suitable and adequate to furnish a remedy to the party injured.

But if there were no precedent for such legislation, and if we were unable to see that any use in its nature public could be effected by the exercise of the power conferred on the commissioners by the terms of the Act under consideration, we should be slow to decide, on the case as stated in the bill, that the statute was invalid, and that the legislature in passing it transcended their constitutional authority. The burden of establishing this proposition is on the plaintiffs. They are bound to make such averments in their bill, either by way of allegations of fact or conclusions of law, as *prima facie* to make it appear that the Act has no force or validity. . . . The bill contains no such allegation. Certainly in a hearing on bill and answer, the court cannot assume the Act to be unconstitutional, in the absence of any statement of facts or other averments to sustain the allegation that it takes property "for uses and purposes which are in violation of the tenth article of the Bill of Rights of the Constitution of the Commonwealth of Massachusetts." Nor is it to be overlooked in this connection, that the ordinary presumption in favor of the validity of an Act of the Legislature is greatly

G. W. Biddle and *W. H. Rawle*, for appellants. *H. Wharton*, for appellee.

The opinion of the court was delivered May 8, 1871, by SHARSWOOD, J. . . .

It is contended that the property of the appellants has been taken in the exercise by the Commonwealth of her right of eminent domain, which she may exercise herself or confer upon corporations or individuals. If so, as it is conceded that full provision for compensation is made, it is within the saving of that other section of the Declaration of Rights — "nor shall any man's property be taken or applied to public use, without the consent of his representatives and without just compensation being made;" Const. Penna., Art. IX., § 10. No doubt the right of eminent domain, being for the safety and advantage of the public, overrides all rights of private property. But for what public use has this estate of the appellants been taken and applied? It has been contended, as the preamble of the Act declares, that "the policy of this Commonwealth has always been to encourage the free transmission of real estate, and to remove restrictions on alienation, so that it is, and is hereby declared to be, necessary for the public use to provide a method of extinguishing such irredeemable rents, having a due regard for private rights." But if this is the kind of public use for which a man's property can be taken, there is practically no limit whatever to the legislative power. It would result that whenever the legislature deem it expedient to transfer one man's property to another upon a valuation, they can effect their object. What that department of the government considers and pronounces to be the policy of the Commonwealth, the judicial department must accept as such. The members of the two houses with the executive, are, upon all questions of policy, the exclusive exponents of the will of the people. Let us test the principle now involved, by a case more extreme than that before us, but which will be *experimentum crucis*. If we can show that a principle logically carried out leads to an absurdity, it is conclusive against it. Suppose then the legislature should adopt what has been a favorite theory with many political economists, that small farms are injurious to the community, prevent the full development of the agricultural resources of a country, and ought therefore, as speedily as possible, to be united and formed into large ones. Then reciting this to be the true policy of the State, let them provide that every farm of less than one hundred acres shall be attached to and become the property of the adjoining owner of a larger farm at a valuation to be determined by a jury. When the King of Samaria coveted the little vineyard of Naboth hard by his palace, that he might have it for a garden of herbs, and offered to give him a better vineyard than it, or if it seemed good to him the worth of it in money, he was met by the sturdy answer, — "The Lord forbid it me that I should give the inheritance of my fathers unto thee." Would any one be hardy enough to stand up in a republican country and claim for its government a power which an Eastern monarch dared not to assume? It

was well remarked by Mr. Justice Gilchrist in the *Concord Railroad Co.* v. *Greeley*, 17 N. H. 57, that "even if the legislature should declare that an Act taking the property of A. and giving it to B. as his private property, was an application of it to public uses, no one would contend that such a declaration made that public which in its nature and object was private." It is not necessary to define what is a public use, — it is quite sufficient to say that the object as set forth in the preamble of this Act is not a public use within the right of eminent domain of the State. Other instances may be mentioned of the dangerous extent of this principle, should it be judicially approved, that the declaration of a general policy will constitute a valid public use. In the course of the development of the immense mineral resources of this State, it has become very common to separate the estate in the mines from the estate in the surface. This has been held to be lawful — as in entire conformity with the established principles of the common law of England, which is the substratum of our system of jurisprudence. It may be found, however, in course of time to be a very inconvenient and even perilous state of things — more so than an intangible, incorporeal hereditament, such as a ground-rent. The legislature may adopt the policy of preventing it, and may well, by laws acting prospectively, prohibit the creation of such separate estates in the same land. But how as to existing estates which have been lawfully created under the sanction of the law and the decisions of this court, are they to be subject to the legislative fiat? Can an Act of Assembly compel the owner of the minerals to surrender his property to the owner of the soil at the valuation of a jury? Can a law say that twelve men shall determine at what price I shall sell my property to another? In the consideration of the practical bearings of this question, we must strike out of the Act of 1869 the provision that the compensation to be awarded shall not be less than twenty years' purchase of the rent. If this is a legitimate taking for public use, that clause might well have been omitted. Whenever property is so taken, all that is necessary is, that some impartial tribunal shall estimate the damages sustained by the owner, and in the case of any corporate body or individual invested with such privilege, that such corporation or individual shall make compensation or give adequate security therefor before such property shall be taken: Const. Art. VII. § 4. What would be the value of coal-mines and mineral estates if the owners could be deprived of them at any time to be selected by the surface proprietor, by the valuation of a jury, upon the principle that private property may be taken from one man and transferred to another, on the ground that it is the policy of the Commonwealth to put an end to such estates separate from the surface of the soil? There are many rights of way resting on express grant — bought and paid for — but now very burdensome and annoying to the owners of the land over which they pass; can they be blown away by the legislature upon this same plea? I say nothing of private roads laid out by authority of law and paid for, nor of ways resting upon prescription

and lapse of time, on account of the first section of the Act of April 21, 1846, Pamph. L. 416, which gives the Courts of Quarter Sessions power to vacate such roads and ways without compensation, and the decision in Stuber's Road, 4 Casey, 199, which affirmed the constitutionality of that Act, except individually to express my surprise that the same learned judge who wrote the opinion in that case, when he came to decide Baggs's Appeal, 7 Wright, 512, did not advert to his first opinion. It is enough for the present purpose to say that the decision in Stuber's Road is not put on the ground of the exercise of the right of eminent domain. That Act excepts private roads resting upon express grant, the evidence of which is still in existence; and apart from the fact that no compensation is provided, it is evident that private property, though derived from express grant or contract, is not therefore exempt from the right of eminent domain. I put aside the decision in Stuber's Road, as resting upon grounds peculiar to itself, not affecting this argument. One more illustration of the extent to which the principle may be carried will be sufficient. A man provides by his will an annuity for his widow for her life, and charges it on his lands, or if he dies intestate, the law does the same thing on partition among his heirs. Here is an encumbrance of the same character as a ground-rent, which though not perpetual, may still continue for an indefinite period, — the life of the widow. It is within the policy recited in this preamble — it is an impediment to the free transmission of real estate, and a restriction on alienation which ought to be removed out of the way. If an act should be passed extinguishing this annuity of the widow on a valuation of her life interest — even though it were provided that it should not be less than the value fixed for such an annual sum by the annuity tables — would it not shock the moral sense and feeling of the entire community? Yet wherein does that case differ from the one before us except in immaterial circumstances?

It is said that the Act of November 27, 1779, 1 Sm. L. 479, commonly called the Divesting Act, by which the estates of the proprietaries were vested in the Commonwealth, is an instance in which private property was taken on reasons of policy. That Act, like the Revolution from which its necessity arose, can be a precedent for nothing in the ordinary course of legislation. It is well vindicated by its preamble, which claims that the rights of property and powers of government in William Penn and his heirs were stipulated to be used and enjoyed as well for the benefit of the settlers as for his own particular emolument, and that these rights and powers could no longer consist with the safety, liberty and happiness of the people. It is by no means clear that the Commonwealth, on the principles of public law, had not a strict legal right to all that was resumed, and that the compensation she made was not an act of liberality, as indeed it is declared in the Act, to be in "remembrance of the enterprising spirit which distinguished the founder of Pennsylvania," as well as in consideration "of the expectations and dependence of his descendants." . . .

It has also been pressed upon us that private roads as well as lateral railroads are cases parallel with the Act now before us, as in them, on mere grounds of policy, private property is taken for a private use on compensation made. As to private roads, they originated at a very early period by an Act of Assembly of February 20, 1735–1736, Hall and Sellers 188, re-enacted in the 17th section of the Act of April 4, 1802, 3 Sm. L. 512, and incorporated by the revisers in the General Road Law of June 13, 1836, Pamph. L. 555; yet it was not until the year 1851 that the question of the constitutionality of these Acts was raised before this court in Pocopson Road, 4 Harris, 15, a case from Chester County. The point seems to have been elaborately argued by Mr. P. F. Smith, for the appellant, and many authorities cited; but Mr. Lewis, for appellee, contented himself with citing Harvey *v.* Thomas, 10 Watts, 63. In the short opinion *per curiam*, affirming the proceedings, no notice whatever was taken of the point. In some of our sister States similar Acts have been held to be unconstitutional. *Taylor* v. *Porter*, 1 Hill, 140; *Clack* v. *White*, 2 Swan (Tenn.), 450; *Dickey* v. *Tennison*, 47 Mo. 373; but their constitutionality was well vindicated in Hickman's Case, 4 Harrington, 580, in which it is said in the opinion of the Supreme Court of Delaware: "It is a part of the system of public roads, essential to the enjoyment of those which are strictly public; for many neighborhoods as well as individuals would be deprived of the benefit of the public highway, but for outlets laid out on private petition and at private cost, and which are private roads in that sense, but branches of the public roads and open to the public for the purposes for which they are laid out." As to lateral railroads, the constitutionality of the Act of May 5, 1832, Pamph. L. 501, was eventually sustained not upon the ground assumed in *Harvey* v. *Thomas*, 10 Watts, 63, but upon the better reason, that the public had the use of them for the purpose for which they were used. *Hays* v. *Risher*, 8 Casey, 169; *Brown* v. *Corey*, 7 Wright, 495; *Keeling* v. *Griffin*, 6 P. F. Smith, 307. It is not necessary to examine those cases in which, in some of our sister States, Acts authorizing mill-owners to flood the lands of an upper riparian proprietor, on compensation, may have been held good. "They were designed," says Chief Justice Shaw, "to provide for the most useful and beneficial occupation and enjoyment of natural streams and water courses where the absolute right of each proprietor to use his own lands and water privileges at his own pleasure cannot be fully enjoyed, and one must of necessity in some degree yield to the other." *Fiske* v. *Framingham Man. Co.*, 13 Pick. 68; *Hazen* v. *Essex Co.*, 12 Cush. 475.

I pass from the argument that this Act is an exercise of the right of eminent domain. I have given more particular attention to it, because it is evidently the ground upon which the lawmakers themselves placed their right to pass the act in question. That respect which is due by this court to the co-ordinate branch of government, made it proper that this point should be fully examined and discussed.

If this Act cannot be sustained on this ground, then it seems clear that it impairs a contract, and is therefore prohibited as well by the Constitution of the United States, Art. I. § 10, as by the Constitution of this Commonwealth, Art. IX. § 17. . . .

Upon the whole, then, we have come to the conclusion that the Act of April 15, 1869, is unconstitutional and void. The particular provisions of this Act seem just and reasonable; but they are not features which affect the character of the Act as contrary to the fundamental law — the *lex legum*. We are bound to look at the principle upon which it is based, and its logical and necessary consequences. As it appears to us, it would overthrow the most valuable barriers which are reared against legislative tyranny, and make all property to be held by a most insecure and uncertain tenure. This Act may be but an entering wedge. Its salutary and conservative restrictions may be repealed hereafter without touching its principle, upon which rests the question of its constitutionality, and every man will then hold his ground-rents, — and the same provision may be extended to other kinds of property, — upon the will of a jury in determining for what price he shall be compelled to sell them. *Judgment reversed.*

AGNEW, J. This case has been argued as if the ground-rent owner had been deprived of his property by a taking for private use, contrary to the Constitution of the State. In my judgment this is not the character of the law — it is remedial rather than aggressive. . . .

It does not seek to take the ground-rent from its owner for public or for private use, but simply to transmute an annual sum of money into its equivalent sum of capital, in order that the impolitic, perpetual union of two estates, growing from a single stalk, may be separated for the welfare of the State. Are not the powers of government adequate for this? In thinking and speaking of the power of eminent domain, we are very apt to be controlled in our thoughts by the commonest mode of its exercise, to wit, the taking of land for public use. But this is not its only form. Domain here means dominion, and it is eminent because of its high control. This high power or dominion of the State is not confined to a single mode of exercise, though seldom seen or thought of in others, but is to be found in all those forms grouped under the name of the police power of the State — a power exercised for the welfare of the people, and rendered necessary by the circumstances which affect the common good. . . . I think the law can be impugned only on the ground that it impairs the validity of a contract; and to this extent I agree that it is not competent for the legislature to sever the ground-rent from the land to which it is attached by its contract relation as between the parties to the contract and their immediate privies, to the extent that it is in the power of men to create a perpetuity, but no farther. Beyond this, to carry the sanctity of a contract is to make the act of two individuals rise higher than the powers of government and the interests of the State, and to dominate

both the power of the legislature and the rights of the people. It cannot be that the contracts of a past generation are beyond the reach of law for a proper purpose, a purpose not to destroy, but to change, to suit the interests of the State. Otherwise a contract would stand on a higher platform than that of the people to change their form of government. A change of the State constitution would effect nothing, for the contract standing on the higher ground of the Federal Constitution would still claim its protection, and thus descending on unborn generations, would cling like the fatal shirt of Nessus, until escheat or an earthquake should end it. I think, therefore, that the legislature can sever the rent from the land by a fair valuation and payment in money in the case of a ground-rent deed all of whose parties are dead and more than twenty-one years have elapsed since the death of the last survivor. But as these facts do not appear in this bill and answer, the judgment should be reversed.[1]

LYNCH v. FORBES.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1894.

[37 *North Eastern Rep.* 437.]

REPORT from Superior Court, Norfolk County; JUSTIN DEWEY, Judge.

Case reserved from Supreme Judicial Court, Norfolk County; JAMES M. MORTON, Judge.

[1] As to a public purpose, see *supra*, pp. 901–916; *infra*, pp. 1209–1257.

In *Savannah* v. *Hancock*, 91 Mo. 54 (1886), BLACK, J., for the court, said: "Section 20, Article 2, Constitution of 1875, provides 'that, whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and, as such, judicially determined, without regard to any legislative assertion that the use is public.' As this is a new section, not found in any of the former constitutions of this State, it may be well to look to the state of the law before its adoption. . . . It will thus be seen that the question whether the use for which the property is about to be taken is a public use, has already been regarded, in this State, as a judicial question, a question which the courts would for themselves decide. Notwithstanding this, it is undeniably true, that the courts were disposed to defer somewhat to a legislative declaration upon the subject. Hence it is said, if the legislature has declared the use, or purpose, to be a public one, its judgment will be respected by the courts, unless the use be palpably private. Dill., Mun. Corp. (3 ed.), sec. 600; Mills on Em. Dom., sec. 10, is to the same effect. Now the constitutional provision of this State, before quoted, makes it the duty of the courts to determine whether the use be a public use, or not, without any regard to a legislative assertion upon the subject. They are freed from the influence of any expressed judgment of the legislature in that behalf, and enjoined to determine the question, wholly regardless of what that branch of the State government asserted upon the subject. The method, however, by which the courts determine whether the use is a public use, remains the same as before. Neither the Constitution, nor any statute, requires that question to be submitted to a jury. The courts will decide the question without the aid of a jury." So Consts. of Col., Miss., and Washington. — ED.

Action by Daniel A. Lynch against Fayette F. Forbes, for trespass to real estate. Defendant justified under Acts 1872, c. 343, and Acts 1888, c. 131, authorizing the town of Brookline to take land for the erection and maintenance of waterworks, and proved that the defendant was the servant and agent of, and acted under the direction of, the selectmen and water board of the town, and was the superintendent and engineer of its water works. The court refused to admit the evidence offered by the plaintiff, or to submit the evidence therein referred to to the jury, but did rule that the question as to whether or not the town had exceeded its authority, and taken more land than it was authorized to take, or any land not within the authority given by said Acts, could not be tested in this suit; that the defendant had shown that the town had conformed to the formal requirements of the statute as to method of taking land, and that defendant's justification was complete, — and directed a verdict for the defendant, and, at request of the parties, reported the case to the Supreme Judicial Court for determination. Judgment on verdict for defendant.

Bill in equity by Daniel A. Lynch against the town of Brookline, praying that the acts of the town in taking plaintiff's land be decreed to be void, and for other relief. The case was reserved, at the request of the parties, for the full court, upon the bill and demurrer. Bill dismissed.

Geo. Fred Williams and *G. W. Anderson*, for plaintiff. *M. & C. A. Williams*, for defendant.

MORTON, J. The principal questions involved in these two cases are the same, and, by agreement of parties, they were argued, and are to be considered, together. The plaintiff contends, in both cases, that the taking was unlawful; and, at the trial of the case in trespass, he offered to show that prior to the taking in question the town had taken all the land that it needed, and that this was not suitable and was not necessary, useful, or proper, for any of the purposes named in the Acts under which it was taken. The plaintiff concedes, what is well settled, that the question whether a necessity exists for the taking of private property for a public use is a legislative, and not a judicial, one. He does not deny that the taking of land for waterworks and a water supply for the general benefit of the inhabitants of a city or town is a taking for a public use; but he contends that where, as here, the authority is given "to take . . . any land or real estate necessary," etc., the question of necessity, so far as it relates to the land actually taken, is one of fact, to be settled by the court or jury. Such has not been deemed to be the law in this State, though it is said, in a work of established authority, that the Constitutions of some of the States require it to be done. *Lund* v. *New Bedford*, 121 Mass. 286; *Eastern R. Co.* v. *Boston & M. R. Co.*, 111 Mass. 125; *Dorgan* v. *Boston*, 12 Allen, 223; *Talbot* v. *Hudson*, 16 Gray, 417; Cooley, Const. Lim. § 538, note. There is no constitutional right on the part of the landowners, in this State, to have the question of the necessity or expe-

diency of the taking in any particular instance submitted to a court or jury. *Holt* v. *Somerville*, 127 Mass. 411. In the absence of any provision in the statutes submitting the matter to a court or jury, the decision of the question lies with the body or individuals to whom the State has delegated the authority to take. They have the same power as the State, acting through any regularly constituted authority, would have. *Fall River Iron Works* v. *Old Colony & F. R. Co.*, 5 Allen, 226; *People* v. *Smith*, 21 N. Y. 597; *Boom Co.* v. *Patterson*, 98 U. S. 406; *Railway Co.* v. *Brown*, 9 H. L. Cas. 246; *Lewis* v. *Board*, 40 Ch. Div. 55; Cooley, Const. Lim. § 538. See Lewis, Em. Dom. § 238, note, for collection of cases. Of course, neither the State nor its delegates can take, under the guise of eminent domain, the property of A. for the purpose of conveying it to B., or for a purpose clearly in excess of, or at variance with, the powers granted. No question of good faith, however, arises here, and the purpose for which the land was taken is within the scope of the Acts authorizing it. The testimony that was offered was therefore rightly excluded, as was also that offered for the purpose of showing that the town was obtaining water from land taken in February, 1889, and that a part, at least, of the water thus taken did not come from the river by percolation. The validity of the taking now in question does not depend on the conduct of the town in regard to another and an earlier taking.

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The result is that in the first case the entry must be, "Judgment on the verdict," and, in the second, "Bill dismissed, with costs;" and it is so ordered.

In *Cary Library* v. *Bliss et al.*, 151 Mass. 364 (1890), the town of Lexington, in accepting certain propositions from Mrs. Maria Cary for endowing a free public library upon certain terms, if it should be established by that town, proceeded to establish the library, and the trustees received certain gifts from her and other persons for the benefit of the institution. Several years afterwards, and after Mrs. Cary's death, a statute was passed purporting to incorporate a new body (the plaintiff), for carrying out the same purposes, with the assent of the town of Lexington, giving it power "to take and hold . . . the funds and property now held by the trustees of Cary Library," &c. The statute went on to provide that "any person sustaining damages by such taking may have his damages assessed," &c. After holding this statute unconstitutional, as impairing the obligation of contracts, the court (Knowlton, J.) said:

"As if apprehensive that the statute, in the parts already considered, was in conflict with the Constitution, the framers of the Act embodied in it a provision for taking the property under the right of eminent domain. Of this property, fifteen hundred dollars was money deposited in a savings bank; and there were two promissory notes of the town of Lexington, amounting to eleven thousand dollars, bearing interest, and payable to the treasurer of the board of trustees.

"Property can be taken in this way only in the exercise of the paramount right of the government, founded on a public necessity. The question has been somewhat considered whether that necessity can ever extend to the taking of money. In *Burnett* v. *Sacramento*, 12 Cal. 76, Mr. Justice Field, now of the Supreme Court of the United States, says: 'Money is not that species of property which the sovereign authority can authorize to be taken in the exercise of its right of eminent domain. That right can be exercised only with reference to other property than money, for the property taken is to be the subject of compensation in money itself, and the general doctrine of the authorities of the present day is, that the compensation must be either made, or a fund provided for it in advance.'

"In Cooley on Constitutional Limitations (4th ed.) 656, a similar opinion is expressed, and language to the same effect is found in *People* v. *Brooklyn*, 4 N. Y. 419, 424. There may be a great public exigency, as in time of war, which will authorize the government to take money in the exercise of this right. *Mitchell* v. *Harmony*, 13 How. 115, 128; *Williams* v. *Wilkerman*, 44 Misso. 484; *Yost* v. *Stout*, 4 Cold. 205. But it cannot truly be said that the taking of money by a private corporation, created to administer a public charity, is a taking of property for public use. The money taken must be paid for in money. It cannot be taken unless it is paid for in advance, or sufficient provision is made for immediate payment, which provision must be in money or in that which is deemed its equivalent. There can be no necessity for such a taking. In its nature it is not a taking for a public use. There can be a taking for a public use under this power only when, in the nature of the case, there is or may be, a public necessity for the taking. There cannot be such a necessity in favor of a private corporation, which must provide money to pay for money. For this reason, we are of opinion that the legislature could not authorize the taking of this property by the petitioner.

"The only statement of the use to which the property is to be put is found in the provision of the St. of 1888, c. 342, § 5, that it is 'to be held and applied by the corporation in the same manner as if held by said trustees.' The question arises, whether taking property from one party, who holds it for a public use, by another, to hold it in the same manner for precisely the same public use, can be authorized under the Constitution. Can such a taking be founded on a public necessity? It is unlike taking for a public use property which is already devoted to a different public use. There may be a necessity for that. In the first case, the property is already appropriated to a public use as completely in every particular as it is to be. Can the taking be found to be for the purpose which must exist to give it validity? In every case it is a judicial question whether the taking is of such a nature that it is or may be founded on a public necessity. If it is of that nature, it is for the legislature to say whether in a particular case the necessity exists. We are of opinion that the proceeding authorized

by the statute was in its nature merely a transfer of property from one party to another, and not an appropriation of property to public use, nor a taking which was, or which could be found by the legislature to be, a matter of public necessity. *West River Bridge* v. *Dix*, 6 How. 507; *Lake Shore & Michigan Southern Railway* v. *Chicago & Western Indiana Railroad*, 97 Ill. 506; *Chicago & Northwestern Railway* v. *Chicago & Evanston Railroad*, 112 Ill. 589.

"For these reasons, a majority of the court are of opinion that the St. of 1888, c. 342, is not in conformity with the Constitution of the United States. It follows, that the petitioner has no title to the property in the hands of the trustees of the Cary Library, and that the petition must be dismissed. *Petition dismissed.*" [1]

THE GOVERNOR AND COMPANY OF THE CAST PLATE MANUFACTURERS *v.* MEREDITH ET AL.

KING'S BENCH, 1792.

[4 *Durnf. & East*, 794.]

THIS was an action upon the case, in which the plaintiffs declared, That before and at the time of committing the grievances mentioned, they were and from thenceforth hitherto have been and still are possessed of a certain messuage, &c. and a certain yard or piece of land, with divers (to wit) three warehouses erected and built thereon, situate on the north side of High-Ground Street, in the parish of Christchurch in Surrey; and also of a certain entrance or gateway leading from the street through and under the messuage into the yard or piece of land;

[1] In *Hammett* v. *Philadelphia*, 65 Pa. St. 152 (1870), SHARSWOOD, J., for the court, said: "It has been said by Judge Field, of California, now on the bench of the Supreme Court of the United States, that 'money is not that species of property which the sovereign authority can authorize to be taken in the exercise of its right of eminent domain. That right can be exercised only with reference to other property than money, for the property taken is to be the subject of compensation in money itself; and the general doctrine of the authorities of the present day is, that the compensation must be made, or a fund provided for it in advance.' *Burnett* v. *Sacramento*, 12 Cal. 76. I am not able, and do not feel disposed to enter the lists upon such a question, but it does seem to me that there may be occasions in which money may be taken by the State in the exercise of its transcendental right of eminent domain. Such would be the case of a pressing and immediate necessity, as in the event of invasion by a public enemy, or some great calamity, as famine or pestilence, contributions could be levied on banks, corporations, or individuals. The obligation of compensation is not immediate. It is required only that provision should be made for compensation in the future. Judge Ruggles confines the right to exact money by virtue of the eminent domain to the case where it is for the use of the State at large in time of war. *The People ex rel. Griffin* v. *Brooklyn*, 4 Comst. 419. I cannot see that there is any such necessary limitation. The public necessity which gives rise to it, prevents its being restrained by any limitations as to either subject or occasion."

Compare *People* v. *Mayor of Brooklyn*, 4 N. Y. 419, 424. — ED.

and which said entrance during all the time aforesaid, until, &c. was used and of right, &c. by the plaintiffs, for the passing and repassing of carts, wagons, and other carriages, in the service of the plaintiffs into and out of the yard or piece of land for the more convenient and beneficial enjoyment and occupation of the yard, and of the warehouses, &c. yet that the defendants on, &c. wrongfully and injuriously raised, &c. the said street, and the soil and pavement thereof, before the said entrance, &c. by placing great quantities of wood, &c. upon the street, &c. there, to a much greater height than the street or the soil and pavement thereof were before raised, (to wit) to the height of four feet more, &c. and so close and near, &c. to the entrance, that it was and still is thereby greatly blocked up and obstructed, insomuch that the carts, &c. employed in the service of the plaintiffs have been and still are thereby prevented from passing and repassing through the entrance, and the plaintiffs are thereby much injured, &c.

The defendants pleaded the general issue; and at the trial at Kingston before GOULD, J. a verdict was found for the plaintiffs with £150 damages, subject to the opinion of this court on the following case.

The plaintiffs were possessed of the premises mentioned in the declaration under a lease for ninety-five years from Christmas, 1777. The warehouses standing in the yard have been used by them since they have been in possession for the depositing and keeping of plate-glass, which is a commodity of large value; and very brittle in its nature. The gateway in question before the committing of the grievance was of the height of twelve feet and one inch, from the old pavement, with which the street in question had been formerly paved; and the gateway was used for the purpose of admitting wagons into the yard, loaded with plate-glass, that they might be unloaded at the door of the warehouses. The defendants, who acted as pavers under the authority of the commissioners, named in an Act passed in the last session, for paving, &c. Upper-Ground Street in the parish of Christchurch in Surrey, and certain other streets, &c. raised[1] the pavement two feet and one inch higher than the old pavement. The gateway in the centre of the arch is only ten feet high from the level of the new pavement, so that the height of the gateway is now reduced two feet and one inch. The defendants soon after the passing of the above Act of Parliament, and before the commencement of the present action, in order to execute the powers and provisions of the said Act, proceeded to take the level of the street, in order to its being paved; and for that purpose they caused a straight and halt line to be drawn in the front of the houses in the street, showing the level and height of the new intended pavement. And about three months afterwards the defendants laid the ground according to such level and agreeably to the line so marked out, and paved the same, which now makes a regular inclined plane with a declination of only one foot of perpendicular height in seventeen feet of

[1] By sect. 13, the commissioners were empowered to cause the said street, &c to be paved, repaired, *raised*, sunk, or altered, &c.

length; and it would not be effectual if done in any other way: whereas in the original state the declination was about one foot in twelve, which was a very unsafe declivity for horses and carriages going up or down. The line so made was necessary and proper; and any alteration of the inclined surface of the street less material was not sufficient to render the street safe for carriages passing through. In order to admit carriages as heretofore it will be necessary to take down the arch and heighten the same. The case then stated, that by these means the plaintiffs are deprived of the use of the gateway as they had it before, and wagons and other carriages are prevented passing to their warehouses, and are obliged to be unloaded in the street. It was also proved that the plaintiffs had given notice to the defendants, and also to the commissioners, that unless the buildings were so altered as to enable the plaintiffs to enjoy their warehouses as they did before the Act passed, an action would be brought against them for a satisfaction in damages.

Garrow, for the plaintiffs, relied upon the case of *Leader* v. *Moxon and Others*,[1] which was directly in point with the present; and established the principle, that the commissioners under such an Act as the present are liable to make good to individuals any actual damage sustained by their acts. And this is founded in good sense, for it could never be supposed to be the intention of the legislature that the avenue to one man's house should be blocked up for the convenience of his neighbors without some compensation.

Fielding, *contra*, was stopped by the court.

Lord Kenyon, Ch. J. If this action could be maintained, every turnpike Act, paving Act, and navigation Act, would give rise to an infinity of actions. If the legislature think it necessary, as they do in many cases, they enable the commissioners to award satisfaction to the individuals who happen to suffer. But if there be no such power the parties are without remedy, provided the commissioners do not exceed their jurisdiction. But it does not seem to me that the commissioners acting under this Act have been guilty of any excess of jurisdiction. Some individuals suffer an inconvenience under all these Acts of Parliament; but the interests of individuals must give way to the accommodation of the public. I doubt the accuracy of the report of the case cited from Wils.; for I cannot conceive that the judges, in considering whether or not the action could be supported, laid any stress on the enormity of the damage sustained by the plaintiff. That circumstance might have induced the jury to increase the damages, if the action could be supported, but could not of itself give a cause of action: that must have depended on the question, whether or not the commissioners exceeded their jurisdiction.

Buller, J. The question here is, whether or not this action can be maintained? and I am clearly of opinion that it cannot, because a par-

[1] 3 Wils. 461, *vid.* 2 Bl. Rep. 924, s. c. [See *ante*, 673, *n.* — Ed.]

ticular remedy is pointed out by the Act.[1] If there had been no clause in the Act empowering the commissioners to give satisfaction to the party grieved, I am by no means satisfied that, on the broad principle stated by the plaintiffs' counsel, any action could be maintained. There are many cases in which individuals sustain an injury, for which the law gives no action; for instance, pulling down houses, or raising bulwarks, for the preservation and defence of the kingdom against the king's enemies. The civil law writers indeed say, that the individuals who suffer have a right to resort to the public for a satisfaction: but no one ever thought that the common law gave an action against the individual who pulled down the house, &c. This is one of those cases to which the maxim applies, *salus populi suprema est lex.* If the thing complained of were lawful at the time, no action can be sustained against the party doing the act. In this case express power was given to the commissioners to raise the pavement; and, not having exceeded their power, they are not liable to an action for having done it.

GROSE, J. The clause in the act which empowers the commissioners to award satisfaction, is decisive against this action.

Postea to the defendants.

CALLENDER *v.* MARSH.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1823.

[1 *Pick.* 418.]

THIS was an action of trespass on the case for digging down the streets by the plaintiff's dwelling house, in Boston, and taking away the earth, so as to lay bare the foundation walls of the house and endanger its falling; in consequence of which the plaintiff was obliged, at great expense, to build up new walls, and otherwise secure the house, and render it safe and convenient of access, as before.

The defendant pleaded the general issue, and filed a brief statement, pursuant to the statute, in which he set forth his appointment and qualification as surveyer of the highways for the city of Boston, the condition of the street, and the purposes for which the acts complained of were done.

At the trial before PARKER, C. J., the plaintiff proved the digging down of the streets, as stated in his declaration, and gave evidence of the trouble and inconvenience which he had suffered in consequence. His house was built about twenty years ago, the streets having been previously laid out.

[1] The 46th section authorized the commissioners "to make any allowance, or pay part of the expenses incurred by the proprietors of any such house or building, in removing any of the obstructions, nuisances, or annoyances, as aforesaid, in such cases where the proprietors should or might be materially injured on account of the pavement being necessarily raised or lowered, and whereby such cases might be particularly entitled to some compensation."

The defendant proved, by the certificate of the city clerk (which evidence was not objected to), that he was appointed one of the surveyors of highways on the 13th of May, 1822, and that he was sworn into office on the 17th of the same month. No limits were assigned to the surveyors respectively by the city government. The defendant also proved, that he did the acts complained of in virtue of his supposed authority as surveyor. Before he began the digging, he consulted with Babcock, the only other acting surveyor at the time, and after the appointment of Cotton, with him also; having begun the work before Cotton was appointed. He also proved, that for a year or two preceding, propositions had been made to the selectmen for levelling and digging down the streets, and that plans and levels had been taken for that purpose, with a view to reduce the slope, which was so steep as to render it difficult to pass up and down the streets with carts and carriages. No order of the selectmen or of their successors, the mayor and aldermen, on this subject was offered in evidence, nor did it appear that either of those boards had acted thereon, in any other manner than by appointing a committee to take care of the streets. This committee was frequently present during the performing of the acts complained of, and approved of them; and the bills of some of the workmen were rendered to the city officers and by them passed.

A verdict was taken for the plaintiff, subject to the opinion of the whole court.

J. T. Austin, for the defendant; *Davis*, Solicitor General, and *Rand*, for the plaintiff.

The opinion of the court was delivered at the following November term, by

PARKER, C. J. . . . The counsel for the plaintiff have, with laudable diligence, looked into the civil law, to see what course was pursued in ancient times respecting public roads, presuming that on a subject of such common concern the principles adopted by all governments in all times would be nearly the same; and although our own statutes are to be the sole guide of decisions in matters altogether of a local nature, it is well enough to see whether any information can be drawn from so ancient a source, in regard to the use and meaning of terms employed by our own legislature.

The general care of the roads was in the Ædiles; who probably exercised the power and jurisdiction which is given by our statutes to the court of sessions. These appointed subordinate agents for the care of roads within the city, who were called *quatuor viri* from their number; and to the *duum viri* was given the care of the roads without the city. These officers probably answered to the character of our surveyors. The first were called *quatuor viri, viis urbanis curandis;* the second, *duum viri, viarum publicarum extra urbem curatores.* Their duty was among other things *adæquare*, to level the highways, and to construct bridges when necessary. Each individual citizen was obliged to make certain repairs near his own house, as our citizens are

obliged to make and keep in repair the sidewalks. The interdict which was quoted in the argument, viz. *Interdictum hoc perpetuo dabitur, et omnibus et in omnes*, &c. related to private persons, not to any of the above-named public officers. *Heinecc. sec. Ord. Pand. part.* 1, § 74; *D.* 1, 2, 2, 30; *D.* 43, *tt.* 10, 11, 19, *et notis.*

No inference can be drawn from these provisions in favor of the plaintiff in the present action, as it does not appear that any means were provided of idemnifying those who might be put to charge or expense in consequence of the necessary repair of the highways; nor does it appear that the levelling a way already laid out was a subject of adjudication on which persons bordering on the road were parties, having a right to claim compensation. And indeed if such were the provisions of the Roman law, it is difficult to perceive how they could be introduced into ours by any other power than the legislature. We have only to look at our statutes, and we think they explicitly and clearly give the power to the surveyors, which was exercised by the defendant in the case before us.

But it is said, if such be the construction of the statute, the legislature exceeded its constitutional powers, and that the defendant therefore cannot justify under the statute. This objection is founded upon the last clause in the 10th article of the Declaration of Rights, which provides "that whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor."

There has been no construction given to this provision, which can extend the benefit of it to the case of one who suffers an indirect or consequential damage or expense, by means of the right use of property already belonging to the public. It has ever been confined, in judicial application, to the case of property actually taken and appropriated by the government. Thus, if by virtue of any legislative Act the land of any citizen should be occupied by the public for the erection of a fort or any public edifice upon it, without any means provided to indemnify the owner of the property, the title of the owner could not be divested thereby, and he might maintain his action for possession, or of trespass, against those who are instrumental in the act; because such a statute would be directly contrary to the above cited provision; and as no action can be maintained against the public for damages, the only way to secure the party in his constitutional rights would be to declare void the public appropriation. It is upon this principle that the legislature have, in the general law respecting highways, and in their numerous Acts authorizing the making of turnpikes, bridges, canals, etc., provided that the party, whose property is taken to carry into effect these purposes, shall be indemnified and have secured to him an eventual trial by jury on the question of damage, if no compromise shall be made by the several parties. But this course has been confined to the direct loss of property sustained by the individual, and such expenses as are necessarily incident to the very act of taking it.

The streets on which the plaintiff's house stands had become public property by the act of laying them out conformably to law, and the value of the land taken must have been either paid for, or given to the public, at the time, or the street could not have been legally established. Being legally established, although the right or title in the soil remained in him from whom the use was taken, yet the public acquired the right, not only to pass over the surface in the state it was in when first made a street, but the right also to repair and amend the street, and for this purpose, to dig down and remove the soil sufficiently to make the passage safe and convenient. Those who purchase house-lots bordering upon streets are supposed to calculate the chance of such elevations and reductions as the increasing population of a city may require, in order to render the passage to and from the several parts of it safe and convenient, and as their purchase is always voluntary, they may indemnify themselves in the price of the lot which they buy, or take the chance of future improvements, as they shall see fit. The standing laws of the land giving to surveyors the power to make these improvements, every one who purchases a lot upon the summit, or on the decline of a hill, is presumed to foresee the changes which public necessity or convenience may require, and may avoid or provide against a loss.

That this has been the practical construction of our statute we can entertain no doubt; for many instances must have occurred within our principal towns, of streets raised or reduced in such manner as to occasion expense to borderers, and no claim of damages has ever been heard of; and in the country towns it is not unusual to level roads, so as to oblige the owners of fields to rebuild their fences or stone-walls, and no complaint has been made.

There are cases, without doubt, where an individual may suffer by the exercise of this power, and thus be made involuntarily to contribute much more than his proportion to the public convenience; but such cases seem not to be provided for, and must be left to that sense of justice which every community is supposed to be governed by.

A fort may be erected on public ground so near to a man's dwelling-house as materially to reduce its rent and value; the public would not be bound to indemnify the suffering party, for when he built so near to unoccupied ground, which the public had a right to occupy for any purpose its exigencies might require, he should have foreseen the possible purpose to which it might be applied, and should have guarded against a future loss, by abstaining from building there. So the location of school-houses upon public land may materially diminish the value of an adjoining or opposite dwelling-house, on account of the crowd and noise which they usually occasion; but it cannot be imagined that the public are obliged to consult the convenience of the individual so far as to abstain from erecting the school-house, or to pay the owner of the dwelling-house for its diminished value. These are cases of *damnum sine injuria*, and though proper for the favorable interposition

of the community for whose benefit the individual suffers, they do not give a right to demand indemnity, by virtue of the above cited article in the Declaration of Rights.

The case of highways or public streets is analogous; when rightfully laid out, they are to be considered as purchased by the public of him who owned the soil, and by the purchase the right is acquired of doing everything with the soil over which the passage goes, which may render it safe and convenient; and he who sells may claim damages, not only on account of the value of the land taken, but for the diminution of the value of the adjoining lots, calculating upon the future probable reduction or elevation of a street or road; and all this is a proper subject for the inquiry of those who are authorized to lay out, or of a jury, if the parties should demand one. And he who purchases lots so situated, for the purpose of building upon them, is bound to consider the contingencies which may belong to them.

Cases apparently hard will occur; the present is such a one. The plaintiff's house has been standing twenty years, and he had reason to expect, that in any contemplated improvement in the streets his liability to expense would have been attended to by the city authorities, who, had they forbidden the surveyor to proceed, even if they had no legal right to restrain him, would have exposed him to an opinion of the jury that his proceedings were unnecessary and wanton, and so subjected him to damages; but there being no such interposition, on the contrary, the other surveyors having concurred in the act, the committee of the board of aldermen knowing and approving it, it is impossible for us to find the surveyor guilty of a wrong; it not being denied that the acts done have rendered the streets more safe and convenient than they were before. It may be a case very suitable for the consideration of the city authorities, whether according to the practice in like cases of improvements designed for the general good necessarily creating expense to individuals, some fair indemnity ought not to be allowed; but of this they are the judges. If it is not now within the authority of the city officers, it is certainly worthy consideration, whether an application to the legislature ought not to be made, to authorize them to indemnify those citizens who may, in the necessary exercise of powers used for public improvement or convenience, be made indirectly to contribute an undue proportion for those purposes; and there seems to be no good reason why others, whose property is enhanced in value at their neighbor's expense, should not be held to furnish part of the indemnity. If the reducing or raising of streets which have been laid out for a definite number of years, and on which houses have been erected, should be made a matter of adjudication, like that of altering, widening, or turning a street, subject to the same provision for damages, the mischief would be cured; for although, theoretically, all this may be considered as determined when the street is originally laid out, yet practically there may be cases where this just provision has been overlooked.

We do not find in any of the cases cited, or in any authorities presented to our consideration, anything which impugns the opinion we have adopted. The passages from Dalton only show that the law in respect to highways and the duty and power of surveyors is nearly the same in England as with us. Without doubt our statutes were framed with reference to the common law and statutes of England. Whenever a new road or way is to be laid out, or an existing one enlarged or widened, provision is made for indemnity. The inquiry of damages on a writ of *ad quod damnum*, or by jury summoned by the quarter sessions, is applicable only to such cases. So by our statutes the compensation is given, when a road is laid out, or turned, or altered, or discontinued, but in no other case; and this compensation is for the land taken, or for the immediate expense consequent upon the act. Levelling a road is not anywhere found to be considered an alteration of it; nor do we find that the injury it may produce has been compensated, unless it be in the case of *Leader* v. *Moxon*, 3 Wils. 461, which case is spoken of with disapprobation by Lord Kenyon and Mr. Justice Buller in a subsequent case in 4 D. & E. 794, and the principle of it overruled. Indeed in a report of the same case by Sir W. Blackstone, vol. 2, p. 926, it is stated that the commissioners had grossly exceeded their authority; which seems, according to this last report, to have been the principal ground of the decision.

We can perceive no difference in the principle on which this action is founded and that which was involved in the case of *Thurston* v. *Hancock*, 12 Mass. Rep. 220; and the decision in that case was approved of and adopted by the Supreme Court of New York in the case of *Panton* v. *Holland*, 17 Johns. Rep. 100.

That it might be proper for the legislature, by some general Act, to provide that losses of the kind complained of in this suit should be compensated by the town or city within which improvements may be made for the public good, or by the owners of land which may be particularly benefited, is not for us to deny; but without such legislative provision we have no authority upon the subject, it being clear that by the common law, as well as by our statutes, the defendant in this action is not liable to damages.[1] In no case can a person be liable to an action as for a tort, for an act which he is authorized by law to do; and as the statute authorizes surveyors to amend roads and streets by digging them down and building them up where necessary, the legislature not being prohibited by the Constitution from enacting such a statute, we think the defendant is entitled to judgment.

Verdict set aside and a nonsuit entered.[2]

[1] The legislature acted upon this suggestion. See St. Mass. 1825, c. 171, s. 5, Mass. Rev. St. c. 43, s. 14, and Pub. St. Mass. c. 49, s. 14. — Ed.

[2] And so *Woodbury* v. *Beverly*, 153 Mass. 245; *Proctor* v. *Stone*, 158 Mass. 564 (1893), *Mon. Nav. Co.* v. *Coons*, 6 W. & S. 101, 109 (1843); *Brookes* v. *Cedar Brook Co*, 82 Me. 1 (1889); *Ravenstein* v. *N. Y. L. & W. R. Co.*, 136 N. Y. 528 (1893). In *City Council* v. *Maddox*, 89 Ala. 181 (1890), the effect of a change in the State Constitution is stated. Compare *Transp. Co.* v. *Chicago*, 99 U. S. 635; s. c. *infra*, p. 1081; Randolph, Em. Dom. § 398. — Ed.

O'CONNOR *v.* PITTSBURGH.

SUPREME COURT OF PENNSYLVANIA. 1851.

[18 *Pa.* 187.]

ERROR to the District Court of Allegheny County.

This was an action of trespass on the case, brought by the Right Reverend Michael O'Connor, Roman Catholic Bishop of Pittsburgh, for the use of the Roman Catholic congregation of St. Paul's Church, Pittsburgh *v.* The Mayor, Aldermen, and Citizens of Pittsburgh.

The action was brought to November Term, 1849, in the court below, to recover damages from the city of Pittsburgh for injuries done to the Cathedral, by cutting down Grant and Fifth streets, in that city. The bishop held the title of the property in trust for the Roman Catholic congregation of St. Paul's Church, Pittsburgh. . . .

The jury returned a verdict on two of the counts in the declaration in favor of the plaintiff for the sum of $4,000 damages; notwithstanding which LOWRIE, J., subsequently entered judgment on a reserved question for the defendants. . . .

Error was assigned, *inter alia*, to the entry of the judgment.

The case was argued by *McCandless* and *Loomis*, for the plaintiff in error. *Kuhn*, for the city.

The opinion of the court, filed November 24, 1851, was delivered by

GIBSON, C. J. We have had this cause re-argued in order to discover, if possible, some way to relieve the plaintiff consistently with law; but I grieve to say we have discovered none. To the Commonwealth here, as to the king in England, belongs the franchise of every highway as a trustee for the public; and streets regulated and repaired by the authority of a municipal corporation are as much highways as are rivers, railroads, canals, or public roads laid out by the authority of the quarter sessions. In England a public road is called the king's highway; and though it is not usually called the Commonwealth's highway here, it is so in contemplation of law, for it exists only by force of the Commonwealth's authority. Every railroad, canal, turnpike, or bridge company has its franchise by grant from the State, and consequently with its original qualities and immunities adhering to it. Every highway, toll or free, is licensed, constructed, and regulated by the immediate or delegated action of the sovereign power; and in every Commonwealth the people in the aggregate constitute the sovereign. But it is the prerogative of a sovereign to be exempt from coercion by action: for jurisdiction implies superiority, and a sovereign can have no superior. At the declaration of American independence, prerogatives which did not concern the person, state, and dignity of the king, but such as had been held by him in trust for his subjects, were assumed by the people here and exercised immediately by themselves; among the rest, unwisely I think, the prerogative of refusing

to do justice on compulsion. That a suit cannot be maintained against the State without its consent, is shown by the statute which enabled Pennsylvania claimants to sue the State for the value of the lands ceded to Connecticut claimants within the seventeen townships in Luzerne County. But this prerogative would be unavailing if it could not protect the agents whom the Commonwealth has necessarily to employ. It was applied to the protection of a private corporation in the *Monongahela Navigation* v. *Coons*, and *Henry* v. *The Allegheny Bridge;* in which it was held that a chartered company to improve the navigation of a public highway, or to build a bridge, is not answerable for consequential damages; and it was applied to the protection of a municipal corporation in *Green* v. *The Borough of Reading, The Mayor* v. *Randolph, and the Philadelphia and Trenton Railroad;* to which may be added every decision on the subject in our sister States, except the decisions in Ohio, which, however founded in natural justice, are not founded in the law which prevails elsewhere.

Yet it must be admitted that, while it is inequitable to injure the property of an individual for the benefit of the many, it would be impossible for a corporation to bear the pressure of successive common-law actions for the continuance of a nuisance, each verdict being more severe than the preceding one. The modification of the remedy would be for the legislature, which can turn compensation for a permanent detriment into the price of a prospective licer. ; but to attain complete justice, every damage to private property ought to be compensated by the State or corporation that occasioned it, and a general statutory remedy ought to be provided to assess the value. The constitutional provision for the case of private property *taken* for public use, extends not to the case of property *injured* or *destroyed;* but it follows not that the omission may not be supplied by ordinary legislation. No property was taken in this instance; but the cutting down of the street consequent on the reduction of its grade left the building useless, and the ground on which it stood worth no more than the expense of sinking the surface of it to the common level. The loss to the congregation is a total one, while the gain to holders of property in the neighborhood is immense. The legislature that incorporated the city never dreamt that it was laying the foundation of such injustice; but, as the charter stands, it is unavoidable.

Judgment affirmed.[1]

[1] In *O'Brien* v. *Philadelphia*, 150 Pa. 589 (1892), in a like case, the court, STERRETT, J., said: "If any regard is to be had for the constitutional mandate [Const. 1874, Art. xvi. s. 8] that 'municipal and other corporations . . . shall make just compensation for property taken, injured, or destroyed by the construction or enlargement of their works, highways, or improvements,' we are at a loss to see how the learned judge could do otherwise than decide the reserved question as he did. Nobody conversant with the history of the constitutional provision above quoted can entertain any doubt that it was intended to provide, *inter alia*, for the class of cases of which *O'Connor* v. *Pittsburgh*, 18 Pa. 187, is a conspicuous example. It has uniformly been so regarded from the date of its adoption until the present time. . . . In *Ogden* v. *Phila-*

IN *Peart et al.* v. *Meeker* (45 La. Ann.), 12 Southern Rep. 490 (1893), in reversing a judgment for the plaintiff, who complained of the acts of the defendant, President of a Levee District, in locating and constructing a line of levee on the Red River, the court (FENNER, J.) said: "The quantum of damages is admitted between the parties, and the

delphia, 143 Pa. 430, the claim was for damages caused by grading North Street. After stating that the undisputed facts were 'that the first grade . . . was established on the city plan in 1871, but nothing was done on the ground until 1887,' our Brother Mitchell says. 'For the establishment of the grade of 1871 there was no right of action. *O'Connor* v. *Pittsburgh*, 18 Pa. 187; *Philadelphia* v. *Wright*, 100 Pa. 235. Therefore the Statute of Limitation could not begin to run from that date. But the Constitution of 1874, Article xvi. s. 8, gave a right to owners to have compensation for property injured, as well as for property taken by municipal and other corporations in the construction or enlargement of their works.'"

In *Smith* v. *Washington*, 20 How. 135, 148 (1857), the defendant city was sued in an action on the case to recover damages for an alteration of the grade of the street on which the plaintiff had his dwelling-house In sustaining a judgment of the Circuit Court of the United States for the District of Columbia in favor of the defendant, the court (GRIER, J.) said: "Having performed this trust, confided to them by the law, according to the best of their judgment and discretion, without exceeding the jurisdiction and authority vested in them as agents of the public, and on land dedicated to public use for the purposes of a highway, they have not acted 'unlawfully or wrongfully,' as charged in the declaration. They have not trespassed on the plaintiff's property, nor erected a nuisance injurious to it, and are, consequently, not liable to damages where they have committed no wrong, but have fulfilled a duty imposed on them by law as agents of the public. The plaintiff may have suffered inconvenience and been put to expense in consequence of such action; yet, as the act of defendants is not 'unlawful or wrongful,' they are not bound to make any recompense. It is what the law styles *damnum absque injuria*. Private interests must yield to public accommodation; one cannot build his house on the top of a hill in the midst of a city, and require the grade of the street to conform to his convenience at the expense of that of the public. The law on this subject is well settled, both in England and this country. The cases are too numerous for quotation; a reference to one or two more immediately applicable to the questions arising in this case will be sufficient.

"In *Callender* v. *Marsh*, 1 Pick. 417, the defendant, as surveyor of the highways, was charged with digging down a street in Boston, so as to lay bare the foundations of plaintiff's house, and endanger its falling. The authority under which he acted was given by a statute which required 'that all highways, townways, etc., should be *kept in repair and amended* from time to time, that the same may be safe and convenient for travellers.' 'This very general and exclusive authority,' say the court, 'would seem to include everything which may be needed towards making the ways perfect and complete, either by levelling them where they are uneven and difficult of ascent, or raising them where they should be sunken and miry.' It was held, also, that the law does not give a right to compensation for an indirect or consequential damage or expense, resulting from a right use of property belonging to the public.

"In *Green* v. *The Borough of Reading*, 9 Watts, 282, the defendants, by virtue of their authority to 'improve and repair,' graded the street in front of plaintiff's house five feet higher than it had been before, and it was held that the corporation was not liable to an action for any consequential injury to plaintiff's property by reason of such improvement or change of grade in the public street.

"In the case of *O'Connor* v. *Pittsburgh*, 18 Penn. Rep. 187, a church had been built according to the direction of the city regulator, and by a grade established in 1829. Afterwards, in pursuance of an ordinance, the grade of the street was reduced seventeen feet; the church had to be taken down and rebuilt on a lower foundation, at a damage of $4,000. The authority given to the city was 'to improve, repair, and keep

sole question before us is the legal liability of defendant. Whatever may be the law elsewhere, we consider the law of Louisiana too well settled to admit of further dispute to the following effect: That under article 665 of our Civil Code riparian property on navigable rivers in this State is subject to a servitude or easement imposed by law for the public or common utility, authorizing the appropriation by the government, under proper laws, of the space required for the making and repairing of levees, roads, and other public works; that the State is charged with the administration of this public servitude; that in locating and building levees she does not expropriate the property of the citizen, but lawfully appropriates it to a use to which it is subject under the title itself; that in so doing she acts, not under the power of eminent domain, but in the exercise of the police power; that laws, constitutional or statutory, concerning the expropriation of private property for public use, and requiring adequate compensation therefor, have no application to property legitimately required for levee purposes, and that private injury resulting from the legitimate exercise of this legal right is *damnum absque injuria*, to which the individual must submit as a sacrifice to the public safety and welfare. *Ruch* v. *City of New Orleans*, 43 La. Ann. 275, 9 South. Rep. 473; *Bass* v. *State*, 34 La. Ann. 494; *State* v. *Maginnis*, 26 La. Ann. 558; *Cash* v. *Whitworth*, 13 La. Ann. 401; *Dubose* v. *Commissioners*, 11 La. Ann. 165; *Police Jury* v. *Bozman*, 11 La. Ann. 94; *Zenor* v. *Concordia*, 7 La. Ann. 150. It is useless to quote from these decisions. They are familiar to the profession, and their tenor, as above stated, is unambiguous, harmonious, and emphatic. They were rendered under the régime of constitutions which prohibited the taking of private property for public purposes without compensation; and, however broad and emphatic may be the same prohibition in our existing constitution, it had not either the intention or effect to repeal Article 665 of the Civil Code, or to bring within its grasp the lawful appropriation of property for levee purposes. On the contrary, the Constitution itself charges the General Assembly with the duty of maintaining a levee system, authorizes the creation of levee districts under the administration of commissioners to be appointed or elected, and grants specified powers of taxation for this purpose. Const. arts. 213–216. In the execution of these powers and duties, the Red River, Atchafalaya & Bayou Bœuf Levee District was created by Act 79 of 1890, amended and re-enacted by Act 46 of 1892, and the defendant commissioners were appointed. . . . The Constitution itself (Article 214), in authorizing the appointment of commissioners for levee districts, expressly declares that they 'shall in

in order the streets,' etc. The court say, 'We had this case re-argued in order to discover, if possible, some way to relieve the plaintiff consistently with law, but grieve to say we can find none. The law is settled, not only in Pennsylvania, but by every decision in the sister States, except one.'

"We are of opinion, therefore, that the instructions given by the court below on these points were correct, and affirm their judgment." — ED.

the method and manner to be provided by law, have supervision of the erection, repair, and maintenance of the levees in said districts.' These commissioners were therefore bound, under an express constitutional mandate, to exercise their functions exclusively 'in the method and manner' prescribed by law. The law confined their powers to the construction, maintenance, and repair of such levees only as, 'in the opinion of the Board of State Engineers, will protect said levee district from overflow,' and further devolves upon the State Engineers the exclusive authority and duty 'to survey and locate, repair or remove and change all levees,' and further charges said engineers with the full 'responsibility of all such location.'

"The evidence in the case fully establishes that the levee complained of is built on the line surveyed, located, approved by the State Engineers. . . . What was the board to do? The levee was an important one, involving the protection of an extensive region from overflow. Under the mandates of law above referred to its duty was clear and manifest to build the levee on the line located by the State Engineers, who are charged with the authority, duty, and responsibility of making such location. It is difficult to understand how this corporation can incur liability for performing the plain duty imposed on it by law, or how, in any event, the corporate funds could be used in satisfaction of such liability. It is clear that the commissioners, even if they desired to do so, could not, under section 11, devote the corporate funds to the satisfaction of plaintiff's claim, without violating the law, and the judicial power could not be invoked to compel them to violate the law. To hold otherwise would be to authorize such officers to create unwarranted debts against this corporation, which is a mere functionary of the State, and for their payment to divert public funds from the purposes to which they are lawfully and exclusively dedicated. Whatever be the rights of plaintiff, and whatever be her remedies for their vindication, the latter cannot possibly take the shape of an action of damages against this corporation. The law under which the officers of this corporation and the State Engineers have acted is a valid law, and nothing done in the proper execution of its mandates can give rise to any action of damages. If such an action exists, it must arise from acts of these officers in violation of the authority conferred upon them. This brings the case within the dilemma propounded in Bass' Case, where we said: 'The dilemma seems irresistible: Either the Board of Engineers, the public agents of the State, have acted within the scope of their mandate and authority, or they have not. If they have, then, as they have carried out a valid law, neither they nor the State can be held responsible. If they have acted beyond that scope, their principal cannot be made responsible for their unauthorized act, and they alone are chargeable.' *Bass* v. *State*, 34 La. Ann. 494. For the reasons heretofore indicated we think the corporate liability of this levee district is governed by the same rules which apply to the State herself. If there is any liability for damages it rests on the officers individually

who have acted in excess of their authority, and under the law in this case, which we have heretofore quoted, it seems quite clear that, as between these commissioners and the State Engineers, the latter alone would be charged with whatever responsibility might result from the improper location of the levees. We need not advert to the strong shield of protection which the law extends over public officers charged with discretionary duties, and which exempts them from liability for honest errors, and except in clear cases of oppression and injustice; and it is only proper to say that nothing in this record indicates any but honest motives and conscientious action on the part of all the public officers concerned. It is undoubtedly the duty of the public officers charged by the State with the execution of its police power, to make no greater sacrifice of private rights than the public welfare demands. In several cases this court has said that power so conferred is not arbitrary, and that the citizen is not without remedy to subject it to judicial control in proper cases. We are not called upon in this case to consider this question further than to say that the present action of damages against this levee district is not an appropriate remedy, and cannot be sustained. It is therefore decreed that the judgment appealed from be reversed, and that plaintiff's demand be rejected, at her costs in both courts." [1]

[1] The exact scope and limitations of property rights may, of course, differ materially in different States. Compare the doctrine of the Appropriation of Waters in the Pacific and adjacent States, by which a permanent right to running water, even as against riparian owners, is acquired by actual prior appropriation to mining or any other useful purposes. See Black's edition of Pomeroy's Water Rights.

In *Drake* v. *Earhart*, 2 Idaho, 716, 720 (1890), BEATTY, C. J., for the court, said: "The important question, for the settlement of which this appeal was chiefly brought, is what, if any, rights the appellant has to any of that water as a riparian proprietor. His claim is not based upon prior or any appropriation under our territorial laws, but upon the fact that the stream in question flows by its natural channel through his lands; hence, that he is entitled to the use thereof allowed by the common law. This doctrine of riparian proprietorship in water as against prior appropriation has been very often discussed, and nearly always decided the same way by almost every appellate court between Mexico and the British possessions, and from the shores of the Pacific to the eastern slope of the Rocky mountains, as well as by the Supreme Court of the United States. But for the fact that it has elsewhere repeatedly appeared in the same court, it would seem surprising that it should now be seeking another solution in this. While there are questions growing out of the water laws and rights not fully adjudicated, this phantom of riparian rights, based upon facts like those in this case, has been so often decided adversely to such claim, and in favor of the prior appropriation, that the maxim, 'first in time, first in right,' should be considered the settled law here. Whether or not it is a beneficent rule, it is the lineal descendant of the law of necessity. When, from among the most energetic and enterprising classes of the east, that enormous tide of emigration poured into the west, this was found an arid land, which could be utilized as an agricultural country, or made valuable for its gold, only by the use of its streams of water. The new inhabitants were without law, but they quickly recognized that each man should not be a law unto himself. Accustomed, as they had been, to obedience to the laws they had helped make, as the settlements increased to such numbers as justified organization, they established their local customs and rules for their government in the use of water and land. They found a new condition of things. The use of water to which they had been accustomed, and the laws concern-

PUMPELLY *v.* GREEN BAY COMPANY.

SUPREME COURT OF THE UNITED STATES. 1871.

[13 *Wall* 166.]

ERROR to the Circuit Court of the United States for the District of Wisconsin; the case being thus:

The Constitution of Wisconsin ordains that "the property of no person shall be taken for public use without just compensation therefor."

With this provision in force as fundamental law, one Pumpelly, in September, 1867, brought trespass on the case against the Green Bay and Mississippi Canal Co. for overflowing 640 acres of his land by means of a dam erected across Fox River, the northern outlet of Lake Winnebago, by which, as the declaration averred, the waters of the lake were raised so high as to forcibly and with violence overflow all his said land, from the time of the completion of the dam in 1861 to the commencement of this suit; the water coming with such a violence, the declaration averred, as to tear up his trees and grass by the roots, and wash them, with his hay by tons, away, to choke up his drains and fill up his ditches, to saturate some of his lands with water, and to

ing it, had no application here. The demand for water they found greater than the supply, as is the unfortunate fact still all over this arid region. Instead of attempting to divide it among all, thus making it unprofitable to any, or instead of applying the common-law riparian doctrine, to which they had been accustomed, they disregarded the traditions of the past, and established as the only rule suitable to their situation that of prior appropriation. This did not mean that the first appropriator could take all he pleased, but what he actually needed, and could properly use without waste. Thus was established the local custom, which pervaded the entire west, and became the basis of the laws we have to-day on that subject. Very soon these customs attracted the attention of the legislatures, where they were approved and adopted, and next we find them undergoing the crucial test of judicial investigation. As far back as 1855, the Supreme Court of California, in *Irwin* v. *Phillips*, 5 Cal. 145, and in *Tartar* v. *Mining Co.*, Id. 397, distinctly held that the prior appropriator of water should hold it against the riparian claim of the owner of land through which it flowed, and, also, that in all branches of industry the prior appropriator of land, water, and easements would be protected. Not only had such become the law by custom, by the legislative will, and the decisions of the courts, without dissent, but the general government, for many years, without protest, acquiesced in such occupation and use of its lands and waters by its citizens, while valuable properties and industries were building upon this principle. To put the question beyond uncertainty, to approve and adopt what already existed as the common law of the west, the Congress, by its Act of July 26, 1866, § 9, provided 'that whenever, by priority of possession, rights to the use of water for mining, agriculture, manufacturing, or other purposes have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same.' It will be observed that the act is based upon the existence of local customs, laws, and decisions of courts. It is not necessary that all these conditions shall exist for the protection of the right; but, as held in *Basey* v. *Gallagher*, 20 Wall. 684, the existence of either condition is sufficient"

Compare *Stowell* v. *Johnson et al.*, 7 Utah 215, *Strickler* v. *Col. Springs*, 25 Pac. Rep. (Col.) 313. — ED.

dirty and injure other parts by bringing and leaving on them deposits of sand, and otherwise greatly injuring him. The canal company pleaded six pleas, of which the second was the most important, but of which the fourth and sixth may also be mentioned.

This second plea was divisible, apparently, into two parts.

The first part set up (quoting it entire) a statute of Wisconsin Territory, approved March 10th, 1848, by which one Curtis Reed and his associates were authorized to construct a dam across Fox River, the northern outlet of Winnebago Lake, to enable them to use the waters of the river for hydraulic purposes. . . .

A general demurrer to these three pleas being overruled by the court, the plaintiff brought the case here.

Messrs. B. J. Stevens and *H. L. Palmer*, in support of the ruling below.

Messrs. J. M. Gillet and *D. Taylor*, contra.

MR. JUSTICE MILLER delivered the opinion of the court. . . .

As we are of opinion that the statute did not authorize the erection of a dam which would raise the water of the lake above the ordinary level, and as the plea does not deny that the dam of the defendant did so raise the water of the lake, we must hold that, so far as the plea relies on this statute as a defence, it is fatally defective.

But this same plea further alleges that the legislature of Wisconsin, after it became a State, projected a system of improving the navigation of the Fox and Wisconsin rivers, which adopted the dam of Reid and Doty, then in process of construction, as part of that system; and that, under that Act, a board of public works was established, which made such arrangements with Reid and Doty that they continued and completed the dam; and that by subsequent legislation, changing the organization under which the work was carried on, the defendants finally became the owners of the dam, with such powers concerning the improvement of the navigation of the river as the legislature could confer in that regard. But it does not appear that any statute made provision for compensation to the plaintiff, or those similarly injured, for damages to their lands. So that the plea, as thus considered, presents substantially the defence that the State of Wisconsin, having, in the progress of its system of improving the navigation of the Fox River, authorized the erection of the dam as it now stands, without any provision for compensating the plaintiff for the injury which it does him, the defendant asserts the right, under legislative authority, to build and continue the dam without legal responsibility for those injuries.

And counsel for the defendant, with becoming candor, argue that the damages of which the plaintiff complains are such as the State had a right to inflict in improving the navigation of the Fox River, without making any compensation for them.

This requires a construction of the Constitution of Wisconsin; for though the Constitution of the United States provides that private property shall not be taken for public use without just compensation, it

is well settled that this is a limitation on the power of the Federal government, and not on the States. The Constitution of Wisconsin, however, has a provision almost identical in language, *viz.*, that "the property of no person shall be taken for public use without just compensation therefor."[1] Indeed this limitation on the exercise of the right of eminent domain is so essentially a part of American constitutional law that it is believed that no State is now without it, and the only question that we are to consider is whether the injury to plaintiff's property, as set forth in his declaration, is within its protection.

The declaration states that, by reason of the dam, the water of the lake was so raised as to cause it to overflow all his land, and that the overflow remained continuously from the completion of the dam, in the year 1861, to the commencement of the suit in the year 1867, and the nature of the injuries set out in the declaration are such as show that it worked an almost complete destruction of the value of the land.

The argument of the defendant is that there is no *taking* of the land within the meaning of the constitutional provision, and that the damage is a consequential result of such use of a navigable stream as the government had a right to for the improvement of its navigation.

It would be a very curious and unsatisfactory result, if in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the government, and which has received the commendation of jurists, statesmen, and commentators as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not *taken* for the public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen, as those rights stood at the common law, instead of the government, and make it an authority for invasion of private right under the pretext of the public good, which had no warrant in the laws or practices of our ancestors. . . .

[Here follows a statement of *Sinnickson* v. *Johnson*, 2 Harrison, 129; and *Gardner* v. *Newburgh*, 2 Johns. Ch. 162 (*ante*, pp. 979 and 986, with quotations from them.]

If these be correct statements of the limitations upon the exercise of the right of eminent domain, as the doctrine was understood before it had the benefit of constitutional sanction, by the construction now sought to be placed upon the Constitution it would become an instrument of oppression rather than protection to individual rights.

But there are numerous authorities to sustain the doctrine that a

[1] See *supra*, p. 956, note. — ED.

serious interruption to the common and necessary use of property may be, in the language of Mr. Angell, in his work on water-courses, equivalent to the taking of it, and that under the constitutional provisions it is not necessary that the land should be absolutely taken. Angell on Water-courses, § 465 *a*; *Hooker* v. *New Haven and Northampton Co.*, 14 Connecticut, 146; *Rowe* v. *Granite Bridge Co.*, 21 Pickering, 344; *Canal Appraisers* v. *The People*, 17 Wendell, 604; *Lackland* v. *North Missouri Railroad Co.*, 31 Missouri, 180; *Stevens* v. *Proprietors of Middlesex Canal*, 12 Massachusetts, 466. And perhaps no State court has given more frequent utterance to the doctrine that overflowing land by backing water on it from dams built below is within the constitutional provision than that of Wisconsin. In numerous cases of this kind under the Mill and Mill-dam Act of that State this question has arisen, and the right of the mill-owner to flow back the water has been repeatedly placed on the ground that it was a taking of private property for public use. It is true that the court has often expressed its doubt whether the use under that Act was a public one, within the meaning of the Constitution, but it has never been doubted in any of those cases that it was such a taking as required compensation under the Constitution. *Pratt* v. *Brown*, 3 Wisconsin, 613; *Walker* v. *Shepardson*, 4 Id. 511; *Fisher* v. *Horicon Iron Co.*, 10 Id. 353; *Newell* v. *Smith*, 15 Id. 104; *Goodall* v. *City of Milwaukee*, 5 Id. 39; *Weeks* v. *City of Milwaukee*, 10 Id. 242. As it is the Constitution of that State that we are called on to construe, these decisions of her Supreme Court, that overflowing land by means of a dam across a stream is taking private property, within the meaning of that instrument, are of special weight if not conclusive on us. And in several of these cases the dams were across navigable streams.

It is difficult to reconcile the case of *Alexander* v. *Milwaukee*, 16 Wisconsin, 248, with those just cited, and in its opinion the court seemed to feel the same difficulty. They assert that the weight of authority is in favor of leaving the party injured without remedy when the damage is inflicted for the public good, and is remote and consequential. There are some strong features of analogy between that case and this, but we are not prepared to say, in the face of what the Wisconsin Court had previously decided, that it would hold the case before us to come within the principle of that case. At all events, as the court rests its decision upon the general weight of authority and not upon anything special in the language of the Wisconsin bill of rights, we feel at liberty to hold as we do that the case made by the plaintiff's declaration is within the protection of the constitutional principle embodied in that instrument.

We are not unaware of the numerous cases in the State courts in which the doctrine has been successfully invoked that for a consequential injury to the property of the individual arising from the prosecution of improvements of roads, streets, rivers, and other highways, for the public good, there is no redress; and we do not deny that the principle

is a sound one, in its proper application, to many injuries to property so originating. And when, in the exercise of our duties here, we shall be called upon to construe other State constitutions, we shall not be unmindful of the weight due to the decisions of the courts of those States. But we are of opinion that the decisions referred to have gone to the uttermost limit of sound judicial construction in favor of this principle, and, in some cases, beyond it, and that it remains true that where real estate is actually invaded by superinduced additions of water, earth, sand, or other material, or by having any artificial structure placed on it, so as to effectually destroy or impair its usefulness, it is a taking, within the meaning of the Constitution, and that this proposition is not in conflict with the weight of judicial authority in this country, and certainly not with sound principle. Beyond this we do not go, and this case calls us to go no further.

We are, therefore, of opinion that the second plea set up no valid defence, and that the demurrer to it should have been sustained.

[A discussion of the fourth and sixth pleas is omitted, as not material to the subject in hand.]

Judgment reversed, and the case remanded to the Circuit Court for further proceedings not inconsistent with this opinion.[1]

EATON *v.* THE BOSTON, CONCORD, AND MONTREAL RAILROAD.

SUPREME JUDICIAL COURT OF NEW HAMPSHIRE. 1872.

[51 *N. H.* 504.]

ACTIONS on the case, against the Boston, Concord, & Montreal Railroad, — one brought by Ezra B. Eaton, the other by Milo Aiken, to recover damages done during the freshet of October, 1869, to their respective farms in Wentworth, and alleged to have been occasioned by the construction of the defendants' railroad.

The defendants were duly incorporated by legislative authority, and constructed their road across the farms of the plaintiffs during the years 1849, 1850, and 1851, — the road having been previously surveyed and located. Damages were duly appraised and paid.

Eaton, on March 24, 1851, after the construction of the road, gave the defendants a warranty deed of that part of his farm on which the road is located, and on the same day executed the following release:

"I, the subscriber, do hereby acknowledge that I have received of the Boston, Concord, & Montreal Railroad the sum of two hundred and seventy-five dollars, in full for the amount of damages assessed to

[1] See *Mills et al.* v. *U. S.*, 46 Fed. Rep. 738. — ED.

me by the railroad commissioners of the State of New Hampshire, in conjunction with the selectmen of Wentworth, on account of the laying out of the said Boston, Concord, & Montreal Railroad through and over my land; and I do hereby release and discharge the said corporation from said damages."

Aiken, on November 7, 1849, gave the defendants a warranty deed of that part of his farm on which the road is located. Said deed contains the following clause: "And in consideration aforesaid, I hereby release said corporation from all damages, direct or consequential, by reason of the constructing, maintaining, and using their railroad on and over the land hereby conveyed, and through my said land." This release, and that executed by Eaton, were printed, save names, amounts, &c., which were inserted in blanks left for that purpose.

Northerly of the plaintiffs' farms, which consist of meadow lands lying on Baker's River, there is a narrow ridge of land, some twenty-five feet or more in height, extending from the high lands on the east westerly to said river, completely protecting said meadows from the effect of floods and freshets in said river. Said ridge is about twenty rods wide upon the top, and a small part of it in width is included in the plaintiff Aiken's farm, — the northerly line of his said farm being near the southerly edge of the top of said ridge. The plaintiff Eaton's farm lies south of said Aiken's. Through this ridge the defendants, in constructing their road, made a deep cut, through which the waters of said river in floods and freshets sometimes flowed; and the damages sued for were occasioned by the waters flowing through said cut, and carrying sand and gravel and stones upon said Aiken's farm, and over and across it to and upon the farm of said Eaton. The plaintiffs claim that the defendants are liable for the damages so occasioned, although they may have constructed their road at said cut with due care and prudence. The defendants say that they are not so liable. The defendants claim that, under the circumstances of this case, the corporation are not liable for any damages accruing to the plaintiffs from a proper construction of their road, and that in constructing the same they were only bound to do it in the usual manner, and so as to make the owners of adjoining land reasonably safe, and with ordinary care and prudence, and that they were not bound to preclude the possibility of damage by reason of such construction.

The parties consented that the foregoing questions be determined by the court, and that afterwards either party may have a trial by jury if desired, without prejudice from anything herein contained.

Upon the foregoing facts appearing, and the parties having stated their positions and claims, the court, *pro forma*, ruled that the plaintiffs would be entitled to recover such damages as have been caused them in consequence of the defendants' cutting away the ridge north of the plaintiffs' farms, and thereby letting the river in times of freshet run through this cut and damage the plaintiffs' land; to which ruling the defendants excepted.

Carpenter and *Flanders*, for the plaintiffs. *H. Bingham*, *Burrows*, and *Page*, for the defendants.

SMITH, J. Eaton's case will be considered first.

It is virtually conceded that, if the cut through the ridge had been made by a private land-owner, who had acquired no rights from the plaintiff or from the legislature, he would be liable for the damages sought to be recovered in this action. It seems to be assumed that the freshets were such as, looking at the history of the stream in this respect, might be "reasonably expected occasionally to occur." The defendants removed the natural barrier which theretofore had completely protected the plaintiff's meadow from the effect of these freshets; and, for the damages caused to the plaintiff in consequence of such removal, the defendants are confessedly liable, unless their case can be distinguished from that of the private land-owner above supposed. Such a distinction is attempted upon two grounds, — first, that the plaintiff has already been compensated for this damage, it being alleged that the defendants have, by negotiation, or by compulsory proceedings, purchased of the plaintiff the right to inflict it; second, that the defendants are acting under legislative authority, by virtue of which they are entitled to inflict this damage on the plaintiff without any liability to compensate him therefor.

In support of the first ground, the defendants rely upon the plaintiff's release, and upon the appraisal of damages under the statute.

The release does not support the defendants' claim. The plaintiff released the defendants from damages on account of the laying out of the railroad through and over his land. The damages which the court ruled that the plaintiff would be entitled to recover were not occasioned by the laying out of the road over the plaintiff's land, but by the construction of the road over the land of other persons. See *Delaware & Raritan Canal Co.* v. *Lee*, 2 Zabriskie, 243. The ruling was, that the plaintiff could recover such damages as have been caused him in consequence of the defendants' cutting away the ridge north of the plaintiff's farm. . . .

The defendants' first position is, that the plaintiff has already received compensation for this damage. This position the court have now overruled. The defendants' next position is, that the plaintiff is not legally entitled to receive any compensation, but is bound to submit to the infliction of this damage without any right of redress. The argument is not put in the precise words we have just used, but that is what we understand them to mean. The defendants say that the legislative charter authorized them to build the road, if they did it in a prudent and careful manner; that they constructed the road at the cut with due care and prudence; and that they cannot be made liable as tort-feasors for doing what the legislature authorized them to do. This involves two propositions: first, that the legislature have attempted to authorize the defendants to inflict this injury upon the plaintiff without making compensation; and second, that the legislature have power to

confer such authority. There are decisions which tend to show that the charter should not be construed as evincing any legislative intention to authorize this injury, or to shield the defendants from liability in a common-law action. *Tinsman* v. *Belvidere Delaware R. R. Co.*, 2 Dutcher N. J. 148; *Sinnickson* v. *Johnson*, 2 Harr. N. J. 129; *Hooker* v. *New Haven & Northampton Co.*, 14 Conn. 146; *Fletcher* v. *Auburn & Syracuse R. R. Co.*, 25 Wendell, 462; *Brown* v. *Cayuga & Susquehanna R. R. Co.*, 12 N. Y. (2 Kernan), 486, p. 491. See, also, *Eastman* v. *Company*, 44 N. H. 143, p. 160; *Hooksett* v. *Company*, 44 N. H. 105, p. 110; *Company* v. *Goodale*, 46 N. H. 53, p. 57; Barrows, J., in *Lee* v. *Pembroke Iron Co.*, 57 Maine, 481, p. 488. But we propose to waive inquiry on this point, and to consider only the correctness of the second proposition, or, in other words, the question of legislative power.

The defendants cannot claim protection under an implied power, where an express power would be invalid: the legislature cannot do indirectly what they cannot do directly. Unless an express provision in the charter, authorizing the infliction of this injury without making compensation, would be a valid exercise of legislative power, the defendants cannot successfully set up the plea that the injury was necessarily consequent upon the exercise of their chartered powers, and therefore impliedly authorized. The defence, then, really presents this question: Have the legislature power to authorize the railroad corporation to divert the waters of the river, by removing a natural barrier, so as to cause the waters "sometimes in floods and freshets" to flow over the plaintiff's land, "carrying sand, gravel, and stones" upon his farm, without making any provision for his compensation?

Although the Constitution of this State does not contain, in any one clause, an express provision requiring compensation to be made when private property is taken for public uses, yet it has been construed by the courts, in view of the spirit and tenor of the whole instrument, as prohibiting such taking without compensation; and it is understood to be the settled law of the State, that the legislature cannot constitutionally authorize such a taking without compensation. *Piscataqua Bridge* v. *N. H. Bridge*,[1] 7 N. H. 35, pp. 66, 70; Perley, C. J., in

[1] The language here referred to is as follows: "That franchise, as we have said, is property. 'No part of a man's property shall be taken from him or applied to public uses, without his own consent, or that of the representative body of the people.' N. H. Bill of Rights, Art. 12. This has always been understood necessarily to include, as a matter of right, and as one of the first principles of justice, the further limitation, that in case his property is taken without his consent, due compensation must be provided. 1 Black. Com. 139; 2 Johns. C. R. 166; *Gardner* v. *Village of Newburgh*, and *authorities there cited*. It is not supposed here that even the consent of the representative body of the people could give authority to take the property of individual citizens for highways, bridges, ferries, and other works of internal improvement, without the assent of the owner, and without any indemnity provided by law. Such a power would be essentially tyrannical, and in contravention of other articles in the Bill of Rights." — PARKER, J., for the court, in *Prop'rs of Piscataqua Bridge* v. *N. H. Bridge et al.*, *ubi supra*. — ED.

Petition of Mount Washington Road Co., 35 N. H. 134, pp. 141, 142; Sargent, J., in *Eastman* v. *Amoskeag Manuf. Co.*, 44 N. H. 143, p. 160; *State* v. *Franklin Falls Co.*, 49 N. H. 240, p. 251. The counsel for the defendants have not been understood to question the correctness of this interpretation of the Constitution.

The vital issue then is, whether the injuries complained of amount to a taking of the plaintiff's property, within the constitutional meaning of those terms. It might seem that to state such a question is to answer it; but an examination of the authorities reveals a decided conflict of opinion. The constitutional prohibition (which exists in most, or all, of the States) has received, in some quarters, a construction which renders it of comparatively little worth, being interpreted much as if it read: "No person shall be divested of the formal title to property without compensation, but he may without compensation be deprived of all that makes the title valuable." To constitute a "taking of property," it seems to have sometimes been held necessary that there should be "an exclusive appropriation," "a total assumption of possession," "a complete ouster," an absolute or total conversion of the entire property, "a taking of the property altogether." These views seem to us to be founded on a misconception of the meaning of the term "property," as used in the various State constitutions.

In a strict legal sense, land is not "property," but the subject of property. The term "property," although in common parlance frequently applied to a tract of land or a chattel, in its legal signification "means only the rights of the owner in relation to it." "It denotes a right . . . over a determinate thing." "Property is the right of any person to possess, use, enjoy, and dispose of a thing." Selden, J., in *Wynehamer* v. *The People*, 13 N. Y. 378, p. 433; 1 Blackstone Com. 138; 2 Austin on Jurisprudence, 3d ed., 817, 818. If property in land consists in certain essential rights, and a physical interference with the land substantially subverts one of those rights, such interference "takes," *pro tanto*, the owner's "property." The right of indefinite user (or of using indefinitely) is an essential quality or attribute of absolute property, without which absolute property can have no legal existence. "Use is the real side of property." This right of user necessarily includes the right and power of excluding others from using the land. See 2 Austin on Jurisprudence, 3d ed., 836; Wells, J., in *Walker* v. *O. C. W. R. R.*, 103 Mass. 10, p. 14. From the very nature of these rights of user and of exclusion, it is evident that they cannot be materially abridged without, *ipso facto*, taking the owner's "property." If the right of indefinite user is an essential element of absolute property or complete ownership, whatever physical interference annuls this right takes "property," although the owner may still have left to him valuable rights (in the article) of a more limited and circumscribed nature. He has not the same property that he formerly had. Then, he had an unlimited right; now, he has only a limited right. His absolute ownership has been reduced to a qualified owner-

ship. Restricting A's unlimited right of using one hundred acres of land to a limited right of using the same land, may work a far greater injury to A than to take from him the title in fee-simple to one acre, leaving him the unrestricted right of using the remaining ninety-nine acres. Nobody doubts that the latter transaction would constitute a "taking of property." Why not the former?

If, on the other hand, the land itself be regarded as "property," the practical result is the same. The purpose of this constitutional prohibition cannot be ignored in its interpretation. The framers of the Constitution intended to protect rights which are worth protecting; not mere empty titles, or barren insignia of ownership, which are of no substantial value. If the land, "in its corporeal substance and entity," is "property," still, all that makes this property of any value is the aggregation of rights or qualities which the law annexes as incidents to the ownership of it. The constitutional prohibition must have been intended to protect all the essential elements of ownership which make "property" valuable. Among these elements is, fundamentally, the right of user, including, of course, the corresponding right of excluding others from the use. See Comstock, J., in *Wynehamer* v. *The People*, 13 N. Y. 378, p. 396. A physical interference with the land, which substantially abridges this right, takes the owner's "property" to just so great an extent as he is thereby deprived of this right. "To deprive one of the use of his land is depriving him of his land;" for, as Lord Coke said: "What is the land but the profits thereof?" Sutherland, J., in *People* v. *Kerr*, 37 Barb. 357, p. 399; Co. Litt. 4 *b*. The private injury is thereby as completely effected as if the land itself were "physically taken away."

The principle must be the same whether the owner is wholly deprived of the use of his land, or only partially deprived of it; although the amount or value of the property taken in the two instances may widely differ. If the railroad corporation take a strip four rods wide out of a farm to build their track upon, they cannot escape paying for the strip by the plea that they have not taken the whole farm. So a partial, but substantial, restriction of the right of user may not annihilate all the owner's rights of property in the land, but it is none the less true that a part of his property is taken. Taking a part "is as much forbidden by the Constitution as taking the whole. The difference is only one of degree; the quantum of interest may vary, but the principle is the same." See 6 Am. Law Review, 197–198; Lawrence, J., in *Nevins* v. *City of Peoria*, 41 Illinois, 502, p. 511. The explicit language used in one clause of our Constitution indicates the spirit of the whole instrument. "No part of a man's property shall be taken. . . ." Constitution of N. H., Bill of Rights, article 12. The opposite construction would practically nullify the Constitution. If the public can take part of a man's property without compensation, they can, by successive takings of the different parts, soon acquire the whole. Or, if it is held that the complete divestiture of the last scintilla of interest is a taking

of the whole for which compensation must be made, it will be easy to leave the owner an interest in the land of infinitesimal value.

The injury complained of in this case is not a mere personal inconvenience or annoyance to the occupant. Two marked characteristics distinguish this injury from that described in many other cases. First, it is a physical injury to the land itself, a physical interference with the rights of property, an actual disturbance of the plaintiff's possession. Second, it would clearly be actionable if done by a private person without legislative authority. The damage is "consequential," in the sense of not following immediately in point of time upon the act of cutting through the ridge, but it is what Sir William Erle calls "consequential damage to the actionable degree." See *Brand* v. *H. & C. R. Co.*, Law Reports, 2 Queen's Bench, 223, p. 249. These occasional inundations may produce the same effect in preventing the plaintiff from making a beneficial use of the land as would be caused by a manual asportation of the constituent materials of the soil. Covering the land with water, or with stones, is a serious interruption of the plaintiff's right to use it in the ordinary manner. If it be said that the plaintiff still has his land, it may be answered, that the face of the land does not remain unchanged, and that the injury may result in taking away part of the soil ("and, if this may be done, the plaintiff's dwelling-house may soon follow"); and that, even if the soil remains, the plaintiff may, by these occasional submergings, be deprived of the profits which would otherwise grow out of his tenure. "His dominion over it, his power of choice as to the uses to which he will devote it, are materially limited." Brinkerhoff, J., in *Reeves* v. *Treasurer of Wood County*, 8 Ohio St. 333, p. 346.

The nature of the injury done to the plaintiff may also be seen by adverting to the nature of the right claimed by the defendants. The primary purpose of the defendants in cutting through the ridge was to construct their road at a lower level than would otherwise have been practicable. But, although the cut was not made "for the purpose of conducting the water in a given course" on to the plaintiff's land, it has that result; and the defendants persist in allowing this excavation to remain, notwithstanding the injury thereby visibly caused to the plaintiff. Rather than raise the grade of their track, they insist upon keeping open a canal to conduct the flood-waters of the river directly on to the plaintiff's land. If it be said that the water came naturally from the southerly end of the cut on to the plaintiff's land, the answer is, that the water did not come naturally to the southerly end of the cut. It came there by reason of the defendants' having made that cut. In consequence of the cut, water collected at the southerly boundary of the ridge, north of the plaintiff's farm, which would not have been there if the ridge had remained in its normal and unbroken condition. They have "so dealt with the soil" of the ridge, that, if a flood came, instead of being held in check by the ridge, and ultimately getting away by the proper river channel without harm to the plaintiff, it flowed

through where the ridge once was on to the plaintiff's land. "Could the defendants say they were not liable because they did not cause the rain to fall," which resulted in the freshet; or because the water "came there by the attraction of gravitation?" See Bramwell, Baron, in *Smith* v. *Fletcher*, Law Reports, 7 Exchq. 305, p. 310. If the ridge still remained in its natural condition, could the defendants pump up the flood-water into a spout on the top of the ridge, and thence, by means of the spout, pour it directly on to the plaintiff's land? If not, how can they maintain a canal through which the water by the force of gravitation will inevitably find its way to the plaintiff's land? See Ames, J., in *Shipley* v. *Fifty Associates*, 106 Mass. 194, pp. 199, 200; Chapman, C. J., in *Salisbury v. Herchenroder*, 106 Mass. 458, p. 460. To turn a stream of water on to the plaintiff's premises is as marked an infringement of his proprietary rights as it would be for the defendants to go upon the premises in person and "dig a ditch, or deposit upon them a mound of earth." See Lawrence, J., in *Nevins* v. *City of Peoria*, 41 Illinois, 502, p. 510; Dixon, C. J., in *Pettigrew* v. *Village of Evansville*, 25 Wisconsin, 223, pp. 231, 236. The defendants may, perhaps, regret that they cannot maintain their track at its present level without thereby occasionally pouring flood-water on to the land of the plaintiff. Indeed, the passage of this water through the cut may cause some injury to the defendants' road bed. But the advantages of maintaining the track at the present grade outweigh, in the defendants' estimation, the risk of injury by water to themselves and to the plaintiff. In asserting the right to maintain the present condition of things as to the cut, the defendants necessarily assert the right to produce all the results which naturally follow from the existence of the cut. In effect, they thus assert a right to discharge water on to the plaintiff's land. Such a right is an easement. A right of "occasional flooding" is just as much an easement as a right of "permanent submerging;" it belongs to the class of easements which "are by their nature intermittent — that is, usable or used only at times." See Goddard's Law of Easements, 125. If the defendants had erected a dam on their own land across the river below the plaintiff's meadow, and by means of flash-boards thereon had occasionally caused the water to flow back and overflow the plaintiff's meadow so long and under such circumstances as to give them a prescriptive right to continue such flowage, the right thus acquired would unquestionably be an "easement." The right acquired in that case does not differ in its nature from the right now claimed. In the former instance, the defendants flow the plaintiff's land by erecting an unnatural barrier below his premises. In the present instance, they flow his land by removing a natural barrier on the land above his premises. In both instances, they flow his land by making "a non-natural use" of their own land. In both instances, they do an act upon their own land, the effect of which is to restrict or burden the plaintiff's ownership of his land (see *Leconfield* v. *Lonsdale*, Law Reports, 5 Com. Pleas, 657, p. 696); and the weight of that burden

is not necessarily dependent upon the source of the water, whether from below or above. See Bell, J., in *Tillotson* v. *Smith*, 32 N. H. 90, pp. 95–96. In both instances they turn water upon the plaintiff's land "which does not flow naturally in that place." If the right acquired in the former instance is an easement, equally so must be the right claimed in the latter. If, then, the claim set up by the defendants in this case is well founded, an easement is already vested in them. An easement is property, and is within the protection of the constitutional prohibition now under consideration. If the defendants have acquired this easement, it cannot be taken from them, even for the public use, without compensation. But the right acquired by the defendants is subtracted from the plaintiff's ownership of the land. Whatever interest the defendants have acquired in this respect the plaintiff has lost. If what they have gained is property, then what he has lost is property. If the easement, when once acquired, cannot be taken from the defendants without compensation, can the defendants take it from the plaintiff in the first instance without compensation? See Brinkerhoff, J., *ubi sup.*; Selden, J., in *Williams* v. *N. Y. Central R. R.*, 16 N. Y. 97, p. 109. An easement is all that the railroad corporation acquire when they locate and construct their track directly over a man's land. The fee remains in the original owner. *Blake* v. *Rich*, 34 N. H. 282. Yet nobody doubts that such location and construction is a "taking of property," for which compensation must be made. See Redfield, J., in *Hatch* v. *Vt. Central R. R.*, 25 Vt. 49, p. 66. What difference does it make in principle whether the plaintiff's land is encumbered with stones, or with iron rails? whether the defendants run a locomotive over it, or flood it with the waters of Baker's River? See Wilcox, J., in *March* v. *P. & C. R. R.*, 19 N. H. 372, p. 380; Walworth, Chan., in *Canal Com'rs & Canal Appraisers* v. *The People*, 5 Wendell, 423, p. 452.

If it should be held that the legislature had conferred a valid authority upon the defendants to make this cut, if necessary to the construction of the railroad, or if made with care and skill, the question of necessity or of care would become material, and might have to be decided by a jury. See *Johnson* v. *Atlantic & St. L. R. Co.*, 35 N. H. 569; *Estabrooks* v. *P. & S. R. Co.*, 12 Cush. 224; *Mellen* v. *Western R. R.*, 4 Gray, 301; *Curtis* v. *Eastern R. R.*, 14 Allen, 55; same case, 98 Mass. 428. But in the view now taken, these questions are immaterial. The defendants are not held liable, as in some other cases, because their acts were unnecessary, or unskilful, and hence not within the contemplation of the charter. They are held liable, irrespective of any negligence on their part, on the ground that it was beyond the power of the legislature to authorize the infliction of this injury on the plaintiff, without making provision for his compensation.

We think that here has been a taking of the plaintiff's property; that, as the statutes under which the defendants acted make no provision for the plaintiff's compensation, they afford no justification; that the defendants are liable in this action as wrong-doers; and that the

ruling of the court was correct. These conclusions, which are supported by authorities to which reference will soon be made, seem to us so clear, that, if there were no adverse authorities, it would be unnecessary to prolong the discussion of this case. But, as there are respectable authorities which are in direct conflict with these conclusions, it has been thought desirable to examine some arguments which have, at various times, been advanced in support of the opposite view.

In some instances, as soon as it has been made to appear that there is a legislative enactment purporting to authorize the doing of the act complained of, the complaint has been at once summarily disposed of by the curt statement "that an act authorized by law cannot be a tort." This is begging the question. It assumes the constitutionality of the statute. If the enactment is opposed to the Constitution, it is "in fact no law at all." "The term unconstitutional law, in American jurisprudence, is a misnomer, and implies a contradiction." "The will of the legislature is only law when it is in harmony with, or at least is not opposed to, that controlling instrument which governs the legislative body equally with the private citizen." Cooley's Constitutional Limitations, 1st ed., pp. 3, 4. The error in question originates in a "fallacy of reference." It arises from following English authorities, without adverting to the immense difference between the practically omnipotent powers of the British Parliament and the comparatively limited powers of our State legislatures, acting under the restrictions of written constitutions. Parliament is the supreme power of the realm. It is at once a legislature and a constitutional convention. 1 De Tocqueville's Democracy in America, Reeves's Translation, 2d Am. ed., 80. Parliament can "do everything that is not naturally impossible;" and what it does "no authority on earth can undo." 1 Blackstone's Com. 161; 4 Coke's Inst. 36. A State legislature, on the other hand, "is powerless when it attempts to pass the limits prescribed by the Constitution." See Cooley's Const. Lim., 1st ed., 45, 46. In England, whenever it appears that the act complained of was authorized by a parliamentary statute, the court are perfectly justified in dismissing the complaint, on the ground that the act was "authorized by law." In this country, when it appears that the legislature have gone through the form of enacting a statute purporting to authorize the act complained of, the further inquiry remains, whether the legislature had the constitutional power to pass such a statute. If they had not, then their enactment is not "law," and can afford no justification. The error of blindly following English authorities, as to the justification afforded by statutory enactments, has repeatedly been exposed. Swan, J., in *Crawford* v. *The Village of Delaware*, 7 Ohio St. 459, pp. 466, 477; Maison, Senator, in *Bloodgood* v. *Mohawk & Hudson Railroad Co.*, 18 Wendell, 9, pp. 29–31; Archer, C. J., in *Barron* v. *Mayor of Baltimore*, 2 Amer. Jurist, 210; Smith, J., in *Goodall* v. *City of Milwaukee*, 5 Wisconsin, 32, pp. 38, 45; Cooley's Const. Lim., 1st ed., 85; and see, also, Angell on Watercourses, 6th ed., sec. 461;

Sutherland, J., in *People* v. *Kerr*, 37 Barb. 357, pp. 412, 415; 1 Redf. on Railways, 4th ed., 232.

The error in the argument just commented upon, may, perhaps, be summed up in the statement, that it confounds the legislature with the constitutional convention. Closely allied to this is the error of confounding the legislature with the Supreme Court. It seems to have been contended that the legislature is competent to determine whether a franchise will be injurious to other interests, and that it is to be presumed, after a legislative grant, "that there is no just claim for resulting damages which has not been provided for." See American Law Magazine, vol. 1, No. 1, April, 1843, 58–60. This assumes both the omniscience and omnipotence of the legislature. If the legislators themselves are to finally decide whether they have transcended their constitutional powers, "then," in the words of Daniel Webster, "the Constitution ceases to be a legal and becomes only a moral restraint upon the legislature." It "is admonitory or advisory only, not legally binding. . . ." Speech on the Independence of the Judiciary, quoted in Cooley's Const. Lim., 1st ed. 46, note 1. It is now universally conceded to be the province and duty of the judiciary to pass upon the constitutionality of statutes; but it is to be regretted that some courts have manifested excessive reluctance to pronounce statutes unconstitutional. "Whatever respect may be due to the legislature, that due to the Constitution is still greater." Lawrence, J., in *Bunn* v. *The People*, 45 Illinois, 397, p. 419. The result has sometimes been "to sacrifice the individual to the community." See Sedgwick on Damages, 5th ed., 121, 122. "It is not," said Mr. Sedgwick, "an agreeable observation to make, but I believe it cannot be denied, that the protection afforded by the English government to property is much more complete in this respect than under our system, although Parliament claims to be despotically supreme, and although we boast our submission to constitutional restrictions. . . ." Sedgwick on Stat. and Const. Law, 523, 524, note. Parliamentary Acts, at the present time, usually contain carefully drawn clauses, scrupulously providing for the indemnity of those who are liable to be injured by the exercise of the powers granted by the Act. In this country it too often happens that the legislature neglect to carefully perform this duty, and the failure of the courts to pronounce the Act unconstitutional leaves the injured party without remedy. In view of the "form that the constitutional provision has assumed," in the hands of some courts, "it must," said the same author, "be admitted that in practice our constitutional guarantees are very flexible things. . . ." Sedgwick on Stat. and Const. Law, 534.

It is said that "if the legislature is competent to furnish the remedy, there is no denial of justice, though no action can be sustained at law." 1 Amer. Law Magazine, April, 1843, 57. Leave to apply to a future legislature for an act of indemnity is not the "certain remedy" to which (by Article 14 of the Bill of Rights) every subject is entitled "for all injuries he may receive . . . in his property." Besides, "is

the obligation to make him compensation any stronger upon a future legislature than it was on that one by whose authority his property has been taken;" and if they have "failed to make a constitutional provision for his compensation," "what assurance can he have" that any future legislature will do so? "It was, however, to place the rights of property upon higher grounds than the mere legislative sense of justice and equity, that this prohibition upon legislative power was embodied in the bill of rights." Moore, J., in *Buffalo B. B. & C. R. R. Co.* v. *Ferris*, 26 Texas, 588, p. 602. . . .

It is familiar law that "where an agent exceeds his authority, what he does within it is valid, if that part be distinctly severable from the remainder." 1 Parsons on Contracts, 4th ed., 58. The same principle applies to the exercise by the legislature of the power delegated to them by the Constitution. No sound argument can be founded upon the hardship to the grantees of not receiving all that the legislature undertook to convey to them. Conceding that the grantees, by assuming the performance of the duties required of them by the charter, have paid a full consideration for all the privileges which the charter purported to convey to them, how does their case differ from that of other unfortunate persons who have purchased property of an irresponsible party who had no right to sell? Is the fact that the purchaser paid a full consideration to the wrongful vendor allowed to divest the title of the true owner? Yet, upon what other theory can it be said (1 Amer. Law Magazine, 75) that "we cannot look beyond the charter itself to determine the duties and liabilities of the grantee"?

It is said that a land-owner is not entitled to compensation where the damage is merely "consequential." The use of this term "consequential damage" "prolongs the dispute," and "introduces an equivocation which is fatal to any hope of a clear settlement." It means both damage which is so remote as not to be actionable, and damage which is actionable. Sometimes it is used to denote damage which, though actionable, does not follow immediately, in point of time, upon the doing of the act complained of; what Erle, C. J., aptly terms "consequential damage to the actionable degree." *Brand* v. *H. & C. R. Co.*, Law Reports, 2 Queen's Bench, 223, p. 249. It is thus used to signify damage which is recoverable at common law in an action of case, as contradistinguished from an action of trespass. On the other hand, it is used to denote a damage which is so remote a consequence of an act that the law affords no remedy to recover it. The terms "remote damages" and "consequential damages" "are not necessarily synonymous, or to be indifferently used. All remote damages are consequential, but all consequential damages are by no means remote." Sedgwick on Damages, 5th ed., 56. When, then, it is said that a land-owner is not entitled to compensation for "consequential damage," it is impossible either to affirm or deny the correctness of the statement until we know in what sense the phrase "consequential damage" is used. If it is to be taken to mean damage which would

not have been actionable at common law if done by a private individual, the proposition is correct. The constitutional restriction was designed "not to give new rights, but to protect those already existing." Pierce on Am. R. R. Law, 173; and see *Rickett* v. *Directors, &c., of Metropolitan Railway Co.*, Law Reports, 2 House of Lords, 175, pp. 188, 189, 196. But this does not concern the present case, where it is virtually conceded that the injury would have been actionable if done by a private individual not acting under statutory authority. If, upon the other hand, the phrase is used to describe damage, which, though not following immediately in point of time upon the doing of the act complained of, is nevertheless actionable, there seems no good reason for establishing an arbitrary rule that such damage can in no event amount to a "taking of property."

The severity of the injury ultimately resulting from an act is not always in inverse proportion to the lapse of time between the doing of the act and the production of the result. Heavy damages are recovered in case as well as in trespass. The question whether the injury constitutes a "taking of property" must depend on its effect upon proprietary rights, not on the length of time necessary to produce that effect. If a man's entire farm is permanently submerged, is the damage to him any less because the submerging was only the "consequential" result of another's act? It has been said "that a nuisance by flooding a man's land was originally considered so far a species of ouster, that he might have had a remedy for it by assize of novel disseisin;" but if it be conceded that at present the only common law remedy is by an action on the case, that does not change the aspect of the constitutional question. The form of action in which the remedy must be sought cannot be decisive of the question whether the injury falls within the constitutional prohibition. "We are not to suppose that the framers of the Constitution meant to entangle their meaning in the mazes" of the refined technical distinctions by which the common-law system of forms of action is "perplexed and encumbered." Such a test would be inapplicable in a large proportion of the States, where the distinction between trespass and case has been annihilated by the abolition of the old forms of action. We are not alone in the opinion that the phrase "consequential damage" has been misapplied in some of the discussions on this constitutional question; — see the criticisms of Miller, J., in *Pumpelly* v. *Green Bay Company*, 13 Wallace U. S. 166, p. 180; Paine, J., in *Alexander* v. *City of Milwaukee*, 16 Wisconsin, 247, p. 258; Sutherland, J., in *People* v. *Kerr*, 37 Barb. 357, pp. 403, 408; — and we think that the confusion thus engendered will account for some erroneous decisions. If this most ambiguous expression is to be used at all in this connection, the meaning attached to it should always be clearly defined, as is done in Pierce on Am. Railroad Law, 173.

It may perhaps be urged that a decision in favor of the plaintiff will give rise to a multiplicity of suits by other claimants, many of whom

have sustained no substantial damage. But this affords no ground for denying redress to this plaintiff, who has clearly sustained a substantial injury. Nor will the present decision be a precedent in future cases differing in their nature from the one before us. The answers given by other courts to similar objections are quite decisive. Ld. Denman, C. J., in *Regina* v. *Eastern Counties Railway Co.*, 2 Queen's Bench, 347, pp. 362, 363; Montague Smith, J., in *Brand* v. *H. & C. Railway Co.*, Law Reports, 2 Queen's Bench, 223, p. 245; Parker, C. J., in *Boston & Roxbury Mill Corp.* v. *Gardner*, 2 Pick. 33, pp. 38, 39. . . . [Here follows, at considerable length, a learned classification and consideration of the cases, ending with those designated as "the highway grade cases." The opinion closes as follows:]

By the foregoing review of authorities, it appears that the number of actual decisions in irreconcilable conflict with the present opinion is much smaller than has sometimes been supposed, and that, in a large proportion of the cases cited, the application of the principles here maintained would not have necessitated the rendition of a different judgment from that which the courts actually rendered in those cases.

Thus far Eaton's case alone has been under consideration. The only difference between Eaton's case and Aiken's case arises from the fact that a small part of the ridge is included in Aiken's farm, while none of it is on the farm of Eaton. This difference does not affect the present inquiry, which relates solely to the correctness of the ruling at the trial. The court did not rule that Aiken could recover the damages occasioned to him by the entire cut through the ridge. The ruling was carefully limited to "such damages as have been caused" the plaintiffs "in consequence of the defendants' cutting away the ridge north of the plaintiffs' farms." If any damage was caused to Aiken by the defendants' removing any portion of that "small part" of the ridge which was included in his farm, he is not entitled to recover for it under this ruling. So far, then, as the correctness of the ruling is concerned, Aiken's case stands on the same legal principle as Eaton's. Under this ruling it will be for a jury to say how much of the injury to Aiken's meadow was occasioned by the removal of that part of the ridge which was north of Aiken's farm.

In both cases the exception is overruled. As the defendants elect trial by jury, the order must be, *Case discharged.*[1]

[1] Of this strong and closely reasoned judgment, it has been said that, "The leading case upon the subject, and the one which has contributed more than any other toward bringing about the change referred to in the last section is *Eaton* v. *B. C. & M. R. R. Co.*, 51 N. H. 504." Lewis, Em. Domain, s. 58 (Chicago, 1888). The change here referred to is one thought by Mr. Lewis to have taken place "within the last twenty years," the nature of which is sufficiently indicated in the opinion.

"That the flowing of lands against the owner's consent, and without compensation, is a taking of his property in violation of that provision of our Constitution, and that of most or all the American States, which prohibits the taking of property without compensation, is a proposition which seems to me so self-evident as hardly to admit of illustration by any example which can be made clearer; and which therefore can hardly

need the support of authorities. But see *Hooker* v. *New Haven and Northampton Co.*, 14 Conn. 146; *Rowe* v. *Granite Bridge Corp.*, 21 Pick. 344; *Nevins* v. *City of Peoria*, 41 Ill. 502, 510; *Pettigrew* v. *Village of Evansville*, 25 Wis. 223, 231, 236; *Pumpelly* v. *Green Bay Co.*, 13 Wallace, 166. But the most satisfactory and best considered case which can be found in the books upon this subject, which examines, classifies, and analyzes nearly all the cases, and in the conclusions of which I wholly agree, is that of *Eaton* v. *B. C. & M. R. R. Co.*, 51 N. H. 504–535." — *Grand Rapids Booming Co.* v. *Jarvis*, 30 Mich. 321 (1874), Christiancy, J., for the court.

See the elaborate affirmation of this case in *Thompson* v. *Androscoggin Riv. Imp. Co.*, 54 N. H. 545 (1874). Compare *Weaver* v. *Miss. & Rum River Boom Co.*, 28 Minn. 534, 538 (1881); *Janesville* v. *Carpenter*, 77 Wis. 288 (1890); *Anderson* v. *Henderson*, 124 Ill. 164; Randolph, Em. Dom. s. 429; *Atty.-Gen.* v. *Tomline*, 14 Ch. Div 58 (1880); *Head* v. *Amosk. Co.*, *supra*, pp. 767–768; *Turner* v. *Nye*, *supra*, p. 893; *Williams* v. *Nelson*, 23 Pick. 141; see also Strong, J., for the court, in *Transport. Co.* v. *Chicago*, *infra*, p. 1082; and Earl, J., dissenting, in *Story* v. *El. Ry. Co.*, *infra*, p. 1105.

It will be observed that the judgment in the principal case may rest upon other grounds than those on which the court puts it.

The question of whether property has been taken under the power of eminent domain is, indeed, a question of substance; it is not a mere matter of names, or of the alleged or nominal ground on which the legislature assumes to act. It seems that it should make no difference under what head of legislative power it is sought to justify an act, *e. g.*, under the so-called police power or taxation, — if there be, in reality, and upon a large and just consideration of the matter, a taking, divesting, or destruction of property by the State for public purposes, compensation must be made. Such a doctrine, however, is to be applied with a recognition of well-known exceptions and qualifications, in full view of that historical conception of the meaning of a taking of property for public purposes, as contrasted with the usual operations of public authority, not thought of as requiring compensation, which may be gathered from the established practices of all civilized governments, and particularly of our own ancestors, and which is illustrated in such a case as *Com.* v. *Alger*, 7 Cush. 53 (*supra*, p. 693), or *Com.* v. *Tewksbury*, 11 Met. 55. See *supra*, p. 699 and note. Compare also *Mugler* v. *Kansas*, 123 U. S. 623 (*supra*, p. 782); and *Miller* v. *Horton*, 152 Mass. 540. A comparison, in the last case, of the dissenting opinion with that of the court will illustrate the true nature of the inquiry in such cases and the difficulties of the subject. In reasoning on such questions there is danger in assuming that the framers of our constitutions used language in the definite and exact sense reached by modern analysis. It is moreover never to be forgotten that much in our constitutions is addressed to legislatures and not at all to courts; that much injustice, in the way among other ways, of not making compensation where it should be given, for injuries suffered from acts of the executive and the legislature is beyond the reach of courts. See *supra*, pp. 151–154.

Compare what is said in "Origin and Scope of the American Doctrine of Constitutional Law" (Little and Brown, 1893), 26 *et seq.*, in discussing the meaning of the rule that laws are not to be set aside as unconstitutional unless they are so beyond a reasonable doubt: "In such a work there can be no permanent or fitting *modus vivendi* between the different departments unless each is sure of the full co-operation of the others, so long as its own action conforms to any reasonable and fairly permissible view of its constitutional power. The ultimate arbiter of what is rational and permissible is indeed always the courts, so far as litigated cases bring the question before them. This leaves to our courts a great and stately jurisdiction. It will only imperil the whole of it if it is sought to give them more. They must not step into the shoes of the law-maker, or be unmindful of the hint that is found in the sagacious remark of an English bishop nearly two centuries ago, quoted lately from Mr. Justice Holmes: — 'Whoever hath an absolute authority to interpret any written or spoken laws, it is he who is truly the law-giver, to all intents and purposes, and not the person who first wrote or spoke them.' . . . If what I have said be sound, it is greatly to be desired that it should be more emphasized by our courts, in its full significance. It has been

KOCH v. DELAWARE, &c. RAILROAD COMPANY.

SUPREME COURT OF NEW JERSEY. 1891.

[53 *N. J. Law*, 256.]

ON demurrer to declaration. Argued at November Term, 1890, before BEASLEY, CHIEF JUSTICE, and JUSTICES DIXON and MAGIE.

For the plaintiff, *McDermit* and *Maher*. For the demurrants, *Bedle*, *Muirheid*, and *McGee*.

The opinion of the court was delivered by

BEASLEY, CHIEF JUSTICE. The declaration complains of damages arising from the flooding of her lands by an act of the defendant alleged to be illegal.

The lands so injured are described as adjoining a certain stream of water called Ned's Creek, which empties into a contiguous creek, known as Kingsland's Creek, and that the premises in question were drained and kept dry, until the grievance complained of, by means of a sluice at the mouth of the last-named stream.

These allegations do not appear to have any relation to the case, except to show, with unnecessary particularity, that antecedently to the tort complained of, the plaintiffs' premises had not been subject to any watery influx. No complaint is made of any interference with the sluice or creeks thus in a measure described.

The declaration then proceeds to the *gravamen* of the supposed cause of action. Briefly it is thus stated: That by a certain Act of the Legislature, the same being a supplement to "An Act to incorporate the Kingsland and Saw Mill Company," a certain tract of land is described, the northerly side of which abuts upon the line of the Boonton branch

often remarked that private rights are more respected by the legislatures of some countries which have no written constitution than by ours. No doubt our doctrine of constitutional law has had a tendency to drive out questions of justice and right, and to fill the mind of legislators with thoughts of mere legality, of what the Constitution allows. And moreover, even in the matter of legality, they have felt little responsibility; if we are wrong, they say, the courts will correct it. Meantime they and the people whom they represent, not being thrown back on themselves, on the responsible exercise of their own prudence, moral sense, and honor, lose much of what is best in the political experience of any nation; and they are belittled as well as demoralized. If what I have been saying is true, the safe and permanent road towards reform is that of impressing upon our people a far stronger sense than they have of the great range of possible mischief that our system leaves open, and must leave open to the legislatures, and of the clear limits of judicial power; so that responsibility may be brought sharply home where it belongs. The checking and cutting down of legislative power by numerous detailed prohibitions in the Constitution, cannot be accomplished without making the government petty and incompetent. This process has already been carried much too far in some of our States. Under no system can the power of courts go far to save a people from ruin; our chief protection lies elsewhere If this be true, it is of the greatest public importance to put the matter in its true light." — ED.

of the Morris and Essex Railroad Company, and that the plaintiffs' premises are a part of the tract so set forth. Then follows an averment that by another provision of the statute referred to it is enacted, "that it shall not be lawful to make any opening through the causeway or roadbed of the Boonton branch of the Morris and Essex Railroad Company, whereby any overflow or tide-water from the meadows lying beyond the same shall be discharged upon" the tract of land just mentioned.

The tort laid to the defendant is, that it "unlawfully made an opening through the causeway or roadbed of the Boonton branch, and thereby caused the plaintiffs' lands to be overflowed by the tide-water."

These statements can have but a single meaning. They denote that the plaintiffs' lands are protected from the incoming of tide-water by the artificial structure described as the causeway of the railroad, and the wrong done is, that the defendant has, in part, removed that dam.

It is, consequently, plain, that the plaintiffs, in order to show a suable wrong, must make it evident that they have a legal right to insist on the maintenance of the railroad structure in question. It is not sufficient for them to show that they will sustain a detriment by its removal; the ground of their action is, and must be, a deprivation of a right that the law secures to them; and, therefore, if they cannot require the keeping up of this embankment, they cannot complain, in a court of law, of its destruction or its impairment, whether such act be done by its owner or by a stranger as an act of trespass.

And this seems to be the theory upon which the present pleading has been composed. The plaintiffs' legal right to the unimpaired existence of this defensive roadway, so beneficial to their property, is described in the declaration as emanating from the legislative prohibition against any persons making an opening in it. As the language of the Act is plain to that effect, there can be no doubt of the validity of this reliance of the plaintiffs, if the Act itself be sustainable.

And this seems to me to be the flaw in the plaintiffs' case; the statute appears to be destitute of all semblance of legality. It is a private Act, and it is not shown that it has even been accepted by the corporate body for whose benefit it was designed. It arbitrarily forbids the Boonton branch railroad to make use of its roadway in a particular manner — that is, to remove it at its pleasure, in whole or in part. This is not within the competency of legislation. It is not perceived how the law-maker can direct this corporate body to forever refrain from removing a roadbed constructed by it on its own property. The legislature, by its edict, cannot burden the land of the railroad for the benefit of other property.

Inasmuch, therefore, as this statute cannot be sustained, the plaintiffs' supposed cause of action has no basis.

The defendant is entitled to judgment on the demurrer.

IN *Transportation Co.* v. *Chicago*, 99 U. S. 635 (1878), on error to the Circuit Court of the United States for the Northern District of Illinois, STRONG, J., for the court said: "We are of opinion that no error has been shown in this record, though the assignments are very numerous. The action was case to recover damages for injuries alleged to have been sustained by the plaintiffs in consequence of the action of the city authorities in constructing a tunnel or passageway along the line of La Salle Street and under the Chicago River, where it crosses that street. The plaintiffs were the lessees of a lot bounded on the east by the street, and on the south by the river, and the principal injury of which they complain is, that by the operations of the city they were deprived of access to their premises, both on the side of the river and on that of the street, during the prosecution of the work. It is not claimed that the obstruction was a permanent one, or that it was continued during a longer time than was necessary to complete the improvement. Nor is it contended that there was unreasonable delay in pushing the work to completion, or that the coffer-dam constructed in the river, extending some twenty-five or thirty feet in front of the plaintiff's lot, was not necessary, indeed indispensable, for the construction of the tunnel.

"The case has been argued on the assumption that the erection of the coffer-dam, and the necessary excavations in the street, constituted a public nuisance, causing special damage to the plaintiffs, beyond those incident to the public at large, and hence, it is inferred, the city is responsible to them for the injurious consequences resulting therefrom. The answer to this is that the assumption is unwarranted. That cannot be a nuisance, such as to give a common-law right of action, which the law authorizes. We refer to an action at common law such as this is. A legislature may and often does authorize and even direct acts to be done which are harmful to individuals, and which without the authority would be nuisances; but in such a case, if the statute be such as the legislature has power to pass, the acts are lawful, and are not nuisances, unless the power has been exceeded. In such grants of power a right to compensation for consequential injuries caused by the authorized erections may be given to those who suffer, but then the right is a creature of the statute. It has no existence without it. If this were not so, the suffering party would be entitled to repeated actions until an abatement of the erections would be enforced, or perhaps he might restrain them by injunction. . . .

"It is immaterial whether the fee of the street was in the State or in the city or in the adjoining lot-holders. If in the latter, the State had an easement to repair and improve the street over its entire length and breadth, to adapt it to easy and safe passage.

"It is undeniable that in making the improvement of which the plaintiffs complain the city was the agent of the State, and performing a public duty imposed upon it by the legislature; and that persons appointed or authorized by law to make or improve a highway are not answerable for consequential damages, if they act within their jurisdic-

tion and with care and skill, is a doctrine almost universally accepted alike in England and in this country. It was asserted unqualifiedly in *The Governor and Company of the British Cast-Plate Manufacturers* v. *Meredith*, 4 Durnf. & E. 794; in *Sutton* v. *Clarke*, 6 Taun. 28; and in *Boulton* v. *Crowther*, 2 Barn. & Cres. 703. It was asserted in *Green* v. *The Borough of Reading*, 9 Watts (Pa.), 382; *O'Connor* v. *Pittsburgh*, 18 Pa. St. 187; in *Callender* v. *Marsh*, 1 Pick. (Mass.) 418; as well as by the courts of numerous other States. It was asserted in *Smith* v. *The Corporation of Washington* (20 How. 135), in this court; and it has been held by the Supreme Court of Illinois. The decisions in Ohio, so far as we know, are the solitary exceptions. The doctrine, however it may at times appear to be at variance with natural justice, rests upon the soundest legal reason. The State holds its highways in trust for the public. Improvements made by its direction or by its authority are its acts, and the ultimate responsibility, of course, should rest upon it. But it is the prerogative of the State to be exempt from coercion by suit, except by its own consent. This prerogative would amount to nothing if it does not protect the agents for improving highways which the State is compelled to employ. The remedy, therefore, for a consequential injury resulting from the State's action through its agents, if there be any, must be that, and that only, which the legislature shall give. It does not exist at common law. The decisions to which we have referred were made in view of Magna Charta and the restriction to be found in the constitution of every State, that private property shall not be taken for public use without just compensation being made. But acts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though their consequences may impair its use, are universally held not to be a taking within the meaning of the constitutional provision. They do not entitle the owner of such property to compensation from the State or its agents, or give him any right of action. This is supported by an immense weight of authority. Those who are curious to see the decisions will find them collected in Cooley on Constitutional Limitations, page 542 and notes. The extremest qualification of the doctrine is to be found, perhaps, in *Pumpelly* v. *Green Bay Company*, 13 Wall. 166, and in *Eaton* v. *Boston, Concord, & Montreal Railroad Co.*, 51 N. H. 504. In those cases it was held that permanent flooding of private property may be regarded as a "taking." In those cases there was a physical invasion of the real estate of the private owner, and a practical ouster of his possession. But in the present case there was no such invasion. No entry was made upon the plaintiffs' lot. All that was done was to render for a time its use more inconvenient.

"The present Constitution of Illinois took effect on the 8th of August, 1870, after the work of constructing the tunnel had been substantially completed. It ordains that private property shall not be 'taken or damaged' for public use without just compensation. This is an exten-

sion of the common provision for the protection of private property. But it has no application to this case, as was decided by the Supreme Court of the State in *Chicago* v. *Rumsey*, recently decided, and reported in Chicago Legal News, vol. x. p. 333, 87 Ill. 348. That case also decides that the city is not liable for consequential damages resulting from an improvement made in the street, the fee of which is in the city, provided the improvement had the sanction of the legislature. It also decides that La Salle Street is such a street, and declares that a recovery of such damages by an adjacent lot-holder has been denied by the settled law of the State up to the adoption of the present Constitution. There would appear, therefore, to be little left in this case for controversy." [1]

CHICAGO *v.* TAYLOR.

SUPREME COURT OF THE UNITED STATES. 1887.

[125 *U. S.* 161.]

TRESPASS ON THE CASE. Judgment for plaintiffs. Defendant sued out this writ of error [to the Circuit Court of the United States for the Northern District of Illinois.] The case is stated in the opinion of the court.

Mr. Frederick S. Winston and *Mr. John W. Green*, for plaintiff in error. *Mr. George A. Follansbee* and *Mr. Thomas M. Hoyne*, for defendants in error.

MR. JUSTICE HARLAN delivered the opinion of the court.

This action was brought by Moses Taylor, as owner of an undivided interest in a lot in Chicago, having sixty feet front on Lumber Street, one hundred and fifty feet on Eighteenth Street, and three hundred feet on the South Branch of Chicago River, to recover the damages sustained by reason of the construction, by that city, of a viaduct on Eighteenth Street, in the immediate vicinity of said lot. The city did this work under the power conferred by its charter "to lay out, establish, open, alter, widen, extend, grade, pave, or otherwise improve streets, alleys, avenues, sidewalks, wharves, parks, and public grounds, and vacate the same," and "to construct and keep in repair bridges, viaducts, and tunnels, and to regulate the use thereof." It appears that the construction of the viaduct was directed by special ordinances of the city council.

For many years prior to, as well as at, the time this viaduct was built, the lot in question was used as a coal-yard, having upon it sheds, machinery, engines, boilers, tracks, and other contrivances required in the business of buying, storing, and selling coal. The premises were long so used, and they were peculiarly well adapted for such business. There was evidence before the jury tending to show that, by reason of

[1] See *City Council* v. *Maddox*, 89 Ala. 181 (1890). — ED.

the construction of the viaduct, the actual market value of the lot, for the purposes for which it was specially adapted, or for any other purpose for which it was likely to be used, was materially diminished, access to it from Eighteenth Street being greatly obstructed, and at some points practically cut off; and that, as a necessary result of this work, the use of Lumber Street, as a way of approach to the coal-yard by its occupants and buyers, and as a way of exit for teams carrying coal from the yard to customers, was seriously impaired. There was also evidence tending to show that one of the results of the construction of the viaduct, and the approaches on either side of it to the bridge over Chicago River, was, that the coal-yard was often flooded with water running on to it from said approaches, whereby the use of the premises as a place for handling and storing coal was greatly interfered with, and often became wholly impracticable.

On behalf of the city there was evidence tending to show that the plaintiff did not sustain any real damage, and that the inconveniences to occupants of the premises, resulting from the construction and maintenance of the viaduct, were common to all other persons in the vicinity, and could not be the basis of an individual claim for damages against the city.

There was a verdict and judgment against the city. The court below having refused to set aside the judgment and grant a new trial, the case has been brought here for review in respect to errors of law which, it is contended, were committed in the admission of incompetent evidence, in the refusal of instructions asked by the city, and in the charge of the court to the jury.

Before noticing the assignments of error it will be well to ascertain what principles have been announced by this court or by the Supreme Court of Illinois in respect to the liability of municipal or other corporations in that State, for damages resulting to owners of private property from the alteration or improvement, under legislative authority, of streets and other public highways.

By the Constitution of Illinois, adopted in 1848, it was provided that no man's property shall "be taken or applied to public use without just compensation being made to him." Art. XIII. § 11. While this Constitution was in force Chicago commenced, and substantially completed, a tunnel under Chicago River, along the line of La Salle Street, in that city. It was sued for damages by the Northern Transportation Company, owning a line of steamers running between Ogdensburg, New York, and Chicago, and also a lot in the latter city, with dock and wharfage privileges, the principal injury of which it complained being that, during the prosecution of the work by the city, it was deprived of access to its premises, both on the side of the river and on that of the street. This court — in *Transportation Co.* v. *Chicago*, 99 U. S. 635, 641 — held that in making the improvement of which the plaintiff complained the city was the agent of the State, performing a public duty imposed by the legislature; and that "persons appointed or authorized by law to

make or improve a highway are not answerable for consequential damages, if they act within their jurisdiction, and with care and skill, is a doctrine almost universally accepted, alike in England and in this country," — citing numerous cases, among others *Smith* v. *Corporation of Washington*, 20 How. 135. "The decisions to which we have referred," the court continued, "were made in view of Magna Charta, and the restriction to be found in the Constitution of every State, that private property shall not be taken for public use without just compensation being made. But acts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though their consequences may impair its use, are universally held not to be a taking within the meaning of the constitutional provision. They do not entitle the owner of such property to compensation from the State or its agents, or give him any right of action." This view, the court further said, was not in conflict with the doctrine announced in *Pumpelly* v. *Green Bay Co.*, 13 Wall. 166, which was a case of the permanent flooding of private property, a physical invasion of the real estate of the private owner, a practical ouster of his possession.

In *City of Chicago* v. *Rumsey*, 87 Illinois, 348, 363, the Supreme Court of Illinois, upon a full review of previous decisions, and especially referring to *Moses* v. *Pittsburg, Fort Wayne, & Chicago R. R. Co.*, 21 Illinois, 516; *Roberts* v. *Chicago*, 26 Illinois, 249; *Murphy* v. *Chicago*, 29 Illinois, 279; *Stone* v. *Fairbury, Pontiac, and Northwestern Railroad Co.*, 68 Illinois, 394; *Stetson* v. *The Chicago and Evanston Railroad Co.*, 75 Illinois, 74; and *Chicago, Burlington, and Quincy Railroad Co.* v. *McGinnis*, 79 Illinois, 269, held it to have been the settled law of that State, up to the time of the adoption of the Constitution of 1870, that there could be "no recovery by an adjacent property-holder, on streets the fee whereof is in the city, for the merely consequential damages resulting from the character of the improvements made in the streets, provided such improvement has the sanction of the legislature."

But the present case arose under, and must be determined with reference to, the Constitution of Illinois adopted in 1870, in which the prohibition against the appropriation of private property for public use, without compensation, is declared in different words from those employed in the Constitution of 1848. The provision in the existing Constitution is, that "private property shall not be taken *or damaged* for public use without just compensation." An important inquiry in the present case is to the meaning of the word "damaged" in this clause.

The earliest case in Illinois in which this question was first directly made and considered, is *Rigney* v. *City of Chicago*, 102 Illinois, 64, 74, 80. That was an action to recover damages sustained by the plaintiff by reason of the construction by Chicago of a viaduct or bridge along Halstead Street and across Kinzie Street, in that city, some 220 feet west of his premises, fronting on the latter street. There was no claim

that the plaintiff's possession was disturbed, or that any direct physical injury was done to his premises by the structure in question. But the complaint was, that his communication with Halstead Street, by way of Kinzie Street, had been cut off, whereby he was deprived of a public right enjoyed by him in connection with his premises, and an injury inflicted upon him in excess of that sustained by the public. For that special injury, in excess of the injury done to others, he brought suit. The trial court peremptorily instructed the jury to find for the city, holding, in effect, that the fee of the streets being in the city, there could be no recovery for the obstruction of which the plaintiff complained.

That judgment was reversed, an elaborate opinion being delivered, reviewing the principal cases under the Constitution of 1848, and referring to the adjudications in the courts of other States upon the general question as to what amounts to a taking of private property for public use within the meaning of such a provision as that contained in the former Constitution of Illinois. After alluding to the decisions of other State Courts to the effect that such a provision extended only to an actual appropriation of property by the State, and did not embrace consequential injuries, although what was done resulted, substantially, in depriving the owner of its use, the Supreme Court of Illinois reviewed numerous cases determined by it under the Constitution of 1848. *Nevins* v. *City of Peoria*, 41 Illinois, 502, decided in 1866; *Gillam* v. *Madison County Railroad*, 49 Illinois, 484; *City of Aurora* v. *Gillett*, 56 Illinois, 132; *Aurora* v. *Reed*, 57 Illinois, 29; *City of Jacksonville* v. *Lambert*, 62 Illinois, 519; *Toledo, Wabash, &c. Railroad* v. *Morrison*, 71 Illinois, 616. It says: "Whatever, therefore, may be the rule in other States, it clearly appears from this review of the cases that previous to, and at the time of the adoption of the present Constitution, it was the settled doctrine of this court that any actual physical injury to private property by reason of the erection, construction, or operation of a public improvement in or along a public street or highway, whereby its appropriate use or enjoyment was materially interrupted, or its value substantially impaired, was regarded as a taking of private property, within the meaning of the Constitution, to the extent of the damages thereby occasioned, and actions for such injuries were uniformly sustained."

Touching the provision in the Constitution of 1870, the court said that the framers of that instrument evidently had in view the giving of greater security to private rights by giving relief in cases of hardship not covered by the preceding Constitution, and for that purpose extended the right to compensation to those whose property had been "damaged" for public use; that the introduction of that word, so far from being superfluous or accidental, indicated a deliberate purpose to make a change in the organic law of the State, and abolished the old test of direct physical injury to the *corpus* or subject of the property affected. The new rule of civil conduct, introduced by the present

Constitution, the court adjudged, required compensation in all cases where it appeared "there has been some physical disturbance of a right, either public or private, which the plaintiff enjoys in connection with his property, and which gives to it an additional value, and that by reason of such disturbance he has sustained a special damage with respect to his property in excess of that sustained by the public generally." The Chief Justice concurred in the judgment, and in the general views expressed by the court, holding that while the owner of a lot on a street held it subject to the right of the public to improve it in any ordinary and reasonable mode deemed wise and beneficial by the proper public functionaries, he was entitled, under the Constitution of 1870, to compensation in case of a sudden and extraordinary change in the grade of the street or highway, whereby the value of his property is in fact impaired. Three of the justices of the State court dissented.

As we understand the previous cases of *Pekin* v. *Brereton*, 67 Illinois, 477; *Pekin* v. *Winkel*, 77 Illinois, 56; *Shawneetown* v. *Mason*, 82 Illinois, 337; *Elgin* v. *Eaton*, 83 Illinois, 535; and *Stack* v. *St. Louis*, 85 Illinois, 377, — all of which arose under the present Constitution of Illinois, — they proceeded upon the same grounds as those expressed in *Rigney* v. *Chicago*, although in no one of them did the court distinctly declare how far the present Constitution differed from the former in respect to the matter now before us.

At the same term when Rigney's case was decided, the State court had occasion to consider this question as presented in a somewhat different aspect. The Union Building Association owned a building and lot three and a half blocks from a certain part of La Salle Street in Chicago, which the city proposed to close up, and permit to be occupied by the Board of Trade with its building. As the streets adjacent to the plaintiff's property were to remain in the same condition as to width, etc., that they were in before, and as the closing up of a portion of La Salle Street would not, in any degree, interfere with access to its lot, or with the use and enjoyment of it, it was held that there was no special or particular injury done for which an action would lie against the city. That case was distinguished from *Rigney* v. *Chicago* in this, that in the latter case the court held that "property-holders bordering upon streets have, as an incident to their ownership of such property, a right of access by way of the streets, which cannot be taken away or materially impaired by the city, without incurring legal liability to the extent of the damages thereby occasioned." *City of Chicago* v. *Union Building Association*, 102 Illinois, 379, 397.

In *Chicago & Western Indiana Railroad* v. *Ayres*, 106 Illinois, 518, the court — all the justices concurring — observed: "It is needless to say our decisions have not been harmonious on this question, but in the case of *Rigney* v. *City of Chicago*, 102 Illinois, 64, there was a full review of the decision of our courts, as well as the courts of Great Britain, under a statute containing a provision similar to the provision in our Constitution. The conclusion there reached was, that under this

constitutional provision a recovery may be had in all cases where private property has sustained a substantial damage by the making and using an improvement that is public in its character, — that it does not require that the damag. shall be caused by a trespass, or an actual physical invasion of the owner's real estate, but if the construction and operation of the railroad or other improvement is the cause of the damage, though consequential, the party may recover. We regard that case as conclusive of this question. The case of *Pittsburg & Fort Wayne Railroad Co.* v. *Reich*, 101 Illinois, 157, is in point on this question of damages, and the case of *City of Chicago* v. *Union Building Association*, 102 Illinois, 379, also reviews the authorities and approves the doctrine in *Rigney* v. *Chicago*, *supra*. These cases, therefore, overrule the doctrines of the earlier cases." Our attention has not been called to, nor are we aware of any subsequent decision of the State court giving the Constitution of 1870 an interpretation different from that indicated in *Rigney* v. *Chicago*, and *Chicago, &c. Railroad Co.* v. *Ayres*. We concur in that interpretation. The use of the word "damaged" in the clause providing for compensation to owners of private property, appropriated to public use, could have been with no other intention than that expressed by the State court. Such a change in the organic law of the State was not meaningless. But it would be meaningless if it should be adjudged that the Constitution of 1870 gave no additional or greater security to private property, sought to be appropriated to public use, than was guaranteed by the former Constitution.

The charge to the jury by the learned judge who presided at the trial gave effect to the principles announced in the foregoing cases arising under the present Constitution of Illinois. It covered every vital question in the case, in language so well guarded that the jury could not well have misunderstood the exact issue to be tried, or the proper bearing of all the evidence. So far as the special requests for instructions in behalf of the city contained sound propositions of law they were fully embodied in the charge to the jury.

In behalf of the city it was contended that, if liable at all, it was only liable for such damage as was done to the market value of the property by rendering access to it difficult or inconvenient. The court said, in substance, to the jury that the flooding of the lot by water running down upon it from the approaches to the viaduct was an element of damage which they might consider; though if such flooding merely caused inconvenience to the occupant in the conduct of his business, such as his coal getting wet, or its becoming more difficult to keep his scales properly adjusted, these were not elements of impairment to the value of the property for purposes of sale. The jury were also instructed that although the occupant may have found it difficult to haul coal out of the lot, and although it may have been much more unprofitable to conduct the business of selling coal at this lot, that did not weigh upon the question as to the value of the lot in the market. Other obser-

vations were made to the jury, but the court, in different forms of expression, said to them that the question was, whether, by reason of the construction of the viaduct, the value, that is, the market price, of the property had been diminished. The scope of the charge is fairly indicated in the following extract: "The real question is, has the value of this property to sell or rent been diminished by the construction of this viaduct? It may be that it can no longer be used for the purposes of a coal-yard, or for any purpose for which it has heretofore been used, but that would not be material if it can be rented or sold at as good a price for other purposes, except that if the proof satisfies you that any of the permanent improvements put on the lot for the particular business which has been heretofore carried on there, and for which it was improved, have been impaired in value, or are not worth as much after this viaduct was built and the bridge was raised as before, and you can from the proof determine how much these improvements are damaged, the plaintiff would be entitled to recover for such damage to the improvements, — that is to say, this lot being improved for a specific purpose, if the proof satisfies you that it can no longer be rented or used for that purpose, and that thereby these improvements have been lost or impaired in value, then the impairment of value to these improvements is one of the elements of damage which the plaintiff is entitled to have considered and passed upon and included in his damage."

It would serve no useful purpose to examine in detail all the requests for instructions, and compare them with the charge, or discuss the questions arising upon exceptions to the admission of evidence. After a careful consideration of all the propositions advanced for the city, we are unable to discover any substantial error committed to its prejudice. It may be, as suggested by its counsel, that the present Constitution of Illinois, in regard to compensation to owners of private property "damaged" for the public use, has proved a serious obstacle to municipal improvements; that the sound policy of the old rule, that private property is held subject to any consequential damages that may arise from the erection on a public highway of a lawful structure, is being constantly vindicated; and that the constitutional provision in question is "a handicap" upon municipal improvement of public highways. And it may also be, as is suggested, doubtful whether a constitutional convention could now be convened that would again incorporate in the organic law the existing provision in regard to indirect or consequential damage to private property so far as the same is caused by public improvements. We dismiss these several suggestions with the single observation that they can be addressed more properly to the people of the State in support of a proposition to change their Constitution.

We perceive no error in the record, and the judgment is

Affirmed.[1]

[1] See also *Osborne* v. *Mo. Pac. Ry. Co.*, 147 U. S. 248 (1893); *Jackson* v. *Chic. &c. Ry. Co.*, 41 Fed. Rep. 656 (West. D. Mo. 1890); *Peel* v. *Atlanta*, 85 Geo. 138 (1890);

IN the *Case of the Philadelphia and Trenton Railroad Company*, 6 Wharton, 25, 43 (1840), in considering a statute purporting to authorize the corporation to construct and operate its road in public highways and providing no compensation, the court (GIBSON, C. J.) said: "The remaining exception is more important, because it calls in question, for specific reasons, the validity of the statute which is the foundation of

Tex. &c. Ry. Co. v. *Meadows*, 73 Tex. 32; *McMahon* v. *St. Louis, &c. Ry. Co.*, 41 La. Ann. 827; *Omaha R. R. Co.* v. *Janecek*, 30 Neb 276 (1890); *Gainesville, &c. R. Co.* v. *Hall*, 78 Tex. 169 (1890); *Smith* v. *St. Joseph*, 27 S. W. Rep. (Mo. 1894).

In *Hot Springs R. R. Co.* v. *Williamson*, 136 U. S. 121, 129 (1890), LAMAR, J., for the court, said: "It is proper to add that we concur in the view taken of this case by the Supreme Court of Arkansas. That court held that the Act of Congress granting the right of way to the defendant company over the strip of land upon which its road was to be operated (which in this case was along the line of Benton Street, an original street in the town of Hot Springs, and used as such at the time of the passage of the Act) carried with it the right to construct, maintain, and operate its line of railroad therein, and to appropriate such right as a location for its turn-table and depots, and for any other purpose necessary to the operation of its road; but that it was equally clear, under the provisions of the present Constitution of the State of Arkansas, that if, in the exercise of that right, the property of an adjoining owner was damaged in the use and enjoyment of the street upon which the road was located, such owner would be entitled to recover such damages from the company. It further held that the contention of the plaintiff in error that the Act of Congress invested it with an absolute title to the street along which its road was located, and exempted it from any liability for consequential damages resulting to an abutting owner from the laying of its track in a proper and skilful manner, was founded upon cases arising under the familiar constitutional restriction that private property shall not be taken for public use without compensation, which decisions generally turned upon the question, what is a *taking*, within the meaning of such provision? That the Constitution of that State of 1878, which provides that 'private property shall not be taken, appropriated, or damaged for public use without just compensation,' has changed that rule; that all the decisions rendered under similar constitutional provisions concur in holding that the use of a street by a railroad company as a site for its track, under legislative or municipal authority, when it interferes with the rights of adjoining land-owners to the use of the street, as a means of ingress and egress, subjects the railroad company to an action for damages, on account of the diminution of the value of the property caused by such use; and, lastly, that even conceding the authority of the town of Hot Springs to pass the ordinance authorizing the company to construct and maintain the railroad embankment, track, and turn-table complained of, it cannot impair the constitutional right of the defendant in error to compensation.

"We think those views are sound and in accordance with the decisions of this court in *Pennsylvania Railroad Company* v. *Miller*, 132 U. S. 75, and *New York Elevated Railroad* v. *Fifth Nat. Bank*, decided May 5, 1890, 135 U. S. 432."

Compare *City of Pueblo* v. *Strait*, 36 Pac. Rep. 700 (Col. May, 1894). In this case HAYT, C. J., for the court, said: "The insertion of the word 'damaged' first appears in the amended Constitution of Illinois, adopted in 1870. It has since been incorporated into the constitutions of West Virginia, Pennsylvania, Arkansas, Missouri, Alabama, Nebraska, Texas, Georgia, California, Colorado, Kentucky, Montana, and the Dakotas." A previous case in Colorado is cited, in which the court "was of opinion that it [this provision] was a recognition of a new right of action not necessarily known to the common law; and this principle has been recognized since in several of the cases *supra*."

In *Omaha* v. *Kramer*, 25 Neb. 489, 492 (1889), the court (MAXWELL, J.), after criticising the decision in *Pa. R. R. Co.* v. *Marchant*, 119 Pa. 541, said: "Section 21, Article I. of the Constitution of this State provides that 'the property of no person

the proceeding, and which is said to be unconstitutional because it impairs the obligation of contracts; by violating the chartered rights of the districts of Spring Garden and the Northern Liberties; by violating the contract under which the right of passage is assured to the inhabitants of this particular street; by taking the property of the street without compensation to the districts or individual proprietors; and by monopolizing the street in derogation of the public and private uses to

shall be taken or damaged for public use without just compensation therefor.' The section above taken, except the words 'or damaged,' was in the Constitution of 1867. Under that Constitution, if any portion of a person's real estate was taken for public use, he could recover all the damages sustained by the taking; but if none of his real estate was taken for public use he could recover nothing, although his property had been greatly damaged by such use. The provision, therefore, is remedial in its nature, and the well-known rule that, in the construction of remedial statutes, three points are to be considered, *viz.*, the old law, the mischief, and the remedy, and so to construe the Act as to suppress the mischief and advance the remedy, is to be applied. 1 Blackstone Com. 87. Applying this rule to the provision in question, and it embraces all damages which affect the value of a person's property, and includes cases like that under consideration. In other words, the words 'or damaged,' in Sec. 21, Art. I. of the Constitution, include all actual damages resulting from the exercise of the right of eminent domain which diminish the market value of private property. *Reardon* v. *San Francisco*, 66 Cal. 492; *Atlanta* v. *Green*, 67 Ga. 386; *C. & W. I. R. Co.* v. *Ayres*, 106 Ill. 511; *Rigney* v. *Chicago*, 102 Id. 64; *St. L., V., & T. H. R. R. Co.* v. *Haller*, 82 Id. 208; *Hot Springs R. R. Co.* v. *Williamson*, 45 Ark. 429; *Gottschalk* v. *C. B. & Q. R. Co.*, 14 Neb. 550; *Schaller* v. *Omaha*, 23 Id. 325.

"The fact that damages are consequential will not preclude a recovery, if the construction and operation of the public improvement is the cause of the injury; and it is not necessary that the damages be caused by trespass or an actual physical invasion of the owner's real estate. The test is: Excluding general benefits, is the property in fact damaged? If so, the owner is entitled to compensation.

"It is not within the scope of the authority of the law-making department of the government to take the property of A and give it to B, even if B has the right to condemn property for public use. This being so, it is equally beyond the power of such department to confer the right on B to damage or destroy the property of A without making compensation therefor. The right of the legislature to authorize the taking of private property for public use is based on the condition that an equivalent in value be paid to the owner. If property is diminished in actual value by reason of a public improvement, it is to the extent of the diminution taken for public use, as much so as if it was directly appropriated. The cases differ in regard to the mode of appropriation only. In the one case all the property is taken, while in the other it is taken only to the extent that it is diminished in value, and in either case the owner is entitled to be compensated for his loss. Laws are made to protect private rights, and not to destroy them, the only exception being where a party by his own fault has forfeited the same. By protecting and enforcing the rights of each individual, the rights of all are respected and secured, and the humblest person made to feel that he can suffer no wrong to his estate without receiving adequate redress. Constitutional guarantees are of little avail unless carried out in the spirit in which they were framed, and no plea of public benefits should be permitted to impoverish the owner of private property, or override a plain constitutional inhibition. If the public desire to erect works for public use, then the public — the party benefited — must bear the burden, while each owner of private property, as one of the public, in some of the modes provided by law, must pay his share of the indebtedness or expense, and thus the burdens are equalized. The judgment of the District Court is reversed, and the cause remanded for further proceedings. *Reversed and remanded.*"

But see Randolph, Eminent Domain, s. 154. — Ed.

which it had been applied. This, perhaps, is the substance of all these multifarious specifications.

"What is the dominion of the public over such a street? In England, a highway is the property of the king as *parens patriæ*, or universal trustee; in Pennsylvania, it is the property of the people, not of a particular district, but of the whole State; who, constituting as they do the legitimate sovereign, may dispose of it by their representatives, and at their pleasure. Highways, therefore, being universally the property of the State, are subject to its absolute direction and control. An exclusive right of ferriage across a navigable stream, which is a public highway, is grantable only by it; and the navigation of the stream may be impeded or broken up by it at its pleasure. In the construction of her system of improvements, Pennsylvania has acted on this principle. Her dams across her principal rivers to feed her canals, have injured if they have not destroyed the descending navigation by the natural channels; and this without a suspicion of want of constitutional power. The right of passage by land or by water, is a franchise which she holds in trust for all her citizens, but over which she holds despotic sway, the remedy for an abuse of it being a change of rulers, and a consequent change of the law. No person, natural or corporate, has an exclusive interest in the trust, unless she has granted it to him. Her right extends even to the soil, being an equivalent for the six per cent. thrown into every public grant as compensation for what may be reclaimed for roads; and she has acted on the basis of it; for though damages for special injuries to improvements have been allowed by the general road laws, nothing has been given for the use of the ground. This principle was broadly asserted in *The Commonwealth* v. *Fisher*, 1 Penns. Rep. 466.

"Such being a highway as a subject of legislative authority, in what respect is a street in an incorporated town to be distinguished from it? A municipal corporation is a separate community; and hence a notion that it stands in relation to its streets as the State stands in relation to the highways of its territory. That would make it sovereign within its precincts — a consequence not to be pretended. The owner of a town plot lays out his streets as he sees fit, or the owner of ground in an incorporated town dedicates it to public use as a street; but it follows not that the dominion of the State is not instantly attached to it. The general road law extends to every incorporated town from which it is not excluded by provision of the charter; and the statute book is full of special Acts for opening, widening, altering, or vacating streets and alleys in Philadelphia and our other cities. Were it not for the universality of the public sovereignty, the public lines of communication, by railroads and canals, might be cut by the authority of every petty borough through which they pass; a doctrine to which Pennsylvania cannot submit, and which it would be dangerous to urge. It would be strange, therefore, were the streets of an incorporated town, not public highways, subject perhaps to corporate regulation for pur-

poses of grading, curbing, and paving; but subject also to the paramount authority of the legislature in the regulation of their use by carriages, rail-cars, or means of locomotion yet to be invented, and this without distinction between the inhabitants and their fellow-citizens elsewhere. The doctrine was carried to its extent in *Rung* v. *Shoenberger*, 2 Watts, 23, in which it was affirmed that, though a city has a qualified property in its public squares, it holds them as a trustee for the public for whose use the ground was originally left open; and that the enjoyment of them is equally free to all the inhabitants of the Commonwealth, subject to regulations not inconsistent with the grant. In *Barter* v. *The Commonwealth*, 3 Penns. Rep. 259, it was inadvertently said that the title to the soil of a street is in the corporation, whose right to improve it for purposes which conduce to the public enjoyment of it, is exclusive and paramount to the right of an inhabitant. The point was only incidentally involved, and consequently not very particularly considered; but the question of title, involving, as it has done, no more than the bounds of the grant, has lain between the grantor and the grantee, or those deriving title from them. In no case has title been claimed by the corporation. In the *Union Burial Ground Company* v. *Robinson*, 5 Whart. 18, in which the point was elaborately argued, the contest was betwixt the grantor and a purchaser from the grantee; and though the cause was eventually decided on another ground, the court inclined to think, on the authority of many decisions, that the title to the street, even had it been opened, would have remained in the grantor; and such appears to be the principle of *Kirkham* v. *Sharp*, 1 Whart. Rep. 323. The legal title to the ground, therefore, remains in him who owned it before the street was laid out; but even that is an immaterial consideration; for an adverse right of soil could not impair the public right of way over it, or prevent the legislature from modifying, abridging, or enlarging its use, whether the title were in the corporation or a stranger. I take it then that the regulation of a street is given to a corporation only for corporate purposes, and subject to the paramount authority of the State in respect to its general and more extended uses; and that there would have been no invasion of chartered rights in this instance, even did either of these districts stand in a relation to the public which would impart to its charter the qualities of a compact.

"What then is the interest of an individual inhabitant as a subject of compensation under the constitutional injunction that private property be not taken by a corporation for public use without it? Even agreeing that his ground extends to the middle of the street, the public have a right of way over it. Neither the part used for the street, nor the part occupied by himself, is taken away from him; and as it was dedicated to public use without restriction, he is not within the benefit of the constitutional prohibition, which extends not to matters of mere annoyance. The injury of which he can complain, is not direct but consequential. It consists either in an obstruction of his right of passage,

which is personal; or in a depreciation of his property by decreasing the enjoyment of it; but no part of it is taken from him and acquired by the company. The prohibition, even when it precluded a seizure of private property immediately by the State, was not largely interpreted, nor was there reason that it should be, as ample compensation was obtained from her sense of justice without it. The sufferers were overpaid, and this sort of aggression was always courted as a favor. But though she usually compensated consequential damage, it was of favor, not of right. Nor did she always make such compensation. In one well-known instance she destroyed a ferry by cutting off access to the shore, without provision for the sufferer; and in *The Commonwealth* v. *Richter*, 1 Penns. Rep. 467, damages were unavailingly claimed from her for flooding a spring by a dam. The clause in the amended Constitution which narrows the former prohibition to a taking of private property for a public use by a corporation, is to receive the same construction; the word 'taking' being interpreted to mean, taking the property altogether; not a consequential injury to it which is no taking at all. For compensation of the latter, the citizen must depend on the forecast and justice of the legislature.

"On the subject of the next specification, it seems scarcely necessary to say that monopolies are not prohibited by the Constitution; and that to abolish them would destroy many of our most useful institutions. Every grant of privileges, so far as it goes, is exclusive; and every exclusive privilege is a monopoly. Not only is every railroad, turnpike, or canal such, but every bank, college, hospital, asylum, or church, is a monopoly; and the ten thousand beneficial societies incorporated by the executive on the certificates of their legality, by the attorney-general and judges of the Supreme Court, are all monopolies. Nor does it seem more necessary to remark, on the subject of the concluding specifications of exception to the confirmation of the report by the associate judges of the sessions alone, that the approval was an act of the court; and that they were competent to hold it.

"*Proceedings affirmed.*"[1]

[1] Compare 1 Hare, Am. Const. Law, 371, 378–380, *Struthers* v. *Dunkirk, &c. Ry. Co*, 87 Pa. 282 (1878). In *Borough of Millvale* v. *Evergreen Ry. Co.*, 131 Pa. 1, 22, 23 (1889), the court (GREEN, J.) cited the case of the *Phil. & Trenton Ry. Co.* as "the leading case upon this subject," and quoted with approval the following language of BLACK, C. J., in *Com.* v. *R. R. Co.*, 27 Pa. 354: "The right of the supreme legislative power to authorize the building of a railroad on a street or other public highway is not now to be doubted. . . . If such conversion of a public street to purposes for which it was not originally designed does operate severely upon a portion of the people, the injury must be borne for the sake of the far greater good which results to the public from the cheap, easy, and rapid conveyance of persons and property by railway. . . . The right of a company, therefore, to build a railroad on the streets of a city, depends, like the lawfulness of all its other acts, upon the terms of its charter. Of course, when the power is given in express words, there can be no dispute about it. It may also be given by implication." — ED.

STORY *v.* THE NEW YORK ELEVATED RAILROAD COMPANY.

NEW YORK COURT OF APPEALS. 1882.

[90 *N. Y.* 122.]

APPEAL from judgment of the General Term of the Court of Common Pleas in and for the city and county of New York, entered upon an order made November 10, 1879, which affirmed a judgment in favor of defendant, entered upon a decision of the court on trial at Special Term.

This action was brought to restrain defendant from constructing its road in that portion of Front Street, in the city of New York, opposite plaintiff's premises. . . . [Here follows a statement of the plaintiff's title to his lots, consisting mainly of extracts from certain deeds.]

The trial court found the following facts among others:

"*Sixth.* That the railway of the defendants, as proposed to be constructed on Front Street, will cause no substantial or material impediment to the passage of persons, animals, and vehicles in and along the street, and but slight obstruction to the light or air from the street.

"*Thirteenth.* That the title of the plaintiff and of his grantors of his said premises was derived from the grantees under the said grants from the city in some cases by devise, in some by inheritance, and in some by conveyance; and that in all the descriptions the premises are described as bounded in front on Front Street.

"*Fourteenth.* That Front Street occupies the strip of land which in the said grants is mentioned as Water Street, and that prior to the execution of the grants, that street was projected across the lots thereby granted and conveyed.

"*Fifteenth.* That shortly after the execution of the said grants, the water lots therein described were filled in by the grantees or those claiming under or through them; that by them Front Street was erected and made, and that presumably, it was erected and made as directed by one of the surveyors of the city.

"*Sixteenth.* That upon plaintiff's said premises is erected a warehouse, occupying the entire front and four stories high; and that since his occupation he has used the same for his office, and for the sale of the merchandise in which he deals.

"*Seventeenth.* That Front Street, for the length of the block in front of the plaintiff's said premises, is a street, of the width about forty-five feet; that the street-way between the curbstones is about twenty-four feet wide; that on the southerly side from the curbstone to the building is about eleven feet; that on the northerly side from the

curbstone to the buildings is about ten feet; and that of the space between the curbstone and the buildings about four and one-half feet is used for the stoops and entrances to areas, and the residue for sidewalk.

"*Eighteenth.* That the defendants propose to construct an elevated railroad through Front Street, in front of the plaintiff's premises, to extend from the Battery to the Harlem River; that the general mode of construction in Front Street, consists of a series of columns about fifteen inches square, fourteen and one-half feet high, placed about five inches inside the edge of the sidewalk, and carrying cross-girders, which support four sets of longitudinal girders, upon which are placed cross-ties for three sets of rails for a steam railroad; that the transverse girders are thirty-nine inches deep, the longitudinal girders thirty-three inches deep; that the cars which the defendants propose to run over such railroad will have bodies eleven feet high above the tracks; that the cars in running will project about two feet over the sidewalk on either side of the street; that they will reach to within about nine feet of the plaintiff's premises; and that the defendants propose to run trains as often as once in every three minutes and at rates of speed as high as eighteen or twenty miles an hour.

"*Nineteenth.* That the plaintiff's premises occupy the southeasterly corner of Front and Moore streets, and that the defendants propose to put one of their columns at that corner on the line of Moore Street, and inside the curb line.

"*Twentieth.* That the said elevated railroad structure will to some extent obscure the light of the abutting premises opposite to it; that the passing trains will also to some extent obstruct such light, and give to the light a flickering character, which would be to some extent objectionable for business purposes, when an uninterrupted light was necessary, and to some extent impair the general usefulness of plaintiff's premises.

"*Twenty-first.* That the line of columns abridges the sidewalk, and correspondingly interferes with the street, as a thoroughfare, where such columns are located thereon.

"*Twenty-second.* That the fronts of the abutting buildings would be exposed to observation from passengers in the passing trains, and the privacy of those in the second or upper stories of the premises invaded.

"*Twenty-third.* That the structure as proposed in Front Street also will fill so much of the carriage-way of the street as is about fifteen feet above the road-way."

Also, that the board of aldermen of the city had, by resolution duly adopted, given its consent for the construction and operation of its road through Front Street.

John E. Parsons and *Wm. M. Evarts*, for appellant. *Joseph H. Choate*, for property owners. *Julian T. Davies* and *Roger Foster*, for Caso and others. *David Dudley Field*, for respondent. . . .

TRACY, J. The principal question to be determined in this case is, has the plaintiff's property been taken for public use within the meaning of the Constitution of this State?

The plaintiff claims that by the true construction of the deeds from the city to his original grantors, the bed of Front (then Water) Street was included in the grant, and that he is now the owner of the fee of one-half of the bed of Front Street in front of his lots. But if this claim be not sustained, then he insists that, in the original grants of the premises in question, the city of New York covenanted with his grantors that Front Street should be and remain an open street forever. That this covenant, being for the benefit of the abutting lands, is one running with the land, and the right or privilege secured thereby constitutes property within the meaning of article 1, section 6, of the Constitution, which provides that "private property shall not be taken for public use without just compensation." . . .

The trial court finds that the grantees made and constructed the several streets mentioned in the grant, and that the plaintiff is now the owner of said lots upon which "is erected a warehouse occupying the entire front, and four stories high." The defendant insists, and the trial court found, that, by the true construction of the deed, the bed of Front Street was excepted therefrom, and never passed to the plaintiff's original grantors. . . .

Assuming the construction placed upon the grant by the court below to be correct, we have to consider the effect of such a covenant in a grant of land made by a municipal corporation having authority to lay out and open streets, and to acquire lands for that purpose. . . .

These cases are directly in point, and it follows that, by the law of this State as interpreted and held by its highest courts for the last fifty years, without criticism or doubt, the grantees of the city, by force of their grant, acquired the right to have Front Street kept forever as a public street. The street thus became what is known to the common law as the servient tenement, and the lots abutting thereon the dominant tenement. Such servitude constitutes a private easement in the bed of the street attached to the lots abutting thereon, and passed to the plaintiff as the owner of such lots. That an easement is property, within the meaning of the Constitution, cannot be doubted. This was expressly adjudicated in this court in the case of *Arnold* v. *The Hudson River Railroad Company* (55 N. Y. 661). Arnold owned a nail factory, together with the right to take a certain quantity of water from a creek, and to convey it over or under the surface of intervening lands to such factory to propel machinery. For this purpose he built a trunk about six feet above the surface, through which the water was conveyed. In 1850, the defendant, having acquired title to a portion of the intervening lands, constructed tracks thereon, removed the portion of the trunk over said surface without Arnold's knowledge, and constructed another trunk under the lands, through which the water was conveyed and then raised by a pen-stock into the old trunk near

the factory. *Held*, by the concurrence of all the judges voting, that Arnold's easement was property within the meaning of Article 1, section 6, of the Constitution, and therefore could not — nor could any portion of it — be taken for public use without compensation.

In *Doyle* v. *Lord* (64 N. Y. 432; 21 Am. Rep. 629), this court held that a lessee of a store had an easement for the purpose of light and air, in a yard attached to the building. In *Sixth Ave. R. R. Co.* v. *Kerr et al.* (72 N. Y. 330), this court also held that an easement in a public street may be condemned and taken for public use.

The next question to be considered is, has the plaintiff's property been taken by the defendant, within the meaning of the Constitution of this State? To constitute such a taking it is sufficient that the person claiming compensation has some right or privilege, secured by grant, in the property appropriated to the public use, which right or privilege is destroyed, injured, or abridged by such appropriation. Has the plaintiff's easement in Front Street been destroyed, or injured, by the appropriation of the street to the uses of the defendant's road? As we have seen, the plaintiff acquired nothing more than a right to have the street kept as a public street, and this must be deemed to be held subject to the power of the legislature to regulate and control the public uses of the street.

This brings us to the question whether the occupation of the street by the defendant's road is compatible with, or destructive of its use as a public street.

Front Street is about forty-five feet in width, the road-way between the curbstones being about twenty-four feet wide.

The trial court has found as a fact that the defendant's road is to be constructed upon a series of columns about fifteen inches square, fourteen and a half feet high, placed about five inches inside the edge of the sidewalk and carrying cross girders, which support four sets of longitudinal girders, upon which are placed cross ties for three sets of rails for a steam railroad; that the girders are thirty-nine inches deep; the longitudinal girders thirty-three inches deep; that the line of columns abridges the sidewalk and correspondingly interferes with the street and thoroughfare where such columns are located thereon.

That the structure as proposed on Front Street will fill so much of the carriage-way of the street as is about fifteen feet above the road-way. The effect of such structure the court finds will be to some extent to obscure the light of the abutting premises opposite to it, and will to some extent impair the general usefulness of the plaintiff's premises and depreciate their value.

Can the street be lawfully appropriated to such a structure without making compensation to the plaintiff for his easement therein? This is a question of power. If the legislature has power to authorize such a structure, without compensation, its exercise cannot be regulated by the courts. If one road may be authorized to be constructed upon two series of iron columns placed in the street, another may be authorized

to be supported upon brick columns, or upon brick arches spanning the street. If a superstructure may be authorized which spans the entire carriage-way at fifteen feet above the bed of the street, one may be authorized which spans the entire street, from building to building, thus excluding light and air from the street and from the property abutting thereon. Thus an open street would be converted into a covered way, and so filled with columns or other permanent structures as to be practically impassable for vehicles. The city undertook and agreed with the plaintiff's grantors that Front Street, when constructed by them, should forever thereafter continue and be kept as a public street in like manner as other streets of the same city now are or lawfully ought to be. This fixes with definiteness and precision the character of the street which the parties to the contract intended to secure. As the other streets of the city were, or lawfully ought to be, so this street was to be; it was to be an open street; one which would furnish light and air to the abutting property, and a free and unobstructed passage to the inhabitants of the city. A covenant to keep a strip of land open as a public street forever is a covenant not to build thereon, and brings this case directly within the principle of the cases of *Hills* v. *Miller*, *The Trustees of Watertown, and White* v. *Cowen and Bagg*, and the *Phœnix Ins. Co.* v. *The Continental Ins. Co.* While the legislature may regulate the uses of the street as a street, it has, we think, no power to authorize a structure thereon which is subversive of, and repugnant to the uses of the street as an open public street. Whether a particular structure authorized by the legislature is consistent or inconsistent with the uses of the street as a street must be largely a question of fact depending upon the nature and character of the structure authorized.

The court below found that the series of iron columns abridges the street, and the superstructure erected thereon obscures the light to the adjoining premises, and depreciates the value of the plaintiff's property.

The extent to which plaintiff's property is appropriated is not material; it cannot, nor can any part of it, be appropriated to the public use without compensation.

We think such a structure closes the street *pro tanto* and thus directly invades the plaintiff's easement in the street as secured by the grant of the city.

Whatever view be taken of the facts of this branch of the case, the same result must be reached. If the title to the bed of the street passed to the grantees of the city, then the public acquired a mere easement in the street, resulting from its dedication to public use, the easement resting upon the express covenant of the owner of the fee that the street shall be kept as a public street forever. The fee remained in the owner making the dedication, and he having sold lots abutting upon the street, the purchaser, as we have already seen, obtained a perpetual right of way over the space called a street to the

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full extent of its dimensions. Whether the bed of the street was excepted from the grant of the city, and the title thereof never vested in the grantees, or whether the bed of the street was included in the grant and passed to such grantees, is of little importance, as in either event the plaintiff has a private easement of a right of way in the street, coupled with an express covenant that the entire space, marked on the map as Front Street, shall forever be kept as a public street.

The defendant's railroad, as authorized by the legislature, directly encroaches upon the plaintiff's easement and appropriates his property to the uses and purposes of the corporation. This constitutes a taking of property for public use. It follows that such a taking cannot be authorized except upon condition that the defendant makes compensation to the plaintiff for the property thus taken.

The conclusion here reached is not in conflict with the determination of this court in the cases of *The People* v. *Kerr* (27 N. Y. 188), *Kellinger* v. *Forty-Second St., etc., R. R. Co.* (50 Id. 206), and other similar cases.

We agree with Church, Ch. J., in the case last cited, that "it is not quite clear as to what was intended to be decided by the court in *The People* v. *Kerr*, relative to the rights of abutting owners." . . .

By the Act of 1813 the city acquired the fee in the street, in trust, however, for a particular public use. Conceding that this trust is for the benefit of the abutting owner, as well as for the public, the only right which he has in the street is the right to insist that the trust be faithfully executed. So long as the street is kept open as a public street, the abutting owner cannot complain. The question presented in the case of *People* v. *Kerr*, was whether the particular structure there authorized was inconsistent with the continued use of the streets as open public streets of the city. Whether it was or not was a question of fact dependent upon the nature and character of the structure there involved. The court found and determined that it was not inconsistent with the public use of a public street, but was in aid of such uses.

And in *Kellinger* v. *The Forty-second Street, etc., R. R. Co.* (50 N. Y. 206), this court limits the decision in the case of *The People* v. *Kerr*, to a "simple declaration that the legislative authority to construct a railroad on the surface of the street without a change of grade was a legitimate exercise of the power of regulating the use of public streets for public uses."

The question whether the abutting owners upon streets opened under the Act of 1813 had the right to prevent their being converted to a use destructive of their existence as public streets was not deemed by the court to be involved in that case. . . .

Had the Act in that case authorized the corporations to take permanent and exclusive possession of portions of the street, to build sidings, and to permanently occupy them with rows of cars standing in front of the stores and residences of abutting owners, and to erect permanent

depot buildings within the limits of the streets for the accommodation of their passengers, we cannot doubt that a different result would have been reached in that case. The fact that a particular structure is found to be consistent with the uses of a street is no evidence that a different structure is not inconsistent with such uses. The conclusion reached in the present case is based upon the character of the structure here involved. The language of Wright, J., in *The People* v. *Kerr*, that the abutting owners have no property, estate, or interest in land forming the bed of the street in front of their respective premises to be protected by the right of eminent domain, must be construed with reference to the point thus being considered. This court had held in the case of *Williams* v. *The New York Central R. R. Co.* (16 N. Y. 107), that where the public had acquired a mere right of way over the land of another, the laying down of railroad tracks and constructing a steam railroad in the street of a city was an enlargement of the use as understood and contemplated by the parties at the time the land was acquired, and imposed an additional burden upon the fee, and that such Act could not be authorized without compensation to the owner.

This case was cited and relied upon in support of the claim of the abutting owners; but the answer was that the abutting owners did not own the fee of the street; that such fee being in the public, the legislature might lawfully appropriate it to any public use consistent with the trust for which it was held, notwithstanding such use of a street may not have been known or contemplated at the time the land was acquired. Having parted with the fee, the abutting owner could not maintain trespass or waste, and against an Act which did nothing more than to impose an additional burden upon the fee, he could not invoke the inhibition of the Constitution that private property shall not be taken for public use without compensation. Thus understood, we think the language of Wright, J., not subject to criticism, and furnishes no support to the claim now made that the owner, whose lands were taken and are now held in trust, to be appropriated and used as open public streets forever, has no standing in court to insist that the trust shall be kept and that the streets shall not be destroyed. . . .

That this trust created by the Act of 1813 was intended to be for the benefit of the abutting owner, as well as for the public, we cannot doubt. City property has little or no value disconnected from the streets upon which it abuts. The opening of a city street makes the property abutting thereon available for the purposes of trade and commerce, and greatly enhances its value. The Act of 1813 proceeds upon the assumption of this well-known fact, and the damages sustained by reason of the taking were assessed in view of the trust assumed by the public, that such lands were to be kept as open public streets forever. The public did not assume to take the lands in fee-simple absolute, but took and paid for a lesser estate; and, in pursuance of the theory of the statute that the abutting owner has a special interest in the street, the cost of the lands was immediately assessed

back upon the abutting property. All the owner has ever received for the lands taken under this Act is the benefit accruing to his abutting property by reason of the trust for which the lands are held. Having surrendered his land in consideration of the trust assumed by the public, if the trust can now be abrogated and the streets surrendered to the uses and purposes of a railroad corporation, it follows that, by indirection, private property may be taken for public use against the consent of the owner, and without compensation.

We have examined the other cases cited by the learned counsel for the respondent, and in none of them do we find authority for the claim here made. The case of *The Transportation Company* v. *Chicago* (99 U. S. 635), is not in point. The injury there complained of was necessarily done in the extension of a city street. The interruption was temporary, ceasing with the completion of the work. This case is decided upon the elementary principle that the public have a right to make such use of the land taken for a street as may be deemed necessary for its proper construction, repair, or maintenance. Within this power is included the right to fix the grade of the street, and to change such grade from time to time as the necessities of the public may require; but, whether the grade be elevated or depressed, it is still a public street, to which the public have the right of free access, subject to such police regulations as may be adopted by the public authority having charge and control of the same.

The argument has been pressed upon our attention with great ability that as railroads, like streets, are intended to facilitate trade and commerce, and lands taken for either are taken for public use, the legislature may, in its discretion, appropriate the public streets of our cities to the use of railroad corporations, and this without reference to the form of their structure or the extent of the injury wrought upon property abutting thereon. This is a startling proposition, and one well calculated to fill the owners of such property with alarm. It cannot be that the vast property abutting on the streets of our great cities is held by so feeble a tenure. This court has repeatedly held that such a rule has no application where the abutting owner owns the fee of the bed of the street; and we are of opinion that in cases where the public has taken the fee, but in trust to be used as a public street, no structure upon the street can be authorized that is inconsistent with the continued use of the same as an open public street. The obligation to preserve it as an open street rests in contract written in the statute under which the lands were taken and which may not be violated by the exercise of any legislative discretion. Whatever force the argument may have as applied to railroads built upon the surface of the street, without change of grade, and where the road is so constructed that the public is not excluded from any part of the street, it has no force when applied to a structure like that authorized in the present case. The answer to the argument is that lands taken for a particular public use cannot be appropriated to a different use without further compensation; that the

authority attempted to be conferred by the legislature upon the defendant to take exclusive possession of portions of the public street, and to erect a series of iron columns on either side thereof, upon which a superstructure is to be erected spanning the street and filling the roadway at fifteen feet above the surface, thus excluding light and air from the adjoining premises, is an attempt to appropriate the street to a use essentially inconsistent with that of a public street, and in respect to the land in question violates the covenant of the city made with the plaintiff's grantors, and in respect to lands acquired under the Act of 1813 violates the trust for which such lands are held for public use.

The argument drawn from the great benefit which these roads have conferred upon the city of New York can have but little weight in determining the legal question presented in this case. No doubt these roads have added much to the aggregate wealth of the city of New York, and have greatly promoted the convenience of its citizens; but the burden of so great a public improvement cannot rightfully be cast upon a few of its citizens, by appropriating their property to the public use, without compensation. The inhibition found in the Constitution against the right of the sovereign to appropriate private property to public use without making compensation therefor was intended to secure all citizens alike against being compelled to contribute unequally to the public burdens.

We are of opinion that the law under which the defendant is incorporated authorizes it to acquire such property as may be necessary for its uses and purposes, upon making compensation therefor. This was substantially determined in the *Matter of New York Elevated Railroad* (70 N. Y. 327); *Gilbert Elevated Railway Co.* (Id. 361).

We have reached in this case the following conclusions:

First. That the plaintiff, by force of the grant of the city, made to his grantors, has a right or privilege in Front Street, which entitles him to have the same kept open and continued as a public street for the benefit of his abutting property.

Second. That this right or privilege constitutes an easement, in the bed of the street, which attaches to the abutting property of the plaintiff, and constitutes private property, within the meaning of the Constitution, of which he cannot be deprived without compensation.

Third. That such a structure as the court found the defendant was about to erect in Front Street, and which it has since erected, is inconsistent with the use of Front Street as a public street.

Fourth. That the plaintiff's property has been taken and appropriated by the defendant for public use without compensation being made therefor.

Fifth. That the defendant's acts are unlawful, and as the structure is permanent in its character — and, if suffered to continue, will inflict a permanent and continuing injury upon the plaintiff — he has the right to restrain the erection and continuance of the road by injunction.

Sixth. That the statutes under which the defendant is organized authorize it to acquire such property as may be necessary for its construction and operation by the exercise of the right of eminent domain.

Seventh. The injunction prohibiting the continuance of the road in Front Street should not be issued until the defendant has had a reasonable time after this decision to acquire the plaintiff's property by agreement, or by proceedings to condemn the same.

EARL, J. (dissenting). At the threshold of this case is presented the inquiry whether the plaintiff's lot extends to the centre of Front Street. I think it does not. . . .

For a long time anterior to the date of the deed Front Street had become like the other streets of the city, and had been maintained and kept in repair by the city. It owned the fee of nearly all the streets within its limits, and it must have been the common practice of conveyancers to exclude the streets from the grants of adjoining lots by confining measurements to the margin of the streets. Reading the precise measurements in plaintiff's deed, in the light of these circumstances I think there is little ground for dispute that his grantors intended to limit their grant to the margin of the street, and that such intent should have effect is shown by the authorities above cited.

Therefore as the plaintiff did not own any of the soil in Front Street, it matters not where the title to it rested. As to him, it may be treated as if it were in the city, and I shall so treat it in the further discussion of this case.

Whatever private rights then the plaintiff has in this street are such and such only as belong to him as an abutter upon the street. Such rights as he has in common with the public generally cannot be enforced in this action or in any other action in his name. It is not disputed that to maintain this action the plaintiff must show that in violation of the Acts under which the defendant was organized, and of the Constitution, "private property" of the plaintiff has been taken without compensation. It is not sufficient for him to show that he is injured or suffers damage from the construction or operation of defendant's railway, or that his adjoining property is deteriorated in value. He must show that his private property is in some proper sense taken, and to this effect are nearly all the authorities in this country, except in States where provision is made in the Constitution or laws that compensation shall be made for property damaged or injuriously affected, as well as for property taken. In Sedgwick on Statutory and Constitutional Law, 519, the learned author, speaking of the constitutional provision which prohibits the taking of private property for public use without compensation, says: "It seems to be settled to entitle the owner to protection under this clause the property must be actually taken in the physical sense of the word, and that the proprietor is not entitled to claim remuneration for indirect or consequential damages, no matter how serious or how clearly and unquestionably resulting from the exercise of the power of eminent domain." In Dillon on Mu-

nicipal Corporation, § 784, it is said that "although the adjoining property may be injured, still it is not, in a constitutional sense, taken for public use." In *Transportation Co.* v. *Chicago* (99 U. S. 635), Judge Strong said that "acts done in the proper exercise of governmental powers and not directly encroaching upon private property, though their consequences may impair its use, are universally held not to be a taking within the meaning of the constitutional provision. They do not entitle the owner of such property to compensation from the State or its agents, or give him any right of action. This is supported by an immense weight of authority." In *O'Connor* v. *Pittsburgh* (18 Penn. St. 187), it was held, after two arguments of the case and much consideration, that the constitutional provision for the case of private property taken for public use extends not to the case of property injured or destroyed. See, also, the cases of *Hatch* v. *The Vermont Central R. R. Co.* (25 Vt. 49), and *Richardson* v. *The Vermont Central R. R. Co.* (Id. 473), where will be found a very learned discussion of the subject and many observations quite applicable to this case. The same rule is laid down in *Radcliff's Executors* v. *The Mayor, etc., of Brooklyn* (4 N. Y. 195). It was there supported by such cogent reasons and full citation of authorities as to place it beyond question in this State, and it has received the uniform sanction of our courts.

Our attention is called to two cases (*Pumpelly* v. *Green Bay Co.*, 13 Wall. 166; and *Eaton* v. *The B. C. & M. R. R.* 51 N. H. 504; 12 Am. Rep. 147), which are supposed to take a new departure in the construction of the constitutional provision we are now considering. They are spoken of in the subsequent case of *Transportation Co.* v. *Chicago* as "the extremest qualification of the doctrine" to be found; they hold that permanent flooding of private property may be regarded as a "taking," and thus they may be justified on the ground that there was a physical invasion of the real estate of the private owner and a practical ouster of his possession.

We should not be embarrassed by any subtle meaning to be given to the word "property" in the constitutional provision. The broad meaning sometimes given to it by law writers whose definitions are more apt to confuse than enlighten, or a meaning which can be evolved only by philologists and etymologists, was probably not in the minds of the framers of our Constitution; they must be supposed to have used the word in its ordinary and popular signification, as representing something that can be owned and possessed and taken from one and transferred to another. In popular parlance there is a distinction between taking property and injuring property. If the word is to have the broad meaning given to it by Austin and certain German and French Civilians, to whose definitions our attention has been called, then it would include every interference with and injury or damage to land by which its use and enjoyment become less convenient or valuable. Such a sense has never been given to it or countenanced in any decision involving the constitutional provision as to taking private property. If

the word is to have such a broad signification, then it was useless to provide in the English Land Clauses Act of 1845, that compensation should be made for land taken not only, but also for land "injuriously affected," and in the Constitution and laws of some of the States that compensation shall be made for both land taken and land damaged.

I do not deem it necessary to define precisely what property rights abutting owners have in the streets of the city of New York adjoining their lots. I will assume, without deciding it, that the streets cannot be absolutely closed against their consent without some compensation to them; for the limitations upon the power of the legislature in reference to closing streets have not been precisely determined in this State. (*Brooklyn Park Comm'rs* v. *Armstrong*, 45 N. Y. 234; 6 Am. Rep. 70; *Coster* v. *Mayor, etc.*, 43 N. Y. 399; *Fearing* v. *Irwin*, 55 Id. 486.) If the plaintiff has an unqualified private easement in Front Street for light and air and for access to his lot, then such easement cannot be taken or destroyed without compensation to him. (*Arnold* v. *The Hudson R. R. R. Co.*, 55 N. Y. 661.) But whatever right an abutter, as such, has in the street is subject to the paramount authority of the State to regulate and control the street for all the purposes of a street, and to make it more suitable for the wants and convenience of the public. The grade of a street may, under authority of law, be changed, and thus great damage may be done to an abutter. The street may be cut down in front of his lot so that he is deprived of all feasible access to it, and so that the walls of his house may fall into the street, and yet he will be entitled to no compensation (*Radcliff's Executors* v. *The Mayor, etc., supra; O'Connor* v. *Pittsburgh, supra; Callender* v. *Marsh*, 1 Pick. 418); and so the street may be raised in front of his house so that travellers can look into his windows and he can have access to his house only through the roof or upper stories, and all light and air will be shut away, and yet he would be without any remedy. The legislature may prescribe how streets shall be used, as such, by limiting the use of some streets, or the parts of streets, to pedestrians or omnibuses, or carriages, or drays, or by allowing them to be occupied under proper regulations for the sale of hay, wood, or other produce. It may authorize shade trees to be planted in them, which will to some extent shut out the light and air from the adjoining houses. Streets cannot be confined to the same use to which they were devoted when first opened. They were opened for streets in a city and may be used in any way the increasing needs of a growing city may require. They may be paved; sidewalks may be built; sewer, water, and gas pipes may be laid; lamp-posts may be erected, and omnibuses with their noisy rattle over stone pavements, and other new and strange vehicles may be authorized to use them. All these things may be done and they are still streets, and used as such. Streets are for the passage and transportation of passengers and property. Suppose the legislature should conclude that to relieve Broadway in the city

of New York from its burden of travel and traffic it was necessary to have an underground street below the same; can its authority to authorize its construction be doubted? And for the same purpose could it not authorize a way to be made fifteen feet above Broadway for the use of pedestrians? When the streets become so crowded with vehicles that it is inconvenient and dangerous for pedestrians to cross from one side to another, can it be doubted that the legislature could authorize them to be bridged, so that pedestrians could pass over them, and that it could do this without compensation to the abutting owners, whose light and air and access might to some extent be interfered with? These improvements would not be a destruction of or a departure from the use to which the land was dedicated when the street was opened; but they would render the street more useful for the very purpose for which it was made, to wit: travel and transportation. If by these improvements the abutting owners were injured, they would have no constitutional right to compensation, for the reason that no property would be taken and the injury would be merely consequential. And if the public authorities could make these improvements, then the legislature could undoubtedly authorize them to be made by *quasi* public corporations, organized for the purpose, as it can authorize plank-road and turnpike companies to take possession of highways and take toll from those who use them.

So in process of time railways came to be used for transportation of persons and property; and a controversy soon arose whether they could be constructed in the streets of cities without compensation to the abutting owners. It was determined that they could not, when such owners owned the fee of the street. (*Wager* v. *The Troy Union R. R. Co.*, 25 N. Y. 526; *Craig* v. *The Rochester City & Brighton R. R. Co.*, 39 Id. 404.) But where they do not own the fee they are entitled to no compensation, as no private property is taken from them within the meaning of the Constitution. That this is the rule was distinctly recognized in the two cases last cited and was adjudicated in the cases of *The People* v. *Kerr* (27 N. Y. 188), and *Kellinger* v. *The Forty Second-Street, etc., R. R. Co.* (50 Id. 206). In the case of *The People* v. *Kerr*, there was uncontradicted proof that the construction and operation of the railway in the street would cause serious damage to the owners of adjoining property, and that such property would be depreciated in value from twenty to twenty-five per cent, and the court found that the construction and operation of the railway "would be a material interference with and injury to the use and enjoyment of the lots fronting on said street in such manner and to such extent that the same would constitute a continuous private nuisance to the plaintiffs" as owners of adjoining lots; and yet it held that the abutting owners were not entitled to compensation. It was adjudged that the construction of a city railroad upon the surface of the street was an appropriation to public use; that the street was under the unqualified control of the legislature, and that any appro-

priation of it to a public use by legislative authority was not a taking of private property so as to require compensation to the city or abutting owners. The decision seems to have been based upon the broad ground that the legislature could authorize the land in the street which had been taken for or dedicated to a public use to be devoted to any public use whatever. But even if it did not go so far as this, it cannot be disputed that it went so far as to hold that the legislature could authorize the streets to be devoted to any public use not inconsistent with their use as streets.

In *Kellinger* v. *The Street Railway Co.* the case of *The People* v. *Kerr* was approved, and it was held that the owners of property adjoining a street in the city of New York, laid out under the Act of 1813, have an easement in the street in common with the whole people to pass and repass and also to have free access to their premises, but that the mere inconvenience of such access occasioned by the lawful use of the street by a railroad is not the subject of an action; and that a complaint alleging that defendant laid its track so near the sidewalk in front of the plaintiff's premises as not to leave sufficient space for a vehicle to stand, and that he and his family were thereby incommoded in leaving and returning to their residence, and the rental value of his premises was greatly depreciated, did not contain a cause of action. Church, Ch. J., speaking of the case of *The People* v. *Kerr*, said: "It clearly holds that the abutting owners had no property in the street, which was taken for the railroad, for which they were entitled to compensation."

The decisions in these two cases were in no degree based upon the fact that the railways were constructed upon the surface of the streets. It can make no difference in principle whether the railway be on the surface or above or below the surface so long as it serves the same public purpose, to wit: the transportation of persons and property. The principle lying at the foundation of these cases, stated most favorably to the plaintiff, is that a railway was simply a new mode of using the streets for the purpose for which they were originally made, and that if the new use produced any greater inconvenience or injury to the abutting owners than the old use, it was *damnum absque injuria*. Nor did these cases proceed upon any distinction between horse railways and those upon which steam is the motive-power. If the legislature could authorize a railway to be operated in any street by horse power, it certainly must have the same right to allow it to be operated by steam, electricity, or any other motive-power. As stated by the learned author of Thompson on Highways, 400, "The distinction between horse railroads and those on which steam is the motive power is not made by any of the cases in the Court of Appeals, but is expressly denied by some of them, and is in conflict with the reasoning and principle of all of them." In *Wager* v. *Troy Union R. R. Co.*, Smith, J., writing the prevailing opinion, said: "It is true that the actual use of the street by the railroad may not be so absolute and constant as to

exclude the public from its use. With a single track, and particularly if the cars used upon it were propelled by horse-power, the interruption of the public easement in the street might be very trifling and of no practical consequence to the public at large. But this consideration cannot affect the question of right of property or of the increase of the burden upon the soil. It would present simply a question of degree in respect to the enlargement of the easement, and would not affect the principle." In the same case, Sutherland, J., in his dissenting opinion, said: "In this case the railroad, I assume, was intended to be and was operated by steam. I cannot see how that affects the question of power." In *Craig* v. *Rochester City, etc., R. R. Co.* (*supra*), Miller, J., writing the opinion, said: "I am at a loss to see any apparent distinction in the application of the rule between cases where steam-power is employed and those cases where the road is operated by horse-power." Judge Dillon, in his excellent work on Municipal Corporations, vol. 2, § 577, says: "Where the fee of the street is in the municipality in trust for the public, or in the public, the control of the legislature is supreme, and it may authorize or delegate to municipal bodies the power to authorize either class of railways to occupy streets without providing for compensation either to the municipality or to the adjoining lot-owners." In Cooley's Constitutional Limitations, 555, the learned author, speaking of the appropriation of the street to the use of all kinds of railroads, says: "A strong inclination is apparent to hold that, when the fee in the public way is taken from the former owner, it is taken for any public use whatever to which the public authorities, with the legislative assent, may see fit afterward to devote it in furtherance of the general purpose of the original appropriation, and if this is so, the owner must be held to be compensated at the time of the original taking for any such possible use; and he takes his chances of that use or any change in it proving beneficial or deleterious to any remaining property he may own or business he may be engaged in," and "when land is taken or dedicated for a town street it is unquestionably appropriated for all the ordinary purposes of a town street, not merely the purposes to which such streets were formerly applied, but those demanded by new improvements and new wants."

I think I have now sufficiently demonstrated that the legislature may authorize a surface railway operated by any motive-power to be constructed in public streets, and that when the abutting owners do not own the fee of the streets they cannot claim any compensation for any inconvenience or injury caused them in the construction and operation of the railway, provided the street still remains open and practicable for the ordinary use of the public; and I am entirely unable to see why the reasoning and authorities which lead to this conclusion do not lead to the further conclusion that railways operated above the surface of the street may be authorized upon the same terms. An elevated railway is only a new mode of using the streets for the transportation of persons and property. It is not a change or subversion of the use for

which the streets were originally opened and laid. The time came when the increasing business and population of the city of New York made the surface railroads a necessity. The time has now come when the convenience and the wants of a vast city make this new mode of travel and transportation, if not a necessity, at least a great convenience; and the devotion of the streets to the use of the elevated railways was only in furtherance of the trust and purpose for which the soil of the streets was originally dedicated or taken. If the surface railways were raised up fifteen feet in the streets and used for the same purpose for which they are now used, could not an Act of the Legislature make them lawful structures without compensation to the abutting owners? As relates to the question of legislative power, what difference could it make whether a railway remained upon the surface or was raised up? Are the elevated railways unlawful elevated fifteen feet above the surface of the streets, while they would be lawful lowered to the surface of the streets? The legislature in regulating any street could build an embankment fifteen feet high and then authorize a surface railroad to be built upon that, to be operated by any motive power, and the noise and dust and interruption of air and light, and disturbance of privacy might be much greater than is caused by an elevated railway. Instead of building an embankment and thus raising the street, the legislature could authorize the whole travel of the street to be carried above the surface upon an elevated road by all the vehicles used for the transportation of persons and property, and the abutting owners could have no legal or constitutional ground of complaint. This is so because the fee which the city owns in its streets extends indefinitely upward and downward, and the space above as well as the space below a street may be utilized for street purposes.

I have not claimed that the legislature could, without compensation to abutting owners, authorize a street in the city of New York to be absolutely closed or wholly and exclusively appropriated to the use of a railroad. There are authorities which would tend to uphold such a claim. I do not affirm or deny the validity of such a claim. I leave the question of the right to exercise that more extensive legislative authority under the Constitution to be determined in some future case wherein it shall be involved. It is sufficient to determine now that the legislature may constitutionally, without compensation to abutting owners, devote the streets of a great city to any use which is not inconsistent with the use for which they were opened or dedicated.

Front Street, adjoining the plaintiff's lot, is not closed by this elevated railway, but it remains an open public street. The finding of the court is that it "will cause no substantial or material impediment to the passage of persons, animals, or vehicles in and along the street, and but slight obstruction to the light or air from the street." We must take this case as the trial court has found it and not assume a case such as the imagination can paint. The stream of traffic and travel with no material diminution can flow through Front Street as freely as

before the construction of the railway. If it be a question of fact whether the street is in some sense closed by the defendant's structure, then the trial court must be deemed to have found the fact in favor of the defendant.

A steam railway operated upon the surface of one of the streets in the city of New York would probably be much more damaging than an elevated railway, and yet, as I have shown, it could undoubtedly be authorized without compensation to abutting owners; and it is impossible for me to perceive upon what reasoning or theory it can be claimed, that abutting owners who have no rights upon the surface of a street for which they can claim compensation, yet have such rights when the railway is elevated above the surface. They have no easement upon or over the surface which cannot be interfered with and greatly impaired under legislative authority without compensation, and yet it is claimed that they have an easement somewhere up in the air which is under the constitutional protection as private property. Where do these aerial rights come from? They do not rest upon any grant, and as the doctrine of ancient lights has no footing in this country, they cannot rest upon prescription. Buildings may be erected upon a street so high and in such a way as to shut out light and air from an adjoining building. They may be erected so as to cast their shadows across the street upon houses there standing and yet no right or easement is invaded. It cannot be doubted that the legislature could authorize surface railways to be operated with double-decked cars fifteen feet high and thus cause nearly all the inconvenience to the abutting owners of an elevated railway, and yet it must be conceded that under the authorities the abutting owners would have no legal cause of complaint.

Light and air are mere incidents and accidents of a street. Streets are not constructed and maintained to furnish them. They come from a street because the street exists, and when the street disappears it is difficult to perceive how any right to them in an abutting owner survives. But as I have before said, it is sufficient now to determine that if there can be any such thing in a street as an easement for light and air, it is subordinate to all the uses and burdens to which a street may be subjected by the paramount authority of the legislature.

I am led to this conclusion by principles fairly to be deduced from decided cases which are binding upon this court as authority. I cannot perceive how this case can be determined in favor of the plaintiff without substantially overruling the cases of *The People* v. *Kerr*, and *Kellinger* v. *The Street Railway Co.* In *The Matter of the Gilbert Elevated Railway Co.* (70 N. Y. 361), Church, Ch. J., said that "the principles adjudicated in these cases will be regarded as obligatory upon this court in deciding future cases." In the case of *Kellinger* v. *The Street Railway Co.*, the same learned judge, speaking of the case of *The People* v. *Kerr*, said: "We should feel bound to adhere to this decision and its necessary legal results, even if we doubted its soundness, because large sums of money have been expended upon the

faith of it, and in many obvious ways it has become a rule of property which should never be abrogated, except for the most cogent reasons." And more than four hundred years before these utterances a learned English judge said: "If we judge against former judgments it is a bad example to the barristers and students of law; they will not have any faith in or give any credit to their books." (Year Book, 33 Hen. VI. 41.)

It is sufficient to say of the Elevated Railway cases reported in 70 N. Y., that the questions we are to determine in this case were not there involved. It was there determined that provision was made in the Rapid Transit Acts for compensation for any rights of private property which the abutting owners had in the streets of the city. But whether they had such rights or not was intentionally and expressly left an open question.

The plaintiff and many other abutters upon the streets through which this elevated railway is constructed undoubtedly suffer great damage from its operation and have the right to complain of the injustice done them; but they must seek their remedy by appealing, not to the courts, but to the legislature, and if they fail there, by appealing to the people who make legislatures. That is the final appeal open to every citizen who suffers injustice under the forms of the Constitution and the laws. The legislature undoubtedly has ample power to compel the defendant yet to make compensation to abutting owners for all the damage done them, and arrest the exercise of its franchise, if it shall refuse to make such compensation. (*Monongahela Nav. Co.* v. *Coon*, 6 Penn. St. 379.) The power which it possesses under the Constitution and the laws to alter or repeal the charters of corporations includes the absolute right to regulate the exercise of corporate franchises, and to prescribe the terms and conditions upon which they may continue to be exercised. (*Albany Northern Railroad Co.* v. *Brownell*, 24 N. Y. 345.)

I will close this discussion by quoting the language of a very learned jurist in *Hatch* v. *The Vermont Central Railroad Co.*: "In the absence of all statutory provision to that effect, no case and certainly no principle seems to justify the subjecting a person, natural or artificial, in the prudent pursuit of his own lawful business, to the payment of consequential damage to others in their property or business. This always happens more or less in all rival pursuits, and often where there is nothing of that kind. One mill or one store or school often injures another. One's dwelling is undermined or its lights darkened or its prospect obscured and thus materially lessened in value by the erection of other buildings upon lands of other proprietors. One is beset with noise or dust or other inconvenience by the alteration of a street, or more especially by the introduction of a railway, but there is no redress in any of these cases. The thing is lawful in the railroad as much as in the other cases supposed. These public works come too near some and too remote from others. They benefit many and injure

some. It is not possible to equalize the advantages and disadvantages. It is so with everything and always will be. Those most skilled in these matters, even empirics of the most sanguine pretensions, soon find their philosophy at fault in all attempts at equalizing the ills of life. The advantages and disadvantages of a single railway could not be satisfactorily balanced by all the courts of the State in forty years; hence they must be left, as all other consequential damage and gain are left, to balance and counterbalance themselves as they best can."

The judgment should be affirmed.

For reversal, ANDREWS, Ch. J., RAPALLO, DANFORTH, and TRACY, JJ. For affirmance, MILLER, EARL, and FINCH, JJ.

Judgment reversed.

[The opinion of DANFORTH, J., concurring, and the dissenting opinions of MILLER, J., and FINCH, J., are omitted. The opinions of DANFORTH, J., and TRACY, J., are each entitled by the reporter "Opinion of the court." This title seems to belong, properly, only to the last. They take substantially the same ground, but the former also holds that the plaintiff had the fee of the street.[1]]

[1] See Randolph, Em. Dom. ss. 404, 416. Compare *Fulton* v. *Short Route Ry. Co.*, 85 Ky. 640 (1887). *Sperb* v. *Met. El. Ry. Co.*, 32 N. E. Rep. 1050 (N. Y. Jany. 1893).

In *Lahr* v. *Metrop. Elev. Ry. Co.* 104 N. Y. 268 (1887), the court (RUGER, C. J.) said: "This action is the sequel of the Story case (*Story* v. *N. Y. El. R. R. Co.*, 90 N. Y. 122), and its defence seems to have been conducted, upon the theory of securing a re-examination of the questions then decided, and in case that effort should prove fruitless, of limiting and restricting as much as possible, their logical effect.

"The endeavor to secure a re-examination of the doctrines of that case must fail, since the decision there made embodied the deliberate judgment of the court, pronounced after the most careful and thorough consideration, and after two arguments at the bar, made by most eminent counsel, had apparently exhausted the resources of learning and reason in the discussion of the questions presented.

"It would be the occasion of great public injury, if a determination thus made could be inconsiderately unsettled and suffered again to become the subject of doubt, and theme of renewed discussion.

"The reasons advanced by the able counsel for the appellant to induce us to reconsider that case, seem to us to be insufficient to render it wise or expedient to do so. The doctrine of the Story case therefore, although pronounced by a divided court, must be considered as *stare decisis* upon all questions involved therein, and as establishing the law, as well for this court as for the people of the State, whenever similar questions may be litigated.

"Wherever, therefore, the principles of that case logically lead us we feel constrained to go, and give full effect to the rule therein stated, that abutters upon public streets in cities are entitled to such damages, as they may have sustained by reason of a diversion of the street, from the use for which it was originally taken, and its illegal appropriation to other and inconsistent uses.

"The case is not only authority upon the questions which it expressly decides, but also upon all such as logically come within the principles therein determined.

"It is therefore unnecessary to enter into a general discussion of those questions, but after restating such propositions as seem to be controlling in this case, we shall simply refer to some alleged distinctions between the present case and the Story case. We hold that the Story case has definitely determined:

"*First.* That an elevated railroad, in the streets of a city, operated by steam-power and constructed as to form, equipments, and dimensions like that described in the

back upon the abutting property. All the owner has ever received for the lands taken under this Act is the benefit accruing to his abutting property by reason of the trust for which the lands are held. Having surrendered his land in consideration of the trust assumed by the public, if the trust can now be abrogated and the streets surrendered to the uses and purposes of a railroad corporation, it follows that, by indirection, private property may be taken for public use against the consent of the owner, and without compensation.

We have examined the other cases cited by the learned counsel for the respondent, and in none of them do we find authority for the claim here made. The case of *The Transportation Company* v. *Chicago* (99 U. S. 635), is not in point. The injury there complained of was necessarily done in the extension of a city street. The interruption was temporary, ceasing with the completion of the work. This case is decided upon the elementary principle that the public have a right to make such use of the land taken for a street as may be deemed necessary for its proper construction, repair, or maintenance. Within this power is included the right to fix the grade of the street, and to change such grade from time to time as the necessities of the public may require; but, whether the grade be elevated or depressed, it is still a public street, to which the public have the right of free access, subject to such police regulations as may be adopted by the public authority having charge and control of the same.

The argument has been pressed upon our attention with great ability that as railroads, like streets, are intended to facilitate trade and commerce, and lands taken for either are taken for public use, the legislature may, in its discretion, appropriate the public streets of our cities to the use of railroad corporations, and this without reference to the form of their structure or the extent of the injury wrought upon property abutting thereon. This is a startling proposition, and one well calculated to fill the owners of such property with alarm. It cannot be that the vast property abutting on the streets of our great cities is held by so feeble a tenure. This court has repeatedly held that such a rule has no application where the abutting owner owns the fee of the bed of the street; and we are of opinion that in cases where the public has taken the fee, but in trust to be used as a public street, no structure upon the street can be authorized that is inconsistent with the continued use of the same as an open public street. The obligation to preserve it as an open street rests in contract written in the statute under which the lands were taken and which may not be violated by the exercise of any legislative discretion. Whatever force the argument may have as applied to railroads built upon the surface of the street, without change of grade, and where the road is so constructed that the public is not excluded from any part of the street, it has no force when applied to a structure like that authorized in the present case. The answer to the argument is that lands taken for a particular public use cannot be appropriated to a different use without further compensation; that the

authority attempted to be conferred by the legislature upon the defendant to take exclusive possession of portions of the public street, and to erect a series of iron columns on either side thereof, upon which a superstructure is to be erected spanning the street and filling the roadway at fifteen feet above the surface, thus excluding light and air from the adjoining premises, is an attempt to appropriate the street to a use essentially inconsistent with that of a public street, and in respect to the land in question violates the covenant of the city made with the plaintiff's grantors, and in respect to lands acquired under the Act of 1813 violates the trust for which such lands are held for public use.

The argument drawn from the great benefit which these roads have conferred upon the city of New York can have but little weight in determining the legal question presented in this case. No doubt these roads have added much to the aggregate wealth of the city of New York, and have greatly promoted the convenience of its citizens; but the burden of so great a public improvement cannot rightfully be cast upon a few of its citizens, by appropriating their property to the public use, without compensation. The inhibition found in the Constitution against the right of the sovereign to appropriate private property to public use without making compensation therefor was intended to secure all citizens alike against being compelled to contribute unequally to the public burdens.

We are of opinion that the law under which the defendant is incorporated authorizes it to acquire such property as may be necessary for its uses and purposes, upon making compensation therefor. This was substantially determined in the *Matter of New York Elevated Railroad* (70 N. Y. 327); *Gilbert Elevated Railway Co.* (Id. 361).

We have reached in this case the following conclusions:

First. That the plaintiff, by force of the grant of the city, made to his grantors, has a right or privilege in Front Street, which entitles him to have the same kept open and continued as a public street for the benefit of his abutting property.

Second. That this right or privilege constitutes an easement, in the bed of the street, which attaches to the abutting property of the plaintiff, and constitutes private property, within the meaning of the Constitution, of which he cannot be deprived without compensation.

Third. That such a structure as the court found the defendant was about to erect in Front Street, and which it has since erected, is inconsistent with the use of Front Street as a public street.

Fourth. That the plaintiff's property has been taken and appropriated by the defendant for public use without compensation being made therefor.

Fifth. That the defendant's acts are unlawful, and as the structure is permanent in its character — and, if suffered to continue, will inflict a permanent and continuing injury upon the plaintiff — he has the right to restrain the erection and continuance of the road by injunction.

which does not exist by reason of the general right of passage through the street, but if the adjoining owner of land is not the owner of the fee in the street, and the railroad company has obtained the proper authority, he has no right to compensation for such added burden, nor to complain of such use so long as it is not exclusive or excessive. The same reasoning applies, as we have seen, in the case of a steam surface railroad. Such a use of the streets would be an additional burden upon the land, and of course, if the adjoining owner had title in fee to the centre of the street, subject only to the public easement, he would have a right of action, as held by the Williams and other cases, while if he did not, no such right would exist in his favor merely because it was a steam instead of a horse railroad which was to be constructed. The authority of the law and the consent of the city would be enough to authorize the building of either, and the difference between the steam and the horse railroad would not be one of such a nature as to require or permit any difference in the decision of the two cases. If the use of either became unreasonable, excessive, or exclusive, or such as would not leave the passage of the street substantially free and unobstructed, then such excessive, improper, or unreasonable use would be enjoined, and the adjoining owner would be entitled to recover damages sustained by him therefrom, in his means of access, etc., to his land. *Mahady* v. *B. R. R. Co.*, (91 N. Y. 149). In *Washington Cemetery* v. *P. P. & C. I. R. R. Co.* (68 N. Y. 591, at 593), Andrews, J., assumes the right of the legislature to authorize the construction of a railroad on a street without exacting compensation from the corporation authorized to construct it, to the owners of adjoining land, provided such owners did not own the fee in the street. The statute in the case cited permitted the use of steam on some portion of this road, so that Judge Andrews' remarks were not confined to horse railroads.

"Assuming that the plaintiff had no title whatever to the land in the street through which the defendant laid its rails and ran its trains under legislative and municipal authority, I think it clear that prior to the decision of this court in the Story case (90 N. Y. 122) he had no cause of action against the defendant based upon any alleged taking of the plaintiff's property or easement by defendant. If its user of the street became excessive or exclusive, and hence degenerated into a nuisance, the plaintiff had another remedy. The claim is now made that the Story case (*supra*), and those cases which followed and are founded upon it, so far altered the law as to permit a recovery in all cases where the easement of the adjoining lot-owner, through the building and operation of the road, is injuriously affected by any deprivation or diminution of light, air, or access to his lot, even though he do not own the fee to the centre of the street; and, where such injury occurs, it is claimed that the property of the owner in his easement of light, air, or access has been taken to a greater or less extent, and compensation is guaranteed to him therefore by the Constitution.

"It was not intended in the Story case to overrule or change the law in regard to steam surface railroads. The case embodied the application of what was regarded as well established principles of law to a new combination of facts, such facts amounting, as was determined, to an absolute and permanent obstruction in a portion of the public street, and in a total and exclusive use of such portion by the defendant, and such permanent obstruction and total and exclusive use, it was further held, amounted to a taking of some portion of the plaintiff's easement in the street for the purpose of furnishing light, air, and access to his adjoining lot. This absolute and permanent obstruction of the street, and this total and exclusive use of a portion thereof by the defendant were accomplished by the erection of a structure for the elevated railroad of defendant, which structure is fully described in the case as reported. The structure, by the mere fact of its existence in the street, permanently and at every moment of the day took away from the plaintiff some portion of the light and air which otherwise would have reached him, and in a degree very appreciable, interfered with and took away from him his facility of access to his lot; such interference not being intermittent and caused by the temporary use of the street by the passage of the vehicles of the defendant while it was operating its road through the street, but caused by the iron posts and by the superstructure imposed thereon, and existing for every moment of the day and night. Such a permanent, total, exclusive, and absolute appropriation of a portion of the street as this structure amounted to, was held to be illegal and

wholly beyond any legitimate or lawful use of a public street. The taking of the property of the plaintiff in that case was held to follow upon the permanent and exclusive nature of the appropriation by the defendant of the public street or of some portion thereof. If that appropriation had been held legal, any merely consequential damage to the owner of the adjoining lot, not having any title to the street, would have furnished no ground for an action against the defendant. It was just at this point that the disagreement existed between the members of this court in the Story case. The judge who wrote one of the dissenting opinions did not think that the facts presented any different principle from that of an ordinary steam surface railroad operating its road through the streets of a city under the authority of the legislature and of the municipality, in a case where the adjoining lot owner did not own the fee in the street. The character of the structure, and all the facts incident thereto, were regarded by him as simply resulting in an additional burden upon the street, somewhat greater in degree it is true than a steam surface railroad, but still it was such a use of the street as the legislature might permit, and the legislature having in fact granted it such power, the use of the street was, therefore, legal, and the defendant was not responsible for the incidental damage resulting to one whose property was not in fact taken within the meaning of the constitutional provision, and the defendant did him, therefore, no actionable injury. The other dissenting judges were of the same opinion.

"A majority of the court, however, saw in the facts existing in that case what was regarded as a plain, palpable, and permanent misappropriation of the street, or some portion of it, to the exclusive use of the defendant corporation, and as resulting from it the court held that there was a taking of property belonging to the plaintiff without compensation, which no legislature could authorize or legalize. But this taking, it cannot be too frequently or strongly asserted, resulted from the absolute, exclusive, and permanent character of the appropriation of the street by the structure of the defendant. There is no hint in either of the prevailing opinions in the Story case of any intention to interfere with or overrule the prior adjudications in this State upon the subject now under discussion, as to the steam surface railroads. In the Story case it was argued that no real distinction in principle existed between a steam surface and an elevated railroad resting on such a structure as was proved in that case. This court, however, made the distinction, and the two prevailing opinions are largely taken up with arguments going to show the distinction was obvious, material, and important, and was so real and tangible in fact as to call for a different judgment than would have been proper and appropriate in the case of the ordinary steam surface railroad such as the Drake case was.

"Judge Tracy, in the Story case, said that the conclusion therein reached was based upon the character of the structure, and that the language of Judge Wright in the Kerr case (*supra*), where he asserted that the abutting owners had no property or estate in the land forming the bed of the street in front of their premises, must be construed with reference to the point then considered. In another portion of his opinion Judge Tracy said that no structure upon the street can be authorized which is inconsistent with the continued use of the street as a public street He also added that, whatever force the argument may have as applied to railroads built upon the surface of the street, without change of grade, and where the road is so constructed that the public is not excluded from any part of the street, it has no force when applied to a structure like that authorized in the present case. This, he says, is an attempt to appropriate the street to a use essentially inconsistent with that of a public street, and hence illegal. He does not pretend that the ordinary steam railroad, laid on the same grade as the street, and not excluding others from its use, appropriates the street to a use essentially or at all inconsistent with that of a public street. The use may be an additional burden laid upon the street, but nevertheless it is such a use as is entirely consistent with its continued use as a public street.

"Judge Danforth in his opinion, views the structure in much the same light. He cites the case of *Corning* v. *Lowerre* (6 Johns. Ch. 439), where Chancellor Kent restrained the defendant by injunction from obstructing Vesey Street in New York city by building a house thereon, and he says that the railroad structure designed by the

defendant for the street opposite the plaintiff's premises is liable to the same objection, that is, it is as permanent in its character and exclusive in its possession of that portion of the street, as was the defendant's building in the case cited. He further says that the street railway cases are in no respect in conflict with the doctrine announced in his opinion. Other citations might be made from both opinions of those most learned and able judges, but enough has been shown to enable us to say with entire correctness that there was no intention in deciding the Story case to reverse or overrule the cases in regard to steam surface railroads which have been already cited. Those cases include just such a case as is the one at bar.

"Following the Story comes the Lahr case (104 N. Y. 268), and the principles decided in the former were reiterated in the latter case. It is difficult to see that any enlarged rule as to awarding damages in that class of cases has been definitely announced in the Lahr case. The general rule to be adopted was agreed upon by the parties and involved an award once for all. The particular damage which the defendant was liable for, growing out of the existence of the defendant's structure, was held by three of the five members of the court then voting to embrace such an injury or inconvenience as was incidental to the use thereof. Two of the five members were in favor of a more restricted rule, and they agreed simply in the result which affirmed the judgment of the court below.

"Then came the Drucker case (106 N. Y 157), and in it the principle was announced, as stated in the head note, that in awarding damages it was proper to prove and take into consideration as elements of damages the impairment of plaintiff's easement of light caused by the road itself, and passage of trains, and the interference with the convenience of access caused by the drippings of oil and water. This was held as a fair result from a holding that the structure was an illegal one, and to the extent above described the court held the plaintiff entitled to an award of damages But the foundation for the recovery in all the cases above cited, of any damages whatever, lies in the fact of the illegality of the structure.

"Looking carefully over the cases involving the elevated railroads and their rights and liabilities, we cannot see that any new rule was adopted in any of those cases which would hold the defendant herein liable under the facts proved, for the taking of any property or any portion of an easement belonging to the plaintiff. On the contrary we think the plaintiff's case is still governed by the case of Drake and the other cases in this court which have already been cited, and in which the principle decided in the Drake case has been assented to and affirmed. Upon such facts it has been held that there was no taking of any property or easement of an adjoining owner who had no title to any portion of the land upon which the street was laid out, where the company was authorized by law and licensed by the city to use the street."

In *Pond* v *The Metrop. Elev. Ry Co.* 112 N Y. 186 (1889) the court (ANDREWS, J.) said "The Story case (90 N. Y. 122) established the principle that an abutting owner on streets in the city of New York, possesses, as incident to such ownership, easements of light, air, and access in and from the adjacent streets, for the benefit of his abutting lands, and that the appurtenant easements and outlying rights constitute private property of which he cannot be deprived without compensation. That was an equity action and the court having reached the conclusion that the defendant's structure was an unlawful invasion of the plaintiff's easements, granted an injunction, postponing its actual issuance, however, until after such reasonable time as would enable the defendant to acquire the plaintiff's right by voluntary agreement or compulsory proceedings. The Story case did not determine any rule of damages. But in *Uline* v. *N. Y. C. & H. R. R. R. Co.* (101 N. Y. 98), the general question as to the scope of the remedy in an ordinary legal action for damages sustained by an abutting owner from the construction of a railway in the street fronting his premises, without his consent and in violation of his rights, was elaborately considered, and it was determined that in such an action the plaintiff could recover temporary damages only; that is, such damages as had been sustained up to the commencement of the action, and the judgment below which allowed damages measured by the permanent depreciation in the value of the plaintiff's lots upon the assumption that the trespass and wrong would be con-

IN *Reining* v. *The New York, Lackawanna, and Western Ry. Co.*, 128 N. Y. 157 (1891), the court (ANDREWS, J.) said: "The principal question in this case respects the rights of the plaintiffs as abutting owners, to recover damages occasioned by the construction of the defendant's road in Water Street in the city of Buffalo. The plaintiffs' premises are situated on the northerly side of Water Street, and are

tinued, was reversed. The case of *Lahr* v. *Met. El. R. Co.* (104 N. Y. 270), was an action like the present one, brought by an abutting owner for damages in which the plaintiff recovered the permanent depreciation in value of his premises by reason of the construction and operation of the defendant's road, on the theory that the appropriation and invasion of the plaintiff's easement was final and complete. This court affirmed the judgment, stating in its opinion that the case was taken out of the operation of the Uline case (*supra*), for the reason that the record disclosed that the parties had agreed upon the rule of damages. The plain inference is, that except for this, the doctrine of the Uline case would have controlled and the objection to the measure of damages would have prevailed. The case of *New York National Bank* v. *Metropolitan Elevated Railway Company* (108 N. Y. 660), is a still more explicit recognition by this court of the application of the doctrine of the Uline case to actions like this. That was an equitable action, brought by an abutting owner, and was sustained. The plaintiff was awarded judgment for past loss of rentals, and an injunction was granted restraining the further operation and maintenance of the road, unless the defendants paid a certain sum equal to the amount of depreciation in the value of the property, as for a permanent appropriation. There was no ground for maintaining the action for equitable relief upon any circumstances disclosed in the complaint, provided the plaintiff could have recovered permanent and complete damages, as for an actual taking of his easement, in a legal action. We think these cases have settled the rule that permanent depreciation cannot be recovered in an action like this. It is understood that this has been the interpretation of our decisions upon which the courts below have acted in many cases. It might be productive of less inconvenience, on the whole, if an opposite rule could be adopted. But the rule established is consistent with legal principles. A recovery of judgment for damages for a trespass or the invasion of an easement does not operate to transfer the title of the property to the defendant, either before or after satisfaction, nor does it extinguish the easement. By the ordinary rule it is an indemnity for a past wrong, leaving unaffected the plaintiff's right to his property. When he comes to the court for equitable relief, the court may mould it to suit the circumstances, as was done in *Henderson* v. *N. Y. C. R. R. Co.* (78 N. Y. 423). The present case was an action for damages simply. The plaintiff neither in his complaint nor on the trial asked for equitable relief.

"We think the judgment should be reversed and a new trial granted. All concur. Judgment reversed."

"The law of the State of New York as declared by the Court of Appeals, appears to be as follows: An elevated railroad erected in and over a street pursuant to the statutes of the State, and with due compensation to the owners of property taken for the purpose, is a lawful structure. The owners of lands abutting on a street in the city of New York have an easement of way, and of light and air, over it; and through a bill in equity for an injunction, may recover of the elevated railroad company full compensation for the permanent injury to this easement; but, in an action at law, cannot, without the defendant's acquiescence, recover permanent damages, measured by the diminution in value of their property, but can recover such temporary damages only as they have sustained to the time of commencing the action. [Citing cases.] This rule of damages at law has not prevailed in analogous cases decided in other jurisdictions, and collected in the briefs of counsel; and in the case last above cited the court observed that 'it might be productive of less inconvenience on the whole, if an opposite rule could be adopted.' 112 N. Y. 190." GRAY, J. for the court, in *N. Y. Elev. R. R.* v. *Fifth Nat. Bk.*, 135 U. S. 432, 440 (1889). — ED.

bounded easterly by Commercial Street, westerly by Maiden Lane, and southerly by Water Street, and occupying the whole lot is a four-story brick building used as a store and residence, constructed before the railroad was placed in Water Street. Water Street runs easterly and westerly, and has existed for more than forty years. Up to 1875, the plaintiffs owned the fee to the centre of the street opposite their premises, subject to the public easement. In that year proceedings were taken by the city of Buffalo to acquire the title to a large number of streets in Buffalo, including Water Street, by condemnation, and resulted in the city acquiring the title, upon payment of a uniform and nominal award of five cents damages to each of several hundred owners of lots on the streets taken including the plaintiffs.

"In 1882, the Common Council of the city of Buffalo by ordinance granted to the defendant the right to construct and maintain two railroad tracks 'along Prince Street to a point midway between Hanover Street and Lloyd Street, thence across Lloyd Street at such grade as will permit said company with a practical construction to cross Commercial Street at the height fixed by the State engineer; thence to and along the centre of Water Street to the docks of the Delaware, Lackawanna, and Western Railroad Company at the foot of Erie Street.' Commercial Slip is a part of the Erie Canal and separates Prince Street and Water Street, and together they form a continuous street except as it is interrupted by Commercial Slip. The defendant, in pursuance of the permission of the Common Council, and in accordance with the map and profile approved by the council, and under the direction of the city engineer, proceeded to raise the grade on Prince Street so as to enable the company to cross Commercial Slip by a bridge fourteen feet above the water line, the height fixed by the State engineer, and to meet this grade of the bridge constructed an embankment in the centre of Water Street from the bridge easterly for the distance of 300 feet, passing the plaintiffs' premises. Water Street is sixty-six feet wide. The sidewalk on the Water Street side of the plaintiffs' lot occupies fourteen feet. The embankment of the defendant is twenty-four feet wide, and at the junction of Water and Commercial streets (at the corner of which is the plaintiffs' lot), it is five feet nine inches high, and from that point descends westerly by a gradual descent passing the plaintiffs' lot and across Maiden Lane and reaches the original level of the street nearly 300 feet west of the corner of Commercial and Water streets. The embankment is supported laterally by solid, perpendicular stone walls, which extend along Water Street in front of the plaintiffs' lot and across the entrance of Maiden Lane. Between the perpendicular stone wall on the northerly side of the embankment and the sidewalk in front of the plaintiffs' building is a space eight to nine feet wide, which is the only carriage-way left on the Water Street side of the plaintiffs' premises. Commercial Street extends northerly and southerly from Main Street to Buffalo harbor. The raising of the embankment in Water Street rendered it necessary to make an embank-

ment in Commercial Street to meet the grade of the railroad, and this was done by the defendant. The defendant paved the surface of the twenty-four feet strip in Water Street occupied by its embankment, and laid thereon part of the way one track, and part of the way two tracks for the accommodation of its business. Carriages or teams cannot cross Water Street in front of plaintiffs' premises. This is prevented by the embankment. Access to their premises on the Water Street side from Commercial Street south of Water Street is also prevented except by first crossing Water Street, and then passing along the embankment on Commercial Street 130 feet, and then turning into the roadway on Commercial Street between the embankment in that street and the sidewalk, and thence into Water Street, or else, when reaching the junction of Commercial and Water streets by turning west and driving down the embankment along the railroad tracks about 300 feet to the end of the grade, and then turning and going easterly along the narrow roadway eight or nine feet wide on the northerly side of the embankment. This space is not sufficient to allow wagons to pass each other, nor can a single wagon with horses be turned around in this space except with difficulty.

"It was conceded that the plaintiffs, up to the time of the trial, had sustained damages in the diminished rental value of their premises by reason of the embankment in the sum of $525, for which sum a verdict was rendered, and no question now arises as to the rule of damages or the amount, provided, upon the facts, damages are legally recoverable. . . . [Here follows a statement of the defendant's position and of *Fobes* v. *R. W. & O. R. R. Co.*, 121 N. Y. 505 (*ante*, p. 1115).]

"It is no longer open to debate in this State that owners of lots abutting on a city street, the fee of which is in the municipality for street uses, although they have no title to the soil, are nevertheless entitled to the benefit of the street in front of their premises for access and other purposes, of which they cannot be deprived except upon compensation. The right of abutting owners in the streets is not, however, of that absolute character that they can resist or prevent any and all interference with the street to their detriment, or which can be asserted to stay the hand of the municipality in the control, regulation, or improvement of the streets in the public interest, although it may be made to appear that the privileges which they had theretofore enjoyed, and the benefits they had derived from the street in its existing condition, would be curtailed or impaired to their injury by the changes proposed.

"The cases of change of grade furnish apposite illustrations. They proceed on the ground that individual interests in streets are subordinate to public interests, and that a lot owner, although he may have built upon and improved his property with a view to the existing and established grade of the street, and relying upon its continuance, has no legal redress for any injury to his property, however serious, caused by a change of grade, provided only that the change is made under lawful authority. This, it is held, is not a taking of the abutting owner's prop-

erty, and the injury requires no compensation. The hardships arising from the application of this rule of law has led to constitutional amendments in many of the States, providing for compensation for property damaged as well as taken in the prosecution of public improvements. The general rule in this State is unchanged, but the Act, chap. 113 of the Laws of 1883, and provisions in some city charters, afford similar relief in certain cases. But that there is a limitation to public powers over the streets of a city, which cannot be transgressed without invading the constitutional rights of abutting owners, was a principle announced in the Story case (90 N. Y. 122), and confirmed and broadened so as to apply to other circumstances in the subsequent cases. The elevated railroad structure, the subject of complaint in the Story case, occupied with its supports and stairways portions of the street, and such occupation was necessarily exclusive, and this fact was prominently brought into view in the opinions delivered. The parts of the street so occupied could not be used for general street purposes. This fact, it is claimed, distinguishes the present case from that, and it is insisted, that this case is more nearly allied to the Fobes case than to that of Story. It is true that the part of the street occupied by the embankment of the defendant is still a part of Water Street. It is also true that the occupation of the embankment by the tracks of the defendant was not necessarily exclusive, that is to say, it is possible for ordinary vehicles to traverse the embankment longitudinally, but such travel would subject the traveller to the risk of meeting railway trains on the narrow causeway, and he would have no opportunity to turn off the embankment, except by driving over the perpendicular wall which supports it. The plaintiffs are practically excluded from the use of that portion of the street by the presence of the railroad there. They and their customers cannot drive across it, and if they had the temerity to drive along it, nevertheless they would be compelled to make a long circuit to reach the plaintiffs' premises from the streets south of the embankment. The only practicable roadway in front on Water Street is but a few feet in width, quite insufficient for a safe and convenient way to and from their lot.

"We think the public cannot justly demand such a sacrifice of private interests, or justify such an appropriation of a street by a municipality in aid of a railroad enterprise. The Fobes case gives no countenance to the defendant's contention. The limitations upon legislative and municipal authority, so carefully stated in the passages quoted from the opinion, are distinctly opposed to such an assumption. That case, and those of Kerr and Kellinger, were cases of railroad tracks laid upon the general grade of city streets, as such grade existed when the tracks were authorized. There was no exclusive appropriation in fact of any portion of the surface by the companies, except that the rails were embedded in the soil. The whole street in each of these cases remained opened and unobstructed, except that the existence of the tracks and the operation of the respective roads thereon rendered

access to the lots of the abutting owners somewhat less safe and convenient than before. Here, as the evidence tends to show, the city of Buffalo, for the convenience and presumably upon the application of the defendant, devoted the centre of Water Street to what is practically the exclusive use of the defendant, leaving for the use of the plaintiffs a narrow and inconvenient roadway, separated from the centre of the street by a barrier therein, impassable for carriages from north to south, opposite the plaintiffs' lot on Water Street, and only theoretically open from east to west, and then only by a circuitous route. It is quite probable that the general interests of Buffalo and of the larger public are promoted by this appropriation of the street, but it by no means follows that a lot-owner whose property is injured should bear the loss for the public benefit. We think the case falls within the principle of the Story case, and that while the law now is that it is competent for the legislature to authorize railroad tracks, either for steam or horse railroads, to be laid on the ordinary grade of streets, the fee of which is in the State or municipality, without making compensation to abutting owners for consequential injuries to their property, the legislature cannot legally authorize structures for railroad purposes to be erected therein for the use and convenience of railroads, which practically exclude the abutting owners from the part of the street so occupied, without compensating them for the injury suffered, and that it is not necessary that there should be an actual physical exclusion of the lot-owners from the use of that part of the street occupied by such structures in order to entitle them to a legal remedy. It is enough if such part of the street is practically and substantially closed against them for ordinary street uses.

"The power conferred by the charter of Buffalo upon the Common Council to 'permit the track of a railroad to be laid in, along or across any street or public ground' (Laws 1870, chap. 519, tit. 3, § 19), must be construed as subject to the qualification that no property rights of abutting owners are thereby invaded. The present controversy could not have arisen prior to 1875, when the plaintiffs were owners of the fee to the centre of Water Street. They would then, under the settled law, have been entitled to compensation. The city of Buffalo having in that year acquired, for a nominal consideration, the technical fee in the street, proceeded afterwards to authorize the laying of the tracks in question, and it is now claimed that this change in the title defeats the plaintiffs' right to compensation. This is probably true, if what has been done by the defendant under license of the city was simply the laying of its tracks on the surface of the street at its ordinary grade, but this was not the character of the change effected.

"The second proposition of the counsel of the defendant that the building of the embankment was a mere change of grade of Water Street, made under the authority of the city, is, we think, untenable. The charter of Buffalo gives plenary power to the city to fix and change the grade of streets by formal proceedings, and provides that when a

grade is established or altered, a description of such grade shall be made and recorded by the city clerk. (Charter 1870, tit. 9, §§ 1, 2, 6.) The action of the Common Council granting permission to the defendant to occupy Water Street, while it involved, as a consequence, the construction of an embankment in Water Street, did not purport to be an exercise of the power to change the grade of the street under the charter. It does not appear that any description was made or recorded as is required when a new grade is established. It would be a strained construction to regard the action of the council as a change of grade of Water Street under the charter provisions. The defendant desired to lay its tracks in Water Street and the other streets mentioned in the grant, and to enable it to do this and cross Commercial Slip an embankment in the street was authorized. The grade of Water Street was not altered, but the defendant was permitted to build an embankment in the street for its railway. The fact that what was done did effect a change in the grade of that part of the street occupied by the embankment does not prove that what was done was in the execution of the power to alter the grade of streets conferred on the council. The primary object of this power contained in municipal charters, is to enable the municipal authorities to render a street more safe and convenient for public travel, to afford drainage, in short, to adapt it more perfectly for the purposes of a public way. It is claimed that the city under this power could lawfully authorize an embankment in part of the street, leaving the other part on a lower level. We are not called upon to say whether there is any limit to the exercise of municipal authority or that the city cannot in exercising the power to establish and alter the grade of streets, raise an embankment in a part of a street if, in its judgment, this will promote the public convenience and the purposes of the street as a highway. But we think it cannot, under the guise of exercising this power, appropriate a part of a street to the exclusive, or practically to the exclusive use of a railroad company, or so as to cut off abutting owners from the use of any part of the street in the accustomed way, without making compensation for the injury sustained. We have held that the authority conferred by the general railroad law upon railroad companies to cross highways in the construction of their lines, authorizes their construction on, over, or below the grade of the highway crossed, and that incidental changes of the grade of the street rendered necessary to accommodate railroad crossings, gives no right of action to abutting owners who may sustain injury. (*Conkling* v. *N. Y. O. & W. R. R. Co.*, 102 N. Y. 107.) The practice of permitting railroads to cross highways is coeval with the introduction of the railroad system in the State, and the decision comports with the general understanding of the bench and the bar. In case of railroad crossings the highway is left as before. No part of it is taken or exclusively appropriated by the railroad company. In these cases there is no use of the highway for railroad purposes. Railroads of necessity intersect highways, and it is held that the State may permit

them to be crossed by a railroad company and that this involves an invasion of no substantial right of the owner of the fee. We ought not to extend the doctrine of the crossing cases to unreasonable limits, and we think that it cannot be applied to justify the exercise of the public powers attempted in the present case." . . .

GRAY, J. I concur with JUDGE ANDREWS. . . .

"Here the object was to subserve the railroad use, and the appropriation by the defendant of this embankment is practically exclusive. The street was subjected to a new use, with consequences as direct, in the permanent deprivation of the abutting property owners' appurtenant easement, as though the railroad was operated in front of his premises upon a structure physically incapable of other uses. I think we have, in the present case, the element of an appropriation by the defendant of the street by a permanent structure and obstruction, and, hence, it must fall within the spirit, if not the letter, of our decision in the Story case."

All concur, except EARL and FINCH, JJ., dissenting.

Judgment affirmed.

NEWMAN *v.* THE METROPOLITAN ELEVATED RAILWAY COMPANY.

NEW YORK COURT OF APPEALS. SECOND DIVISION. 1890.

[118 *N. Y.* 618.]

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made June 18, 1887, which affirmed a judgment in favor of plaintiff entered upon a verdict, and affirmed an order denying a motion for a new trial.

At the commencement of this action the plaintiff held a lease of property situated upon the northwest corner of Church and Rector streets in the city of New York. The lease bore date May 1, 1877, and was for the term of fifteen years, with a right of renewal for an additional term of ten years. Upon the property there was a brick building five stories in height, the first floor of which was used as a restaurant, and the other floors for dwellings.

The Metropolitan Elevated Railway was constructed through Church Street in front of said premises, and in Rector Street there had been erected by the defendants a station from which a covered platform ran to Greenwich Street and there connected with the Ninth Avenue elevated road.

The plaintiff claimed in his complaint that the defendants' structure interfered with the ingress and egress to and from his premises, and also impaired the circulation of light and air from the street to his

building, and deprived him of its customary and lawful use, and greatly reduced its value to him as lessee.

It was admitted that the action was brought and tried as one to recover in one sum the whole damage sustained and to be sustained from the depreciation of the plaintiff's estate, on the assumption that the defendants' structure caused a permanent impairment of the easements in the street for light, air, and access.

The court, having charged the jury that "the damages to plaintiff's leasehold was to be measured by the depreciation of rents caused by defendants' structure, in depriving the premises of the accustomed light, air, and egress which it had before said structure was placed thereon," and that in considering the question of damages "the fact that real estate had risen generally in that district of the city did not relieve the railroad company from the element of damage," was requested by the defendants to charge as follows: "That in estimating the damages to the leasehold interest in this plaintiff caused by the interference by the defendants with the light, air, and access appurtenant to the premises, the jury may take into consideration any benefits peculiar to his house which have arisen by the construction of the road as shown by the evidence." To this the court replied: "That I refuse to charge. On the contrary, the jury have no right to take any such fact into consideration."

The defendants gave evidence tending to show, and from which the jury might have found, that while the upper parts of the building had been made less desirable for dwellings by reason of the erection of the defendants' structure, and in consequence thereof the rents had fallen, the location of the station in Rector Street had, from the greater number of people resorting there, caused the first or store floor of the building to become more desirable for business purposes, and greatly enhanced in rental value.

Julien T. Davies and *W. Bourke Cockran*, for appellant. *James M. Smith* and *Inglis Stuart*, for respondent.

BROWN, J. The basis of the court's refusal to charge as requested is to be found in the Rapid Transit Act (chap. 606, Laws 1875, § 20) and in the General Railroad Law (chap. 140, Laws 1850, § 16) which, by section 8, chapter 885, Laws of 1872, was made applicable to the Gilbert Elevated Railroad Company to whose rights the Metropolitan Railroad Company succeeded. These laws provide that commissioners of appraisal shall not, in determining the amount of compensation to be made to parties owning or interested in property acquired for the construction and operation of railways formed thereunder, "make any allowance or deduction on account of any real or supposed benefits which the party in interest may derive from the construction of the proposed railroad."

What is the true meaning of this provision and how far it is applicable to a case of the character we are considering, is a question we are to determine upon this appeal.

The principle upon which compensation is to be made to the owner of lands taken by proceedings under the General Railroad Law has been frequently considered by the courts of this State, and the rule is now established that such owner is to receive, first, the full value of the land taken, and, second, where a part only of land is taken, a fair and adequate compensation for all injury to the residue sustained or to be sustained by the construction and operation of the railroad. *T. & B. R. R. Co.* v. *Lee*, 13 Barb. 169; *In re C. & S. V. R. R. Co.*, 56 Barb. 456; *In re P. P. & C. I. R. R. Co.*, 13 Hun, 345; *In re N. Y. C. & H. R. R. R. Co.*, 15 Hun, 63; *In re N. Y. L. & W. R. Co.*, 29 Hun, 1; *In re N. Y. L. & W. R. Co.*, 49 Hun, 539; *Henderson* v. *N. Y. C. R. R. Co.*, 78 N. Y. 423.

The first element in the award represents the compensation for land which the railroad takes, and to which it requires title. The second element represents damages which are the result or consequences of the construction of the road upon property not taken, and which the owner still retains. Such damages are wholly consequential, and to ascertain them necessarily involves an inquiry into the effect of the road upon the property, and a consideration of all the advantages and disadvantages resulting and to result therefrom. The rule is well stated in Lewis on Eminent Domain, section 471, as follows: "When part of a tract is taken, just compensation would therefore consist of the value of the part taken, and damages to the remainder, less any special benefits to such remainder by reason of the taking and use of the part for the purpose proposed."

In this rule thus settled in this State, and which controls all awards for taking of land under the General Railroad Act, is to be found the true application of the statutory provision which forbids deductions and allowances to be made by commissioners for any real or supposed benefits, which the parties interested may derive from the construction of the railroad. Whatever land is taken must be paid for by the railroad company at its full market value, and from such value no deduction can be made, although the remainder of the land-owners' property may be largely enhanced in value as a result of the operation of the railroad. But in considering the question of damages to the remainder of the land not taken, the commissioners must consider the effect of the road upon the whole of that remainder, its advantages and disadvantages, benefits and injuries, and if the result is beneficial, there is no damage and nothing can be awarded.

The rule established under the General Railroad Law must govern and control awards made under the Rapid Transit Act. The last-named Act confers upon corporations formed thereunder, the power to acquire property for railroad purposes, and the statutory proceedings prescribed are substantially the same as those under the General Railroad Act and no reason is apparent why the same rule should not apply to proceedings under both Acts.

This court has decided that owners of land abutting upon public

streets have easements therein for ingress and egress to and from their premises, and for the free circulation of light and air to their property, which easements are interests in real estate, and constitute property within the meaning of that term as used in the Constitution.

The easement is the property taken by the railroad company. But in estimating its value it is impossible to consider it as a piece of property, separate and distinct from the land to which it is appurtenant, and the right of the property owner to compensation is measured, not by the value of the easement in the street separate from his abutting property, but by the damages which the abutting property sustains as a result or consequence of the loss of the easement.

It follows that in making an award to a party situated as the plaintiff was with reference to the defendants' railroad, there would be no compensation for property taken beyond a nominal sum, and that his right to recover would rest chiefly upon proof of consequential damages.

An estimate of such damages as I have already shown, involves an inquiry into the effect of the railroad upon the whole property, and a consideration of all its advantages and disadvantages. If the rental value of the whole building was shown to have been diminished, there was injury for which plaintiff was entitled to recover, but if the diminished rental value of the upper floors was equal or overcome by increased rental value in the store then there was no injury and no basis for a recovery of substantial damages against the defendants.

While the precise question presented by the exception in this case has not heretofore been decided in this court, it is covered by the decisions under the General Railroad Law which have been cited, and the rule established by those decisions has recently been applied in the second judicial department to the case of an elevated railroad. *In re Brooklyn Elevated R. Co.* v. *Phillips*, 28 State Reporter, 627. That case was an appeal by property owners from an award of nominal damages in proceedings by an elevated railroad company to condemn an easement in a street. The court said: "The inquiry necessarily takes in the advantages from the railroad when the extent of the injury is to be based upon the diminution of value by reason of its construction. The basis of appraisement must then be the difference in value between the abutting house before the construction of the railroad and afterward."

In *Drucker* v. *Manhattan R. Co.*, 106 N. Y. 157, this court held admissible evidence offered by the property owner that trade and business had fallen off in the street since the erection of the railroad, and that property was for that reason diminished in value. If such evidence is competent to sustain a recovery it is difficult to see why it is not competent for the railroad company to show that the effect of the road has been to cause an increase in business, and hence an enhancement of the value in abutting property.

The question whether, in awarding damages flowing from the construction of a railroad, its injurious effect upon a part of a residue of a

tract of land could alone be considered, has been expressly decided in Illinois. *Page* v. *Chicago R. R. Co.*, 70 Ill. 324. That case was an assessment of damages for a right of way across a tract of forty acres of land. Compensation was awarded for the part taken, but the evidence showing that the residue of the tract would be enhanced in value by the construction and operation of the road, no consequential damages were allowed to the land-owner. The owner claimed that a strip of land next to the railroad was lessened in value by the proximity of the road. The constitutional provision in Illinois relating to the taking of property for public use is the same as our own, and the statute under which the assessment was made provided that benefits should not be set off against or deducted from compensation. The award was sustained on appeal, the court holding that it was not the damages to a strip lying within a limited number of feet of the road-bed that the jury were required to assess, but the damages, if any, to the entire tract. That the effect of the road upon a part of the tract was not to be considered, but upon the whole tract. "This," the court said, "is not deducting benefits from damages, but it is ascertaining whether there be damages or not." To the same effect is the case of *Oregon Central R. R. Co.* v. *Wait*, 3 Oreg. 91.

The statutes we have considered are founded upon the provision of the Constitution forbidding the taking of private property for public purposes without just compensation. Their purpose is to do exact and equal justice among all citizens of the State, and to award to every one full and fair compensation for all property taken for public use or injured by the erection of public improvements.

The rule established by the courts and prevailing under the General Railroad Law accomplishes in a broad and liberal manner that object.

The meaning of the expression "just compensation" has not been limited to the value of property actually taken, but has been held to include all consequential injuries which the land-owner may sustain by reason of depreciation of value in the residue of the property, by reason of the taking of a part and the construction thereon of the public improvement. This rule affords full indemnity to the property owner, and leaves him in as good condition as he was before the construction of the road. And this is all that any citizen has a right to ask. If the rule which the court held in this case is to govern awards made against railroad companies whose structures are erected in the public streets under public authority, when no land is taken, and the compensation is confined to injuries sustained by abutting property, the companies will be compelled in many instances to pay where no injury has been done, and parties will recover who have sustained no loss. Such a rule has not yet received judicial sanction.

The increase of value resulting from the growth of public improvements, the construction of railroads, and improved means of transit accrues to the public benefit generally, and the general appreciation of property consequent upon such improvements belongs to the property

owner, and the railroad company are not entitled to the consideration of that element in the ascertainment of the compensation it must pay to the abutting proprietor. But the special and peculiar advantages which property receives from the construction and operation of the road, and the location of the stations, are elements which enter largely into the inquiry whether there is injury or not, and the jury must consider them and give to them due weight in their verdict.

Between this rule and the statutory provision quoted there is no conflict. The property owner will in every instance receive the "just compensation" which the Constitution secures to him for his property which is taken or injured by the railroad, and the corporation will be compelled to pay whatever damages result from the erection of their structures and the construction of the road. Our conclusion is that the defendant was entitled to the instruction requested, and the exception to its refusal was well taken. The judgment should be reversed and a new trial granted, with costs to abide the event. All concur; FOLLETT, Ch. J., in result. *Judgment reversed.*[1]

[1] And so *Bookman* v. *N. Y. El. R. R. Co.*, 137 N. Y. 302 (1893). In *Bohm* v. *The Metrop. Elev'd Ry. Co.*, 129 N. Y. 576 (1892), the plaintiff alleged that the defendants had unlawfully interfered with, trespassed upon, and illegally taken his easements (or some portion thereof) of light, air, and access to his property by the illegal erection and operation of their elevated railway in such avenue. He demanded judgment restraining defendants from further maintaining their structure in front of his premises and compelling them to remove the same. He also asked to recover the amount of his damage already sustained by reason of the maintenance and operation of the road past his premises, and that if defendants were permitted to maintain and operate the road in the future it should only be upon the condition that they should pay plaintiff the amount of the permanent loss he would suffer by reason of such maintenance and operation. In giving judgment for the plaintiff, the court (PECKHAM, J.) said: "Although these are suits in equity, commenced to obtain equitable relief and to prevent the defendants from operating their road unless they pay the plaintiffs the damages they will sustain from the permanent interference by the railroad with their easements of light, air, and access, yet the rules upon which such damages are to be awarded are so far well settled as to enable us to say that those damages are only such as would be given in a proceeding for the condemnation of lands for a railroad use, regard being had to the different characteristics of the property to be taken in these cases.

"The rule was last announced in this court in the recent case of *American Bank Note Company* v. *New York Elevated R. R. Co.* [129 N. Y. 252], not yet reported. What rule obtains in this State in proceedings to condemn the kind of property which has been taken by the defendants in these cases is now made the subject of inquiry. Generally in taking land the rule may be said to be to pay the full value of the land taken at its market price, and no deductions can be made from that value for any purpose whatever. Then as to the land remaining, the question has been to some extent mooted, whether the company should pay for the injury caused to such land by the mere taking of the other property, or whether, in case the proposed use of the property taken would depreciate the value of that which was not taken, such proposed use could be regarded and the depreciation arising therefrom be awarded as part of the consequential damages suffered from the taking. I think the latter is the true rule. *Henderson* v. *C. R. R.* 78 N. Y. 423, 433; *Newman* v. *R. R.* 118 Id. 618; *In re Petition Brooklyn R. R.* 55 Hun, 165, 167. The case of *In re Petition N. Y. Elevated R. R. etc.*, 36 Hun, 427, is cited for the other rule. The question might be of great importance where there was an injury to the remaining land, but if there have been no injury, the inquiry as to the scope of the liability for damages is not material. There is no question made

but that the defendants are liable to pay the full value of any property taken by them subject to no deduction whatever. How the value of the particular kind of property which is here taken shall be arrived at is the main, and indeed the only, question in these cases. Included in this inquiry and growing out of it arises the question, shall only special benefits to the remaining property be regarded, or may what is termed general benefits be also taken into consideration? Before entering on a discussion of these matters I think it proper to say that I should hesitate to admit the correctness of the claim made by defendants, that where private property is taken by a mere business corporation, as for a public use under the granted power of eminent domain, the legislature could provide that such property could be paid for by benefits accruing to the land-owner's adjacent property consequent upon the taking. This is the case in regard to municipal corporations where land is taken for a public street, or other public and municipal purpose, and where the benefits arising to the adjacent lands of the owner whose property is taken, may be set off against the value of the land taken. So in the case of property taken by the State for canal or other public purposes, where the owner of the land taken was frequently paid its value by the benefits received to his adjacent land not taken. The principle underlying these cases is, however, the right of the municipality or State to tax the owners of the land left, in order to pay for the land taken, on the ground that they are specially benefited by the taking, and hence should be specially taxed for the payment of the land. The case of *Genet* v. *City of Brooklyn*, 99 N. Y. 296, is no authority for a contrary view, for I think it supports that which I have suggested. A mere trading or business corporation has no power of taxation, and the State could not delegate such power to it. If such company desire another's property, it must pay a just compensation for it, and that just compensation would not consist in its doing the owner some benefit upon his remaining property. . . .

"The plaintiffs own no land in the street. Their ownership of the land is bounded by the exterior lines of the street itself. Hence when, under legislative and municipal authority, the railroad structure was built, it was supposed by many there was no liability to abutting owners, because no land of theirs was taken, and any damage they sustained was indirect only, and, therefore, *damnum absque injuria*. When the courts acquired possession of the question, and it was seen that abutting land, which before the erection of the road was worth, for instance, ten thousand dollars, might be reduced to a half or a quarter of that sum in value, or even rendered practically worthless by reason of the building of the road, it became necessary to ascertain if there were not some principle of law which could be resorted to in order to render those who wrought such damage liable for their work. It has now been decided that, although the land itself was not taken, yet the abutting owner, by reason of his situation, had a kind of property in the public street for the purpose of giving to such land facilities of light, of air, and of access from such street. These rights of obtaining for the adjacent lands facilities of light, etc., were called easements, and were held to be appurtenant to the land which fronted on the public street. These easements were decided to be property, and protected by the Constitution from being taken without just compensation. It was held that the defendants, by the erection of their structure and the operation of their trains, interfered with the beneficial enjoyment of these easements by the adjacent land-owner, and in law took a portion of them. By this mode of reasoning, the difficulty of regarding the whole damage done to the adjacent owner as consequential only (because none of his property was taken), and, therefore, not collectible from the defendants, was overcome. The interference with these easements became a taking of them *pro tanto*, and their value was to be paid for, and in addition the damage done the remaining and adjoining land by reason of the taking was also to be paid for, and this damage was in reality the one great injury which owners sustained from the building and operation of the defendants' road. For the purpose of permitting such a recovery, the taking of property had to be shown. The cases of Story, Lahr, Drucker, Abendroth, and Kane (the last of which is reported in 125 N. Y. 164, and in which the others are referred to) finally and completely settled these matters

"It seems to me plain, from this review of the law, that the real injury (if any) suf-

fered by the land-owner in any particular case, lies in the effect produced upon his abutting land by the wrongful interference of defendants with these easements of light, air, and access to such land. And where they are interfered with, and in legal effect taken to any extent, it is not possible to think of them as of any value in and of themselves separated from the adjoining land, but their value is to be measured by the injury which such taking inflicts upon the land which is left, and to which they were appurtenant.

"This is a consequential damage. It is not the light or the air that is valuable separated from the land adjoining. With regard to the subject under discussion there is and can be no value in a given quantity of air, or space, or light in the public street except as it may be used in connection with and as appurtenant to the abutting land. When a person interferes with such light, air, or access and takes it, he takes nothing which is alone and intrinsically valuable, but only as its loss affects the adjoining land. This loss while purely consequential is, nevertheless, a liability which the person proposing to take the property is bound to discharge. . . .

"The real question to be considered is in truth one of damage to the abutting land. *Newman* v. *Elevated R. Co.*, 118 N. Y. 618. What facts may be regarded upon such an inquiry has not been finally decided.

"In the case of Newman (*supra*) a portion of the subject, was involved and discussed, and we must recognize the authority of that case upon the question actually therein decided. A reference to the report is necessary in order to learn that fact. . . .

"The so-called Rapid Transit Acts, under which the defendants were organized, provided that the commissioners of appraisal should not in determining the amount of compensation make any allowance or deduction on account of any real or supposed benefits which the party in interest may derive from the construction of the proposed railroad. The case of Newman decides that this provision does not mean that in examining the question whether injury has resulted to the abutting owner's remaining land by reason of the taking of a portion of the easements spoken of, the court cannot regard the fact that so far from injury the land remaining had been specially enhanced in value by reason of the taking On the contrary, it decides that such fact, of special enhancement in value, is material and may and must be considered upon the question of damage. It is not offsetting injury against benefits. It is discovering whether in reality there has been any injury to the remaining land. To prove that the land has been specially benefited may be proof that it has not been diminished in value. If it would have increased still more in value but for this taking by the road, that difference it must pay because to that extent there would be damage. The Newman case is authority for the proposition that the easements are only of nominal value in and of themselves, and that the result of taking them must be looked for in the effect upon the adjoining land. If instead of loss or injury that land has been specially benefited by the taking by the railroad company, then no damage has been sustained by the land-owner. Although adding nothing to the weight of the authority of the Newman case, I must say that as far as it goes the decision receives my unqualified approval. The remarks of the learned judge in the latter part of the opinion as to general benefits from the growth of the city, etc., were no part of the decision itself and were merely suggestions as to matters not really involved in the case. They raise the question as to how far general benefits to the land may be regarded and also whether assuming them to exist they must have been caused by the railroad company in order to be noticed. I shall add a word or two later on upon that subject. At any rate the case decides that it is a defence to the action to recover damages, if it be proved that in fact the owner's remaining land has been specially benefited by the taking.

"In these cases there is no claim that plaintiffs have received benefits from the taking, which were special and peculiar to their lots and not shared in by the owners of lots generally in the avenue. I confess I have been and am wholly unable to see the least materiality in the distinction between what are termed special and general benefits to the property left, or whether such benefits have been caused by the defendants. Strictly speaking, it is not a question of benefits at all, except that proof of benefits may be one way of showing there has been no injury. The value of the easements taken, we have seen, was merely nominal, and the sole question which remains is,

PIERCE ET AL. *v.* DREW ET AL.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1883.

[136 *Mass.* 75.]

BILL in equity against the selectmen of Brookline and the American Rapid Telegraph Company of Massachusetts, to restrain the selectmen from granting to the telegraph company a location for its posts and wires in Brookline. The defendants demurred to the bill for want of equity. At the hearing, before ENDICOTT, J., a decree was entered sustaining the demurrer and dismissing the bill; and the plaintiffs appealed to the full court. The allegations of the bill appear in the opinion.

A. D. Chandler, for the plaintiffs. *F. Morison*, for the defendants.

therefore, has the owner suffered any damage or injury whatever which has been caused by this taking, for if there have been no damage there can be no recovery. To ascertain the fact whether there has been damage, an excursion into the realms of possibilities as to what might have happened but did not, is not permitted. The inquiry whether the land would have been injured if certain circumstances had not occurred which not only prevented such injury, but enhanced its value, is wholly immaterial. The question is, what in fact has been the actual result upon the land remaining? Has its actual market value been decreased by the taking, or has the taking prevented an enhancement in value greater than has actually occurred, and if so, to what extent? The amount of such decrease in the value of the remaining land, or the amount of the difference between its actual market value and what it would have been worth if the railroad had not taken the other property, is the amount of the damage which the defendants should pay. If on the contrary there has been neither decrease in value caused by the railroad, nor any prevention of an increase from the same cause, how can it be truly said that the lot-owner has been injured to the extent of a farthing? The absence of injury may have been the result of the general growth of the city by reason of which the particular property has grown in value with the rest of the city. It is the fact, not the cause, which is material. Where it appears that the property left has actually advanced in value, unless it can be shown that but for the act of defendants in taking these easements it would have grown still more in value, the fact is plain that it has not been damaged.

"It is said the lot-owner himself is entitled to the benefits accruing to him from the general rise of property caused by a general growth of the city in that vicinity, and that the causes of such growth are too indefinite, and uncertain, and problematical to permit the railroad to take advantage of it upon the question of damages. Of course, the lot-owner is entitled to the benefits arising from these sources. I propose to take no course which shall rob him of them. None other ought to or in fact can have them. It is not a question of permitting the lot-owner to have these benefits. How is he despoiled of them when upon an inquiry whether he has sustained damage from the conduct of the defendants it clearly appears that he has not? If it appear that he would have sustained damage but for the fact that the general growth of the city in that direction prevented it and caused an increase in value, what materiality lies in the fact that this growth was not caused by the railroad? As I have already remarked, the fact that there has been no damage, is the material fact, and not the reasons which in truth prevented the injury from occurring. If it did not occur, then clearly the lot-owner has suffered nothing. He receives all the benefits attaching to the general growth of the city which causes the enhancement in value of his own lots, but he is not permitted to recover from defendants alleged damages which, in fact, he has never sustained." — ED.

DEVENS, J. The facts admitted by the demurrer may be thus stated: The plaintiffs own land on a certain street or public highway in Brookline; they also own a fee in the half of the street which is next to their abutting land.

The defendants are the selectmen of Brookline, and, on the application of the American Rapid Telegraph Company, a corporation organized under the St. of 1874, c. 165 [1] (Pub. Sts. c. 106, § 14), for the transmission of intelligence by electricity, are about to grant to that company, under the Pub. Sts. c. 109, a location along said highway for their posts, wires, &c. The bill seeks to restrain the defendants, upon the ground that the last-named statute is unconstitutional. . . . [Here follows a recital of the substance of the statute and a determination that the business in question is one of a public nature.]

But as, even if the legislature has the right to authorize the erection of telegraph poles along a highway, as a public use thereof, appropriate safeguards must be provided for any rights of property belonging to individual owners which may be taken or invaded, there remain these inquiries for our consideration: first, whether the statute does provide any compensation to the owner of the fee for this new use of the highway; second, whether he is entitled to such compensation; third, whether the owner of property near to, or abutting upon, the highway, is entitled to any compensation therefor other than such as the Act provides. . . .

As the chapter does not, in our opinion, provide for damages to the owner of the fee in the highway by reason of the erection of the telegraphic posts and apparatus, it is to be determined whether such a use of the highway creates a separate and additional burden, requiring an independent assessment of damages, for which the owner of the land was not compensated when the highway was laid out, and thus whether the omission of the Act to provide for this compensation renders it unconstitutional.

It is to be observed that, for more than thirty years, the right to appropriate highways to this public use, without any compensation to the owners of the fee therein, has been asserted; that the statutes in regard to it have more than once been expounded by this court, without any apparent doubt of their validity; and that, up to the present time, no suggestion has ever been made that the rights of such owners were in any way invaded. If the argument that these owners are entitled to compensation be correct, the estates of thousands have been wrongfully used while they were either ignorant of their rights or submissive to injustice; and in the mean time costly telegraphic structures have been erected, and the whole business of the State has accommodated itself to this system of the transmission of intelligence. After so long a practical construction by the legislature and the courts, and

[1] This statute authorizes any number of persons, not less than three, to form a corporation "for the purpose of carrying on any lawful business," excepting certain kinds of business, not material to be stated.

after so widely extended an acquiescence by parties whose estates or interests therein are directly affected, it would require a clear case to justify us in setting aside such a statute as unconstitutional, even if it be true, as it certainly is, that no usage for any course of years, nor any number of legislative or judicial decisions, will sanction a violation of the fundamental law, clearly expressed or necessarily understood. *Packard* v. *Richardson*, 17 Mass. 122, 144 ; *Commonwealth* v. *Parker*, 2 Pick. 549, 557 ; *Holmes* v. *Hunt*, 122 Mass. 505. No right to take the private property of the owner of the fee in the highway is conferred by this Act ; all that is given is the right to use land, by permission of the municipal authorities, the whole beneficial use of which had been previously taken from the owner and appropriated to the public. It is a temporary privilege only which is conferred ; no right is acquired as against the owner of the fee by its enjoyment, nor is any legal right acquired to the continued enjoyment of the privilege, or any presumption of a grant raised thereby. Pub. Sts. c. 109, § 15. The discontinuance of a highway would annul any permit granted under the statute, and no encumbrance would remain upon the land.

In *Chase* v. *Sutton Manuf. Co.*, 4 Cush. 152, 167, it is said by Chief Justice Shaw, " that where, under the authority of the Legislature, in virtue of the sovereign power of eminent domain, private property has been taken for a public use, and a full compensation for a perpetual easement in land has been paid to the owner therefor, and afterwards the land is appropriated to a public use of a like kind, as where a turnpike has by law been converted into a common highway, no new claim for compensation can be sustained by the owner of the land over which it passes." The case itself goes further than the illustration used by the Chief Justice. It related to a claim made by an owner in fee of land which had been taken by a canal company by statutory authority, for the purpose of a navigable waterway, which company had been permitted by statute to sell its property to a railway company ; but, although the two modes of transportation were entirely different, the validity of the Act was sustained, and the claim of the land-owner for further compensation disallowed.

" It is well settled," says Mr. Justice Gray, in *Boston* v. *Richardson*, 13 Allen, 146, 160, " that when land, once duly appropriated to a public use which requires the occupation of its whole surface, is applied by authority of the legislature to another similar public use, no new claim for compensation, unless expressly provided for, can be sustained by the owner of the fee."

When land has been taken or granted for highways, it is so taken or granted for the passing and repassing of travellers thereon, whether on foot or horseback, or with carriages and teams for the transportation and conveyance of passengers and property, and for the transmission of intelligence between the points connected thereby. As every such grant has for its object the procurement of an easement for the public, the incidental powers granted must be so construed as most effectually

to secure to the public the full enjoyment of such easement. *Commonwealth* v. *Temple*, 14 Gray, 69, 77.

It has never been doubted that, by authority of the legislature, highways might be used for gas or water pipes, intended for the convenience of the citizens, although the gas or water was conducted thereunder by companies formed for the purpose; or for sewers, whose object was not merely the incidental one of cleansing the streets, but also the drainage of private estates, the rights of which to enter therein were subject to public regulations. *Commonwealth* v. *Lowell Gas Light Co.*, 12 Allen, 75; *Attorney-General* v. *Metropolitan Railroad*, 125 Mass. 515, 517; *Boston* v. *Richardson*, *ubi supra*.

Nor can we perceive that these are to be treated as incidental uses, as suggested by the plaintiff, because the pipes are conducted under the surface of the travelled way, rather than above it. The rights of the owner of the fee must be the same in either case, and the use of the land under the way for gas-pipes or sewers would effectually prevent his own use of it for cellarage or similar purposes.

When the land was taken for a highway, that which was taken was not merely the privilege of travelling over it in the then known vehicles, or of using it in the then known methods, for either the conveyance of property or transmission of intelligence. Although the horse railroad was deemed a new invention, it was held that a portion of the road might be set aside for it, and the rights of other travellers, to some extent, limited by those privileges necessary for its use. *Commonwealth* v. *Temple*, *ubi supra*; *Attorney-General* v. *Metropolitan Railroad*, *ubi supra*. The discovery of the telegraph developed a new and valuable mode of communicating intelligence. Its use is certainly similar to, if not identical with, that public use of transmitting information for which the highway was originally taken, even if the means adopted are quite different from the post-boy or the mail-coach. It is a newly discovered method of exercising the old public easement, and all appropriate methods must have been deemed to have been paid for when the road was laid out. Under the clause to regulate commerce among the States, conferred on Congress by the Constitution of the United States, although telegraphic communication was unknown when it was adopted, it has been held that it is the right of Congress to prevent the obstruction of telegraphic communication by hostile State legislation, as it has become an indispensable means of intercommunication. *Pensacola Telegraph* v. *Western Union Telegraph* [96 U. S. 1].

No question arises as to any interference with the old methods of communication, as the statute we are considering, by § 8, guards carefully against this by providing that the telegraphic structures are not to be permitted to incommode the public use of highways or public roads. We are therefore of opinion that the use of a portion of a highway for the public use of companies organized under the laws of the State for the transmission of intelligence by electricity, and subject to the supervision of the local municipal authorities, which has

been permitted by the legislature, is a public use similar to that for which the highway was originally taken, or to which it was originally devoted, and that the owner of the fee is entitled to no further compensation.

There remains the inquiry, whether there is any objection to the statute because it does not provide a sufficient remedy for the owners of property near to or adjoining the way, who may be incidentally injured by the structures which the telegraph companies may have been permitted to erect along the line of the highway and within its limits. Such remedy is given by § 4 as the legislature deemed sufficient. We should not be willing to believe that the land-owner thus injured would be without remedy, if the company failed to pay the damages lawfully assessed under this section, while it still endeavored to maintain its structures; but the only compensation to which such owner is entitled is that which the legislature deems just, when it permits the erection of these structures. The legislature may provide for compensation to the adjoining owners, but without such provision there can be no legal claim to it, as the use of the highway is a lawful one. *Attorney-General* v. *Metropolitan Railroad*, *ubi supra*.

The clause in the Declaration of Rights which provides that, "whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor," is confined in its application to property actually taken and appropriated by the government. No construction can be given to it which can extend the benefit of it to the case of one who suffers an indirect or consequential damage or expense by means of the rightful use of property already belonging to the public. *Callender* v. *Marsh*, 1 Pick. 418, 430.

The majority of the court is therefore satisfied that the demurrer to this bill was properly sustained, and the entry will be,

Decree affirmed.

[CHARLES ALLEN, J., for himself and WILLIAM ALLEN, J., gave a dissenting opinion.] [1]

ADAMS v. CHICAGO, BURLINGTON, AND NORTHERN RAILROAD COMPANY.

SUPREME COURT OF MINNESOTA. 1888.

[39 *Minn.* 286.]

APPEAL by defendant from an order of the District Court for Winona County, refusing a new trial after a trial by START, J., a jury being waived.

[1] Compare *Am. Teleph. & Teleg. Co.* v. *Pearce*, 71 Md. 535 (1889). — ED.

Wm. Gale, *J. W. Losey*, and *Young* and *Lightner*, for appellant. *Twoney* and *Randall*, for respondent.

GILFILLAN, C. J. Second Street, in the city of Winona, is, and for 30 years has been, a public street, 70 feet wide, running nearly east and west through the city. Plaintiff is the owner of and occupies as his residence a lot abutting on the south side of said street. The defendant, under authority of the Common Council, which authority the city charter empowered the council to give, has constructed and is operating the main line of its railroad, an ordinary commercial railroad, running to and through Winona, upon and along the north half of Second Street, passing in front of plaintiff's lot, no part of the track being laid south of the centre line of the street. Safe and convenient ingress and egress to and from plaintiff's lot are not materially impaired. The injurious consequences to the lot are not due to any improper construction or operation of the road, but are such as result from constructing and operating a railroad along a street in an ordinary and prudent manner. These injurious consequences arise from the engines and trains passing day and night, and throwing steam, smoke, dust, and cinders upon the plaintiff's premises, and into his house, polluting the air with offensive smells, and interfering with the free circulation of light and pure air into and upon his premises, and jarring the ground so as to cause the house and furniture to vibrate; causing physical discomforts and annoyances to plaintiff and his family, and whereby the rental value of his premises is diminished. The court below ordered judgment for the plaintiff for the damage to the rental value up to the commencement of the action, and the defendant appeals.

The principal question involved has never been directly before this court. There have been, however, cases in which the decisions bore incidentally upon it. It is well settled that where there is no taking of, or encroachment on, one's property or property rights by the construction and operating of a railroad, any inconveniences caused by it, as from noises, smoke, cinders, etc., not due to improper construction, or negligence in operating it, furnish no ground of action; as when the railroad is laid wholly on land which the company has acquired by purchase or condemnation, or in which the party has no interest, so that it does no wrong to him in constructing and operating the road, though there may be some inconvenience or damage to him arising from it, if it be such as the general public suffer, he has no legal cause to complain. Railroads are a necessity, and the public, which enjoys the general incidental benefits from them, must endure any general inconveniences necessarily incident to their construction and operation. And if a railroad company even wrongfully obstructs a street abutting on one's premises, not at the part of the street where it so abuts, unless access to his premises is thereby cut off or materially interfered with, any inconvenience that he may suffer therefrom furnishes no ground for a private action, because the wrong done is a public wrong for which the public authorities are the proper parties to seek redress.

See *Shaubut* v. *St. Paul & Sioux City R. Co.*, 21 Minn. 502; *Rochette* v. *Chicago, Mil. & St. Paul Ry. Co.*, 32 Minn. 201 (20 N. W. Rep. 140); *Barnum* v. *Minnesota Transfer Ry. Co.*, 33 Minn. 365 (23 N. W. Rep. 538). But if a railroad, not touching one's premises, obstructs a street abutting on or leading to them, so as to cut off or materially interfere with his only access to them, the inconvenience is deemed to be special, and not one common to the public, and an action lies. *Brakken* v. *Minn. & St. Louis Ry. Co.*, 29 Minn. 41 (11 N. W. Rep. 124). It is the same where one owns land abutting on a navigable river or lake, and a railroad is laid along between the land and the navigable water. *Brisbine* v. *St. Paul & Sioux City R. Co.*, 23 Minn. 114; *Union Depot, etc. Co.* v. *Brunswick*, 31 Minn. 297 (17 N. W. Rep. 626). And also where a strip between the lots and the river has been dedicated to public use as a levee or landing, and a railroad is laid upon it. *Shurmeier* v. *St. Paul & Pac. R. Co.*, 10 Minn. 59 (82) (88 Am. Dec. 59). Where, however, there is a taking of a part of a tract or lot of land, the diminution in value of the part not taken, caused by the noise of passing trains, and inconvenience and interruption to the use of the part not taken, resulting from the ordinary operation of the road (*County of Blue Earth* v. *St. Paul & Sioux City R. Co.*, 28 Minn. 503, 11 N. W. Rep. 73); and from increased exposure of buildings already erected to danger of fire from passing trains (*Colvill* v. *St. Paul & Chicago Ry. Co.*, 19 Minn. 240 (283); *Johnson* v. *Chicago, B. & N. R. Co.*, 37 Minn. 519, 35 N. W. Rep. 438); and from increased danger of injury to or destruction of the household of the owner, unless the property not taken is equally valuable for some other purpose, — *Curtis* v. *St. Paul, S. & T. F. R. Co.*, 20 Minn. 19 (28), — are proper elements of the damages to be allowed for the taking.

From these decisions the propositions may be stated: That the right of recovery against a railroad company, when there is no improper construction of or negligence in operating the railroad, for inconveniences caused by noises, smoke, dust, and cinders, does not depend on the fact that such inconveniences exist, if they be such as are common to the public at large, but on the fact that there has been a taking of the parties' property for the purpose of the railroad, accompanied with such inconveniences, or to which they are incident; and, if necessarily caused by the company's proper use of its own property, there can be no recovery because of them. And that, where there is a taking, such inconveniences as are necessarily incident to it, and to the use for which the property is taken, are proper elements of the damages to the party. And this further proposition (fully established and more clearly set forth in many other decisions of this court) that the rule of damage is applied only to a case where part of a distinct tract or lot is taken, in which case the damages only to the part not taken are to be estimated. As to that only are the damages deemed special. As to other distinct tracts or lots of the same owner the inconveniences are generally such as the public suffer.

As the plaintiff does not claim to own the land in the street which the company has taken for its road, but claims only a right or interest in the nature of an easement in it appurtenant to his lot, the question has been raised and discussed, at considerable length, whether, conceding the right or interest he claims, the acts of the defendant constitute a taking, within the constitutional provision prohibiting the taking of private property for public use without just compensation. As that provision is inserted for the protection of the citizen, it ought to have a liberal interpretation, so as to effect its general purpose. All property, whatever its character, comes within its protection. It is hardly necessary to say that any right or interest in land in the nature of an easement is property, as much so as a lien upon it by mortgage, judgment, or under mechanic's lien laws. If a man is deprived of his property for the purpose of any enterprise of public use, it must be a taking, even though the right of which he is deprived is not and cannot be employed in the public use. In the case of a lien on land taken for railroad purposes, the company cannot make any use of the lien. It does not succeed to the ownership of it. It merely displaces it, — destroys it. So, in case of an easement. If A. has, as appurtenant to his lot, an easement for right of way over the adjoining land, and such adjoining land is taken for railroad purposes, the company does not and cannot succeed to the easement. But it may destroy or materially impair it by rendering it impossible for the owner of it to enjoy it to the full extent that he is entitled to. Such destruction or impairment is within the meaning of the word "taken," as used in the Constitution, as fully as is the depriving the owner of the possession and use of his corporeal property.

The main question in the case is, has the owner of a lot abutting on a public street a right or interest in the street opposite his lot, appurtenant to his lot, and independent of his ownership of the soil of the street, and, if so, what is that right or interest? If he has, and the acts of the defendant in constructing and operating its railroad along that part of the street opposite plaintiff's lot prevent or impair his enjoyment of such right or interest, then he has a right to recover.

We find a great many cases in which is stated, in general terms, the proposition that, although the fee of the street be in the State or municipality, the owner of an abutting lot has, as appurtenant to his lot, an interest or easement in the street in front of it, which is entirely distinct from the interest of the public. *Grand Rapids & Ind. R. Co.* v. *Heisel*, 38 Mich. 62; *Lexington & Ohio R. Co.* v. *Applegate*, 8 Dana, 289 (33 Am. Dec. 497); *Elizabethtown, etc. R. Co.* v. *Combs*, 10 Bush, 382; *Haynes* v. *Thomas*, 7 Ind. 38; *Protzman* v. *Indianapolis, etc. R. Co.*, 9 Ind. 467 (68 Am. Dec. 650); *Stone* v. *Fairbury, etc. R. Co.*, 68 Ill. 394; *Tate* v. *Ohio & Mississippi R. Co.*, 7 Ind. 479; *Lackland* v. *North Missouri R. Co.*, 31 Mo. 180; *Street Railway* v. *Cumminsville*, 14 Ohio St. 523; *Railway Co.* v. *Lawrence*, 38 Ohio

St. 41; *Crawford* v. *Village of Delaware*, 7 Ohio St. 459; *City of Denver* v. *Bayer*, 7 Col. 113 (2 Pac. Rep. 6); *Town of Rensselaer* v. *Leopold*, 106 Ind. 29 (5 N. E. Rep. 761). In 38 Mich. 62, 71, the Supreme Court states it thus: "Every lot-owner has a peculiar interest in the adjacent street which neither the local nor the general public can pretend to claim; a private right in the nature of an incorporeal hereditament, legally attached to his contiguous ground; an incidental title to certain facilities and franchises, which is in the nature of property, and which can no more be appropriated against his will than any tangible property of which he may be owner." Although the proposition was apparently stated with care and upon deliberation, it seems to us (and we say it with diffidence, because of the eminent character of that court) that the decision of the case was a departure from the doctrine thus laid down (and the same may be said of several of the cases referred to). For where the railroad was laid upon a part of the street opposite the party's lot, of which part he did not own the fee, it denied his right to recover for damages caused to his lot incidental to a proper operating of the railroad, and limited it to cases where the acts of the company, of omission or commission, amounted to a nuisance. As the lot-owner can recover for a private nuisance, committed by the improper operation of a railroad, even on the company's own land, in which he has no interest (*Baltimore & Potomac R. Co.* v. *First Baptist Church*, 108 U. S. 317, 2 Sup. Ct. Rep. 719), it would seem as though, if he is in no better plight in respect to the company's acts in the street, his "peculiar interest," distinct from that of the public, in the street, is of very little value. His title to his interest in the street is precarious, if authority from the State or municipality may justify what would without such authority be a private wrong as to him.

None of the cases we have referred to, nor any till we come to what are known as the "Elevated Railway Cases," attempt to define the limits and extent of the right of an abutting lot-owner in the street opposite his lot, where he does not own the fee. That it extends to purposes of ingress and egress to and from his lot is conceded by all. And for this purpose it may extend beyond the part of the street directly in front; for, as we have seen, an action by him will lie for obstructing the street, away from his lot, so as to cut off or materially interfere with his only access to it.

The questions are asked, how does the lot-owner get an easement in the street? . . . It is, however, hardly necessary to inquire how the lot-owner gets his private right in the street; for it is established law that he has a private right, which, as we have stated, all the cases concede extends to the necessity of access. Access to the lot is only one of the direct advantages which the street affords to it. In a city densely peopled and built up, the admission of light and air into buildings is about as important to their proper use and enjoyment as access to them. Light and air are largely got from the open space which the streets afford. What reason can be given for excluding a right to the street for admit-

ting light and air, when the right to it for access is conceded? For mere purposes of access to the lots, a strip 10 or 15 feet wide might be sufficient. Yet everybody knows that a lot fronting on a street 60 or 70 feet wide is more valuable, because of the uses that can be made of it, than though it front on such a narrow strip. Take a case in one of the States where the fee of the streets is in the State or municipality, and of a street 60 feet wide. The abutting lot-owners have paid for the advantages of the street on the basis of that width, either in the enhanced price paid for their lots, or, if the street was established by condemnation, in the taxes they have paid for the land taken. In such a case, if the State or municipality should attempt to cut the street down to a width of 10 or 15 feet, would it be an answer to objections by lot-owners that the diminished width would be sufficient for mere purposes of access to their lots? It would seem as though the question suggests the answer.

The cases known as the "Elevated Railway Cases" (*Story* v. *N. Y. Elevated R. Co.*, 90 N. Y. 122, and *Lahr* v. *Metropolitan Elevated R. Co.*, 104 N. Y. 268, 10 N. E. Rep. 528) are notable in several respects: first, because they were the first cases (and it seems strange that they should have been) in which was squarely presented, so as to demand a direct decision, the claim of abutting lots to an easement in the street in their front, for purposes of light and air; second, for the number and ability of the counsel on each side, and the thoroughness with which they discussed every point involved, and presented every argument *pro* and *con* that could be suggested; and, lastly and especially, for the exhaustive character of both the prevailing and dissenting opinions by the members of the court. The latter case was really a re-argument of the questions decided in the earlier, and in its opinion the court not only adhered to, but took pains to define, its earlier decision, and in some respects to go beyond it, and give to the principles determined a wider application than appears to have been given to them in the first case. We think that in those cases the doctrine is unqualifiedly established that no matter how the abutting owner acquires title to his land, and no matter how the street was established, so that the only right of the public is to hold it for public use as a street forever (and the public gets no greater right under a dedication), and no matter who may own the fee, "an abutting owner necessarily enjoys certain advantages from the existence of an open street adjoining his property, which belong to him by reason of its location, and are not enjoyed by the general public, such as the right of free access to his premises, and the free admission and circulation of light and air to and through his property." The doctrine was followed and applied by the Circuit Court of the United States for the Southern District of New York, in *Fifth Nat. Bank* v. *N. Y. Elevated R. Co.*, 24 Fed. Rep. 114. The general doctrine, we think, stands on sound reason and considerations of practical justice.

The private right in a street is of course subordinate to the public

right. The latter right is for use as a public street, and the incidental right to put and keep it in condition for such use, and for no other purpose. Whatever limitation or abridgment of the advantages which the abutting lot is entitled to from the street may be caused by the exercise of the public right, the owner of the lot must submit to. If putting it to proper street uses causes annoying noises to be made in front of his lot, or the air to be filled with dust and smoke, so as to darken his premises, or pollute the air that passes from the street upon them, he has no legal cause of complaint. His right to complain arises when such interruptions to the enjoyment of his private right are caused by a perversion of the street to uses for which it was not intended; by employing it for uses which the public right does not justify. That constructing and operating an ordinary commercial railroad on a street is a perversion of the street to a use for which it was not intended, one not justified by the public right, and which the State or municipality, as representing such right, cannot, as against private rights, authorize, — the decisions of this court are full and explicit. It has always been held here, contrary to the decisions in many of the States, that laying such a railroad upon a public street or highway is the imposition of an additional servitude upon it, — an appropriation of it to a use for which it was not intended. *Carli* v. *Stillwater Street Ry., etc. Co.*, 28 Minn. 373 (10 N. W. Rep. 205), and cases cited. Many of the decisions cited to show that upon a state of facts such as exists in this case the lot-owner can have no right of action, were by courts which hold that the use of a street for an ordinary railroad is a legitimate street use, — one that comes within the uses and purposes for which streets are established. Where that is the rule, inasmuch as the right or interest of the abutting lot-owner is subordinate and subject to the right to devote the street to use for a railroad, as well as for any other proper mode of street travel, of course no cause of action in favor of the lot-owner, whether he owns the fee of the street or not, could grow out of the proper construction and operating of a railroad in the street. For that reason the decisions of such courts can be of no authority here, where a different rule upon the rightfulness of using the street for such a purpose prevails.

The conclusions arrived at are that the owner of a lot abutting on a public street has, independent of the fee in the street, as appurtenant to his lot, an easement in the street in front of his lot to the full width of the street, for admission of light and air to his lot, which easement is subordinate only to the public right. That depriving him of or interfering with his enjoyment of the easement for any public use not a proper street use is a taking of his property within the meaning of the Constitution. That appropriating a public street to the construction and operation of an ordinary commercial railroad upon it is not a proper street use. That where, without his consent and without compensation to him, such a railroad is laid and operated along the portion of the street in front of his lot, so as upon that part of the street to cause

smoke, dust, cinders, etc., which darken or pollute the air coming from that part of the street upon his lot, he may recover whatever damages to his lot are caused by so laying and operating such railroad on that part of the street.

That the recovery should be limited to the damages caused by operating the railroad in front of plaintiff's lot, and ought not to include any that might have accrued from operating it on other parts of the street, was undoubtedly the opinion of the court below when it came to make its findings of fact; for it finds as a fact no other damage than the depreciation in the rental value of the lot caused by operating the railroad on the street in front of it. The proof of depreciation in rental value, however, was made in part by admitting proof (against defendant's objection) of the rental value "with the road constructed on that street, and operated there as roads usually are." There was no other evidence of depreciation. The evidence takes into account not merely the consequences to the lot from operating the railroad in front of it, but also from operating the road on the whole or any part of it, however remote from the lot. This would allow plaintiff to recover for such consequences of operating the road as he suffered in common with the public generally, and not merely such as were peculiar to himself. The evidence was erroneously admitted, and, as there was no competent evidence to sustain the finding of the amount of damage, the finding must be set aside. A new trial is therefore ordered of the issue as to the amount of damage (but of no other issue), unless the plaintiff will consent in the court below to take judgment for nominal damages merely.[1]

VANDERBURGH, J. (dissenting). If a street or highway is so occupied or encumbered as to occasion special and peculiar injury to an abutting land-owner, an action for damages or an injunction may be sustained. But I do not assent to the proposition that such owner has property interests in the street, beyond the boundary of his land therein (presumptively the centre line thereof), which are the proper subject of condemnation proceedings. The opposite rule, I think, has always been accepted and acted on in this State, and is supported by the great weight of authority. . . .

[1] And so *Lamm* v. *Chic. &c. Ry. Co.*, 45 Minn. 71, 78 (1890); *Williams* v. *City Electric St. Ry. Co.*, 41 Fed. Rep. 556 (U. S. C. C. E. D. Ark. 1890). Compare *Nichols* v. *Ann Arbor, &c. Ry. Co.*, 87 Mich. 361.

In *Garrett* v. *Lake Roland El. Ry. Co.*, 29 Atl. Rep. 830 (June, 1894), the Maryland Court of Appeals (McSHERRY, J.), in sustaining a decree dismissing the plaintiff's bill, said: "By Section 5 of Ordinance No. 23, approved April 8, 1891, the North Avenue Railway Company (one of the several roads by the consolidation of which the Lake Roland Elevated Railway Company was formed) was authorized to bridge the Northern Central Railway Company's tracks on North Street, by means of an elevated structure, extending, including the necessary approaches thereto, along North Street from the corner of that and Eager streets to the corner of North and Saratoga streets. A stone abutment, forming an inclined plane, to carry on its perpendicular or highest side the iron superstructure, and to serve, on its surface, as the northern approach to the elevated road, has been erected nearly in the centre of North Street between Chase

WESTERN UNION TELEGRAPH COMPANY *v.* WILLIAMS.

VIRGINIA SUPREME COURT OF APPEALS. 1890.

[86 *Va.* 696.]

ERROR to judgment of Circuit Court of New Kent County, rendered October 30, 1888, in an action of trespass on the case wherein James K. Williams was plaintiff, and the plaintiff in error, the Western Union Telegraph Company, was defendant. Opinion states the case.

Staples and *Munford* and *Robert Stiles*, for the plaintiff in error. *Pollard* and *Sands*, *R. T. Lacy*, and *W. W. Gordon*, for the defendant in error.

LACY, J., delivered the opinion of the court. . . . However, it is claimed by the plaintiff in error that, granting that the rights of the

and Eager, directly in front of part of the first-named lots of Mr. Garrett. It is 83 feet and 2½ inches in length, and 15 $\frac{4}{5}$ feet in width, and starts at the street grade, and gradually rises to a height of 9 feet, and leaving a distance or driveway between its western face and the curb line, contiguous to Mr. Garrett's property, of 9 feet and 8¼ inches. . . . The proposition distinctly presented by the record, and earnestly contended for by the appellant's distinguished counsel, is that the erection by the appellee of this abutment on property not owned by the appellant, but in the bed of a public city thoroughfare, upon which his lots abut, destroys the access to his land, interferes with light and air, imposes a new and additional servitude upon his property, and deprives him of the benefit of the use of the same, and amounts in law to a taking of his property that is in fact not trespassed upon or touched, — is illegal, until compensation shall have been first made therefor. Though there has been no physical invasion of the appellant's property, still, if the act complained of constitutes, by reason of its consequences, a taking of the appellant's private property for a public use, within the meaning of section 40 of article 3 of the Constitution of Maryland, which prohibits the taking of private property for public use, except upon just compensation being first paid or tendered, then the injunction should have been granted. . . . There is some conflict among adjudged cases as to what amounts to such a taking, but the overwhelming weight of authority accords with the conclusions which this court announced in two cases that will be fully referred to later on. Apart from the decisions of the Supreme Court of Ohio (see *Crawford* v. *Delaware*, 7 Ohio St. 460), which rest upon a doctrine peculiar to that State, and the recent New York decisions in the Elevated Railway Cases (*Story* v. *Railroad Co.*, 90 N. Y. 122; *Lahr* v. *Railway Co.*, 104 N. Y. 268), which are hopelessly in conflict with the principles announced in other cases in the same State (*Radcliff* v. *Mayor, etc.*, 4 N. Y. 195; *Fobes* v. *Railroad Co.*, 121 N. Y. 505), and the decisions in Minnesota (*Adams* v. *Railroad Co.*, 39 Minn. 286, 39 N. W. 629; *Lamm* v. *Railroad Co.*, 47 N. W. 455), and a few cases in Mississippi (*Theobold* v. *Railway Co.*, 66 Miss. 279), and possibly one or two other States, — all substantially following the New York Elevated Railway Cases, — there is practically an unbroken current of adjudged cases broadly and clearly marking and defining the difference between an incidental injury to, and an actual taking of, private property. . . . We must either adhere to these two decisions in 50 Md. and 74 Md. [*Mayor* v. *Willison*, 50 Md. 148, and *O'Brien* v. *R. R Co.*, 74 Md. 363], strictly in accord, as we have shown them to be, with the decided weight of judicial opinion on this subject, — or else, receding from them, adopt the Ohio or the New York doctrine. We see no reason for departing from, or for modifying, our former deliberate judgments. The Ohio doctrine is peculiar to that State alone (*O'Connor* v. *Pittsburgh* [18 Pa. St. 187], *Northern Transp. Co.* v. *Chicago* [99 U. S. 635]), and is so admitted to be in *Crawford* v. *Delaware*, *supra*. The New York doctrine involves this inextricable dilemma, *viz.*: If the grading of a street by a municipal corporation cuts off all access

plaintiff are what we have stated, and the Commonwealth has only the right to use by going over, still his case is good, because his works are only a use of the easement, and constitute no new taking, — no additional servitude. We will now briefly consider this argument.

The right in the Commonwealth is to use by going along over; this is the extent of the right. If the right was granted to the defendant to go over simply to carry its messages, then the right granted was in existence before the grant, and the right to go over is not only not disputed, but distinctly admitted. This is the servitude over the land fixed upon it by law, and the whole extent of it. If anything more is taken it is an additional servitude, and is a taking of the property within the meaning of the Constitution. To take the whole subject, the land in fee, is a taking. This, however, is the meaning of the term only in a limited sense, and in the narrowest sense of the word. The constitutional provision, which declares that property shall not be taken for public use without just compensation, was intended to establish this principle beyond legislative control, and it is not necessary that property should be absolutely taken, in the sense of completely taking, to bring a case within the protection of the Constitution. As was said by a learned justice of the Supreme Court of the United States: "It would be a curious and unsatisfactory result." [Here follows the rest of a paragraph from the opinion of the court (MILLER, J.) in *Pumpelly* v. *Green Bay Co.*, *ante*, p. 1062.]

It is obvious, and it is so held in many cases, that the construction of a railroad upon a highway is an additional servitude upon the land, for which the owner is entitled to additional compensation. Cooley's Constitutional Limitations, 548; *Ford* v. *Chicago and Northwestern R. R. Co.*, 14 Wis. 616; *Pomeroy* v. *Chicago & M. R. R. Co.*, 10 Wis. 640. And the power of the legislature to authorize a railroad to be constructed on a common highway is denied, upon the ground that the original appropriation permitted the taking for the purposes of a common highway, and no other. The principle is the same when the land is taken for any other purpose distinct from the original purpose, and the reasoning in the two cases is applicable to each. In the case of *Imlay* v. *Union Branch R. R. Co.*, 26 Conn. 255, it is said: "When land is condemned for a special purpose, on the score of public utility, the sequestration is limited to that particular use. Land taken for a highway is not thereby converted into a common. As the property is not

to a person's house, albeit his property is thereby destroyed and rendered valueless, it is not taken, in the constitutional sense; but if a railroad company, in lawfully constructing its road, does precisely the same thing that the city did in grading the street, then the abutter's property is taken, though not physically entered upon at all. . . . The structure is therefore a lawful one. It does not destroy the street, as a street, though it may cause the plaintiff greater inconvenience in gaining access to his lots than he encountered before it was built. But this and the other injuries complained of are purely incidental and consequential, though the appellant [under the statutes and the ordinance] is not without a remedy therefor." . . . [BRYAN, J gave a dissenting opinion.] — ED.

taken, but the use only, the right of the public is limited to the use, the specific use, for which the proprietor has been divested of a complete dominion over his own estate. These are propositions which are no longer open to discussion." *Nicholson* v. *N. Y. & N. H. R. R. Co.*, 22 Conn. 85; *South Carolina R. R. Co.* v. *Steiner*, 44 Ga. 546. In the case of a telephone company, the Chancellor, in the case of *Broome* v. *New York & New Jersey Telephone Co.* (5th Central Rep. 814), held that, in order to justify a telephone company in setting up poles in the highway, it must show that it has acquired the right to do so, either by consent or condemnation from the owner of the soil, saying: "The complainant seeks relief against an invasion of his proprietary right to his land. The defendant, a telephone company, without any leave or license from, or consent by him, but, on the other hand, against his protest and remonstrance, and in disregard of his warning and express prohibition, and without condemnation or any steps to that end, set up its poles upon his land." What has been said is sufficient of itself to establish the right of the complainants to relief: for in order to justify the defendant in setting up the poles, it is necessary for it to show that it has acquired the right to do so, either by consent or condemnation from the owner of the soil. As to these rights of the owner of the soil see American and English Encyclopædia of Law, vol. 9, title "Highways," vii. sec. 2; *Board of Trade Tel. Co.* v. *Barnett*, 107 Ill. 508; *Southwestern R. R. Co.* v. *Southern & A. Tel. Co.*, 46 Ga. 43; *Western Union Tel. Co.* v. *Rich*, 19 Kansas, 517; *Willis* v. *Erie Tel. &c. Co.*, 34 N. W. Rep. 337.

That the erection of a telegraph line upon a highway is an additional servitude is clear from the authorities. That it is such is equally clear upon principle in the light of the Virginia cases cited above. If the right acquired by the Commonwealth in the condemnation of a highway is only the right to pass along over the highway for the public, then, if the untaken parts of the land are his private property, to dig up the soil is to dig up his soil; to cut down the trees is to cut down his trees; to destroy the fences is to destroy his fences; to erect any structure, to affix any pole or post in and upon his land, is to take possession of his land; and all these interfere with his free and unrestricted use of his property. If the Commonwealth took this without just compensation it would be a violation of the Constitution. The Commonwealth cannot constitutionally grant it to another. . . . We think the instructions of the Circuit Court were clearly right, and there is no error therein. . . .

LEWIS, P., dissenting, said: I take a very different view of the case from that taken in the opinion of the court just read, and as the case is an important one, I will state the reasons for my dissent. I agree that the Act of February 10, 1880, does not provide for additional compensation to the owners of lands abutting on highways along which telegraph lines may be constructed, and therefore that the question in the case is, whether, on that account, the Act is unconstitutional? . . .

What, then, is the nature and extent of the public easement in land condemned for a highway? The plaintiff contends that it is merely a right of passage, and nothing more; *Bolling* v. *The Mayor of Petersburg*, 3 Rand. 563, is referred to in support of this position.

That case, which adopts the language of the ancient authorities on the subject, does, indeed, so hold, and when it was decided, the language used was sufficiently comprehensive to cover every then known mode of enjoying the public right. But since that time civilization has advanced; new modes of using the public highways have been discovered, and as the common law adapts itself to the constantly-changing wants and conditions of society, the courts have held, and rightly, I think, that the view contended for by the plaintiff is altogether too narrow and restricted; so that the principle, as now established, is that the highways of a State are not only open and free for travel and traffic, but that, with the assent of the legislature, they may be devoted, under the original appropriation, to such other public uses as are consistent with their use as public thoroughfares. . . .

Much of the confusion in the decisions on the subject of the constitutional power of the legislature over highways is owing, it seems to me, to a failure to discriminate between *the use* for which a highway is appropriated and the modes of using it. Hence, in passing upon such questions, a clear idea of what a highway is ought always to be kept in view. And what is a highway? Perhaps no better definition of it, in the light of reason and the modern decisions, can be given than to say that it is a road or thoroughfare for the use of the general public for the purpose of *inter-communication*, which embraces the right to use the highway, not only for passage, but for the transmission of intelligence. Formerly, as before remarked, the only mode by which intelligence could be transmitted over a highway was by passing over it. But it is not so now. The discovery of the telegraph and the telephone has revolutionized the methods of inter-communication; and I am unable to perceive why, when a message is sent over a telegraph or telephone wire erected on the public highway, the same, or substantially the same, use is not made of the highway as when a message is sent over it by a messenger on foot or on horseback. In the one case, as was well said in the argument at the bar, the message goes with the messenger; in the other, it goes without a messenger, — the only difference being in the mode of sending it. And it hardly seems in keeping with the progressive spirit of the common law, in eulogy of which so much has been justly written, to say that the new method is not admissible, though with the assent of the legislature, because it was not known to Bracton or Blackstone. Said the court, in *Dickerson* v. *Colgrove*, 100 U. S. 578: "The common law is reason dealing by the light of experience with human affairs." And what experience had our fathers with electricity, as an element of inter-communication, in 1825, when *Bolling* v. *Mayor of Petersburg* was decided? None whatever.

That the new method is not inconsistent with the ordinary use of a

highway is, to my mind, obvious. Indeed, it is in aid of it; for it not only furnishes vastly increased facilities of inter-communication, but it tends to the relief of the highway by lessening travel over it, — which in populous cities, and even in the country, is no small consideration. And here it may be remarked that the statute expressly provides that in no case shall a telegraph or telephone erected along a highway obstruct the ordinary use of the highway. Acts 1879–1880, p. 53; Code, secs. 1287–1290. . . . In the argument, a number of authorities were cited to show that it is not competent for the legislature to authorize a telegraph company to construct its line over the right of way of a railroad company, without making just compensation therefor; and this, I take it, no one will deny. The road-bed and right of way of a railroad company — at least in this State — is as much its property as is its rolling-stock, or the money in its treasury, and the one can no more be lawfully taken without just compensation than the other. But that is a very different case from this; for here I have endeavored to show that the plaintiff's property has not been taken; that nothing has been granted but the right to use a public easement, which right, under no circumstances, can last longer than the easement itself.

Fortunately, direct authority is not wanting in support of these views. The precise question has been adjudicated in two well-considered opinions, — one by the Supreme Judicial Court of Massachusetts, in the case of *Pierce* v. *Drew*, 136 Mass. 75; the other by the Supreme Court of Missouri, in the case of *The Julia Building Ass'n* v. *The Bell Telephone Co.*, 88 Mo. 258, — in both of which cases it was distinctly held that an additional servitude is not imposed by the erection on a public highway of a telegraph or telephone line, under a statute of the State, and that such statute is not unconstitutional, because it makes no provision for additional compensation to the owners of the fee in the highway. In the first mentioned case, the court, in an able and learned opinion by Mr. Justice Devens, said: "The discovery of the telegraph developed a new and valuable mode of communicating intelligence. Its use is certainly similar to, if not identical with, that public use of transmitting information for which the highway was originally taken, even if the means adopted are quite different from the post-boy or the mail-coach. It is a newly-discovered method of exercising the old public easement, and all appropriate methods must have been deemed to have been paid for when the road was laid out." And he added that, "under the clause to regulate commerce among the States, conferred on Congress by the Constitution of the United States, although telegraphic communication was unknown when it was adopted, it had been held it is the right of Congress to prevent the obstruction of telegraphic communication by hostile State legislation, as it has become an indispensable means of inter-communication." Citing *Pensacola Telegraph* v. *Western Union Telegraph*, 96 U. S. 1. See also *Telegraph Co.* v. *Texas*, 105 U. S. 460; *Western Union Tel. Co.* v. *Alabama*, 132 U. S. 472, and cases cited.

In the telephone case, it was said: "If a thousand messages were daily transmitted by means of telephone poles, wires, and other appliances used in telephoning, the street through these means would serve the same purpose, which would otherwise require its use either by footmen, horsemen, or carriages to effectuate the same purpose. In this view of it, the erection of telephone poles and wires for transmission of oral messages, so far from imposing a new and additional servitude, would, to the extent of each message transmitted, relieve the street of a servitude or use by a footman, horseman, or carriage."

In opposition to these views, the case of *Board of Trade Tel. Co.* v. *Barnett*, 107 Ill. 507, has been cited. That case was disapproved of by both the Massachusetts and Missouri courts, and, I think, with good reason. The case decides that there is no difference in principle between a telegraph and a steam railway in a country highway, so far as the abstract question of servitude is concerned, and that as the railway is an additional servitude, so also is the telegraph. But this reasoning, to my mind, is fallacious. In the nature of things, the use of a highway for operating a steam-railway more or less excludes the ordinary methods of travel, and is attended with other inconveniences besides. But can this be said of the telegraph? In what way does a telegraph erected on the side of a highway in the country interfere with the rights of the abutting owner, or with its use as a public thoroughfare? Does it exclude or obstruct travel? On the contrary, it is obviously much less of an obstruction than travellers on horseback or in vehicles over the road usually are to one another; and as to any increased dangers or annoyances resulting from the use of streets in a city for the stringing of numerous wires, of which much has been said, that is not a direct but an incidental injury, which is a matter for the legislature, and not for the courts, to consider; for nobody doubts that in such cases the legislature may, if it sees fit, require additional compensation to the owners of the fee to be made.

It has never been questioned, so far as I am informed, that the legislature may authorize telegraph wires to be laid beneath the surface of a street, without additional compensation therefor; and if this can be lawfully done, the power to authorize the wires to be put above the surface would seem to be equally clear, the difference being a mere matter of regulation, as to which, as we have seen, the power of the legislature is unqualified. . . . My opinion, therefore, is that the Act in question is constitutional and valid, and that the judgment of the Circuit Court should be reversed.

RICHARDSON, J., concurred with LEWIS, P. *Judgment affirmed.*[1]

[1] And so *Stowers* v. *Postal Tel. Co.*, 68 Miss. 559 (1891). — ED.

HALSEY *v.* THE RAPID TRANSIT STREET RAILWAY COMPANY.

NEW JERSEY COURT OF CHANCERY. 1890.

[47 *N. J. Eq.* 380.]

Mr. John R. Emery and *Mr. Frederic W. Stevens*, for the complainant. *Mr. Chandler W. Riker* and *Mr. Theodore Runyon*, for the defendant.

VAN FLEET, V. C. The complainant owns lands abutting on Kinney Street and Belmont Avenue, in the city of Newark. His lands have a frontage on Kinney Street of two hundred and thirty-six feet, and on Belmont Avenue of about one hundred and thirty-three feet. His title extends to the middle of the street. The defendant is a street railway corporation. It was organized under a general statute approved April 6th, 1886, entitled "An Act to provide for the Incorporation of Street Railway Companies and to regulate the same." Rep. Sup. p. 363. The defendant has laid two railroad tracks in Kinney Street, and intends to lay two others in Belmont Avenue. One of those laid in Kinney Street is on that part of the street in which the complainant owns the fee of the land. No claim is made that these tracks were put down without authority of law, or in violation of the complainant's rights. They are unquestionably lawful structures. They were put down by permission of the city authorities and under their supervision. The defendant intends to use electricity as the propelling power of its cars, and for the purpose of applying this force to the motors on its cars, it has, with the permission of the city authorities, erected three iron poles in the centre of Kinney Street and strung wires thereon. The poles stand partly on the complainant's land. The erection of these poles and the use to which the defendant intends to apply them constitutes the only ground on which the complainant rests his right to the relief he asks. The bill describes these three poles as standing one hundred and eleven feet distant from each other, about twenty feet in height, ten inches by six in diameter at the base, set in a guard or frame, in the form of an inverted cup, which at its base is twenty-two inches by eighteen in diameter. . . . The poles were erected without the consent of the complainant and without compensation to him. No compensation is intended to be made. The complainant insists that the erection of the poles imposed a new and additional servitude on his land in the street; in other words, that his land, by the erection of the poles, has been appropriated to a purpose for which the public have no right to use it. . . .

The question on which the decision of the case must turn is this: Has the complainant's land in the street been appropriated to a purpose for which the public have no right to use it? It is of the first

importance in discussing this question to keep constantly before the mind the fact that the *locus in quo* is a public highway, where the public right of free passage, common to all the people, is the primary and superior right. The complainant has a right in the same land. He holds the fee subject to the public easement. But his right is subordinate to that of the public, and so insignificant, when contrasted with that of the public, that it has been declared to be practically without the least beneficial interest. Mr. Justice Depue, in pronouncing the judgment of the Court of Errors and Appeals in *Hoboken Land and Improvement Co.* v. *Hoboken*, 7 Vr. 540, 581, said: "With respect to land, over which streets have been laid, the ownership for all substantial purposes is in the public. Nothing remains in the original proprietor but the naked fee, which on the assertion of the public right is divested of all beneficial interest." This view was subsequently enforced by the same court in *Sullivan* v. *North Hudson R. R. Co.*, 22 Vr. 518, 543. Both the nature and extent of the public right are well defined. Lands taken for streets are taken for all time, and if taken upon compensation, compensation is made to the owner once for all. His compensation is awarded on the basis that he is to be deprived perpetually of his land. The lands are acquired for the purpose of providing a means of free passage, common to all the people, and consequently may be rightfully used in any way that will subserve that purpose. By the taking the public acquire a right of free passage over every part of the land, not only by the means in use when the lands were taken, but by such other means as the improvements of the age, and new wants, arising out of an increase in population or an enlargement of business, may render necessary. It is perfectly consistent with the purposes for which streets are acquired that the public authorities should adapt them, in their use, to the improvements and conveniences of the age. *Morris and Essex R. R. Co.* v. *Newark*, 2 Stock. 352, 357. This is the principle on which it has been held that a street railway, operated by animal power, does not impose a new servitude on the land in the street, but is, on the contrary, a legitimate exercise of the right of public passage. Such use, though it may be a new and improved use, still is just such a use as comes precisely within the purposes for which the public acquired the land. Chancellor Williamson, speaking on this subject in the case last cited, said in substance (p. 558), the authority to use a public highway for the purpose of a railroad, retaining the use of such highway for all ordinary purposes, subject only to the inconvenience of the railroad, is not such a taking of private property from the owner of the fee of the adjacent land as is prohibited by the Constitution. The easement of the highway is in the public, although the fee is technically in the adjacent owner. It is the easement only which is appropriated, and no right of the owner is interfered with. While the street is preserved as a common public highway, the use of it does not belong to the owner of the land abutting on it any more than it does to any other individual of the

community. The legislature, therefore, does not, by permitting a railroad company to use the highway in common with the public, take away from the land-owner anything that belongs to him. It is not a misappropriation of the way. It is used, in addition to the ordinary mode, in an improved mode for the people to pass and repass. This exposition of the law, so far as it concerns horse railroads, has been approved as correct in all subsequent cases. As I understand the adjudications of this State, this principle must be considered authoritatively established, that any use of a street which is limited to an exercise of the right of public passage, and which is confined to a mere use of the public easement, whether it be by old methods or new, and which does not tend, in any substantial respect, to destroy the street as a means of free passage, common to all the people, is perfectly legitimate. Such use invades no right of the abutting owners; it takes nothing from them which the law reserved to the original proprietor when his land was taken; it is simply a user of a right already fully vested in the public, and consequently, by its exercise, nothing is taken from the abutting owners which can be made the basis of additional compensation.

It is not denied that the railway tracks which the defendant has laid on the complainant's land were placed there by authority of law, nor that the defendant has a legal right to use them in the transportation of passengers, but the complainant's claim is this: that by the erection of the three poles, his land in the street has been appropriated to a use entirely outside of the public easement, and that it follows, as a necessary legal consequence, that such use constitutes a wrongful taking of his property. Stated more briefly, his claim is, that the erection of the poles puts an additional servitude on his land, and attempts to give the public a right in his land which, as yet, has not been acquired, nor paid for. That the poles will, to a trifling extent, obstruct public travel and prevent infinitesimal parts of the street from being used as a means of free passage, is a fact which cannot be denied, but there is nothing in this situation of affairs which entitles the complainant to the aid of a court of equity, unless it is made to appear that the nuisance thus created results in some substantial injury to him, different from that suffered by the public at large, and that the damage which he will sustain in consequence of the nuisance is irreparable in its character. The rule on this subject is settled. An individual has no right of action, in cases of nuisance created by obstructing a highway, unless he suffers some private, direct, and material damage beyond the public at large, as well as damage otherwise irreparable. Mere diminution of the value of the property of the party complaining, by the nuisance, without irreparable mischief, will not furnish any foundation for equitable relief. *Morris and Essex R. R. Co.* v. *Prudden*, 5 C. E. Gr. 530, 537. . . .

The court might very properly, I think, at this point deny the complainant's application, on the ground that he has shown no such injury

as entitles him to relief by injunction, but as this course would leave the principal question of the case undecided, it should not, in my judgment, be adopted. The litigants, I think, are entitled to a decision on the question, whether or not the complainant's land in the street has been appropriated, by the erection of the poles, to a use not within the public easement. That is the question which received the principal attention of counsel on the argument, and which has occupied the greater part of the time devoted to the consideration of the case.

The right of the defendant to use electricity as its motive-power is clear. The defendant was organized under a general statute, authorizing seven or more persons to associate themselves together, by articles in writing, for the purpose of forming a corporation to construct, maintain, and operate a street railway for the transportation of passengers. Rev. Sup. p. 363. The motive-power to be used by corporations formed under this statute is in no way limited or defined; the statute does not say that they shall use animal, mechanical, or chemical power; it says nothing at all on the subject of power; hence, under the general grant of power to maintain and operate a street railway, it would seem to be clear that a corporation formed under this statute takes, by necessary and unavoidable implication, a right to use any force, in the propulsion of its cars, that may be fit and appropriate to that end, and which does not prevent that part of the public which desires to use the street, according to other customary methods, from having the free and safe use thereof. While the rule is elementary that public grants are to be strictly construed, still it is also well established, that where a corporation is authorized, by a general grant, to exercise a franchise or to carry on a business, and the grant contains no words either defining or limiting the powers which the corporation may exercise, it will take, by implication, all such powers as are reasonably necessary to enable it to accomplish the purposes of its creation. I am, therefore, of opinion, that if there was no other legislation on this subject than that just mentioned, and that it was made to appear that electricity could be used for the propulsion of street cars without preventing the free and safe use of the street by other means of transportation, the defendant would, by force of the statute under which it was organized, have a right to use electricity as its motive-power. But there is other legislation on this subject. Just a month prior to the approval of the statute under which the defendant was organized, another statute was passed, which declares that any street railway company in this State may use electric motors as the propelling power of its cars instead of horses; provided, it shall first obtain the consent of the proper municipal authority to use such motors. Rev. Sup. p. 369, § 30. . . .

By the terms of the statute just construed, no street railway corporation can use electricity as its motive-power until it has obtained the consent of the proper municipal authority. The defendant has such consent. It was given by resolution adopted by the common council and approved by the mayor. The complainant contends that

consent cannot be given by resolution, and insists that the municipality, in such a matter, can only act by ordinance. But the rule, according to the adjudged cases, is firmly settled the other way, and may be stated as follows: Where a statute commits the decision of a matter to the common council or other legislative body of a city, and is silent as to the method in which the decision shall be made, it may be made either by resolution or ordinance. Or — to state the rule in another form — where no method is prescribed in which a municipality shall exercise its power, but it is left free to determine the method for itself, it may act either by resolution or ordinance. One method is just as effectual in point of law as the other. *State* v. *Jersey City*, 3 Dutch. 493; *City of Burlington* v. *Dennison*, 13 Vr. 165; *Butler* v. *Passaic*, 15 Vr. 171.

In view of the legislation and the action of the city authorities just discussed, it would seem to be clear, that the right of the defendant to use electricity as its motive-power stands, at least so far as the public are concerned, on a sure foundation. The poles and wires are to be used to apply electricity to the motors on the cars. They form a part of what is called the overhead system. In the present state of the art, they constitute a part of the best, if not the only means, by which electricity can be successfully used for street-car propulsion. The proof on this point is decisive. Thomas A. Edison is perhaps the highest authority on this subject in this country. He says, in an affidavit annexed to the defendant's answer, that the only method of applying electricity for street-car propulsion which, up to the present time, has proved successful, electrically and commercially, is what is known in the art as the overhead system, whereby electricity is supplied to the motors on the cars from wires suspended above the cars. Other electricians say the same thing. The proofs also show, that there are over two hundred electric street railways in the United States either in operation or in course of construction, and that of those in operation nearly all use the overhead system. That, according to the proofs, is the best system, and the one in general use, and the only one which, as yet, has proved successful. The facts just stated are in no way controverted, so, as the proofs now stand, the court is bound to declare, as an established fact, that the poles and wires are, in the present state of the electric art, necessary to the successful operation of the defendant's railway by electricity. The poles and wires are to be used as helps to the public in exercising their right of passage over the street. They form part of the means by which a new power, to be used in the place of animal power, is to be supplied for the propulsion of street cars, and they have been placed in the street to facilitate its use as a public way and thus add to its utility and convenience. The whole matter may be summed up in a single sentence: the poles and wires have been placed in the street to aid the public in exercising their right of free passage over the street. That being so, it seems to me to be clear beyond question, that the poles and wires do not im-

pose a new burden on the land, but must, on the contrary, be regarded, both in law and reason, as legitimate accessories to the use of the land for the very purposes for which it was acquired. They are to be used for the propulsion of street cars, and the right of the public to use the streets by means of street cars, without making compensation to the owners of the naked fee in the street, is now so thoroughly settled as to be no longer open to debate. It would seem then to be entirely certain, that the occupation of the street by the poles and wires takes nothing from the complainant which the law reserved to the original proprietor when the public easement was acquired. This view is in strict accord with the uniform current of judicial opinion on this subject. The question presented here for judgment has already been considered by the Supreme Court of Rhode Island in *Taggart* v. *Newport Street Railway Co.*, 19 Atl. Rep. 326, and by the Circuit Court of the United States for the eastern district of Arkansas in *Williams* v. *City Electric Street Railway Co.*, 41 Fed. Rep. 556, and by local courts in Kentucky, Ohio, and Indiana, and in each instance the decision has been that the placing of the poles and wires in the street, for the purpose of propelling street cars by electricity, did not impose a new servitude on the land, nor appropriate the land to a use not within the public easement. The decision in these cases was placed upon this manifestly just principle: that the question, whether a new method of using a street for public travel results in the imposition of an additional burden on the land or not, must be determined by the use which the new method makes of the street, and not by the motive-power which it employs in such use. The use is the test and not the motive-power. And this principle exhibits, in a very clear light, the reason why it has been held that the placing of telegraph and telephone poles in the street imposes an additional servitude on the land. They are not placed in the street to aid the public in exercising their right of free passage, nor to facilitate the use of the street as a public way, but to aid in the transmission of intelligence. Although our public highways have always been used for carrying the mails and for the promotion of other like means of communication, yet the use of them for a like purpose, by means of the telegraph and telephone, differs so essentially, in every material respect, from their general and ordinary uses, that the general current of judicial authority has declared that it was not within the public easement. Massachusetts has, however, by a divided court, held otherwise. *Pierce* v. *Drew*, 136 Mass. 75. . . .

The poles and wires . . . are designed to facilitate the use of the streets as means of public passage, and thus increase their utility and convenience to the public. But I do not believe it is possible to imagine any condition of facts which would make it lawful to erect a building, to be used as a dwelling, in a public way. Such use of the land would undoubtedly be entirely foreign to the purposes for which it was acquired. There can, however, be no doubt, I think, that erections may be law-

fully made in the streets of a city for the purpose of lighting them. They must be lighted at night to make their use safe and convenient, and to prevent lawlessness and crime. By the charter of Newark, power is given to its governing body, by express words, to light the streets, parks, and other public places. I have no doubt that in virtue of this power the city has the right to erect poles in the street just where the poles in question are. The poles in question are in fact to be used for the purpose of lighting the street. One of the conditions on which the city gave its consent to the erection of the poles is, that the defendant shall place on every other pole a group of five incandescent lights, of sixteen candle-power each, and furnish such light every night. This use of the poles and wires would, in my judgment, legalize their erection, but this is not their primary use. They were erected primarily and principally to facilitate the use of the street and add to its convenience as a public way, and it is upon this ground that I think it should be declared that their presence in the street invades no right of the complainant.

The averment that the use of electricity by the defendant, as its propelling power, will render the street so extremely dangerous as practically to destroy it as a public way for any other use than that which the defendant may make of it, is not supported by the proofs; on the contrary, I think it is very clearly shown, that an electric current of the volume the defendant will use, may be used with entire safety to everybody.

The complainant's application must be denied, with costs.[1]

[1] And so *Patterson Ry. Co.* v. *Grundy*, 26 Atl. Rep. 788 (N. J. Ch. 1893); *Taggart et al.* v. *Newp. St. Ry. Co.*, 16 R. I. 668 (1890); *Dean* v. *Ann Arbor St. Ry. Co.*, 93 Mich. 330 (1892); aff'g *Det. Ry.* v. *Mills*, 85 Mich. 634 (1891). See Poles and Wires, 4 Harv. Law Rev. 245; Keasbey, Electric Wires in Streets, cc. vi–xi.; Randolph, Em. Dom. s. 403.

In *West Jersey Ry. Co.* v. *Camden, &c. Ry. Co.*, 29 Atl. Rep. 423, 424 (N. J., June, 1894), the court (McGILL, CHANCELLOR), in dissolving an injunction, said: "The complainant seeks to sustain the injunction it has obtained as a protection against the invasion of its property rights which, under the Constitution, cannot be appropriated by the street railway without authority of law, and upon compensation. The rights which it deems to be threatened arise from its status, — first, as the owner of the fee of land occupied by Cooper Street; and, second, as the owner of a steam railroad authorized to cross that street. The ownership of the fee in the soil in the public street is subordinate to the public use thereof for the purposes of a highway. That use is an easement of passage by every one over the highway, and every part of it, by any means which will not substantially and permanently exclude any one from the enjoyment of that common right. The means by which such use is to be lawfully had cannot be particularly defined, because, as suggested by Vice-Chancellor Van Fleet, in *Halsey* v. *Railway Co.*, 47 N. J. Eq. 380, 20 Atl. 859, they will be as numerous as the improvements of the age and new wants, arising out of an increase in population or an enlargement of business, may render necessary. It has been repeatedly declared by the courts of this State that the use of the public easement of a highway by a horse railway is a lawful servitude, and therefore is not a new burden of the soil for which compensation must be made to the owner, the reason being that it is a convenient and beneficial means of passage to the public which does not prevent the accustomed use of the highway by

others. On the contrary, it so accommodates and facilitates that use that it more than compensates for the slight inconvenience that its rails and the necessity of permitting it to have the right of way over ordinary vehicles occasion. It is a means of use which stands in marked distinction from the steam railway (though the difference is only in degree), whose raised rails, noise, speed, and accompanying danger have led the courts to declare it to be incompatible with the common use of the highway, and therefore an additional servitude, for which the owner of the soil must be compensated. *Citizens' Coach Co.* v. *Camden Horse R. Co.*, 33 N. J. Eq. 267. The electric street railway, as now ordinarily in use, by cars patterned in style and size after the horse railway car, stands, as a means of using the highway, in degree, between the horse and the steam railways As in case of the horse railway, its rails do not materially interfere with the ordinary use of the highway. While its motive-power, as usually applied, exceeds in capacity that of the horse railway, and the noise and danger attending its operation are greater, they do not extend to the power, noise, and danger of the steam locomotive, with its attendant train of cars. Its capacity for speed is great, but that is subject to municipal control. I do not now deal with the future possibilities of the electric railway. It may readily be conceived that the greater motive-power it possesses may some time induce an attempt to use the highways by trains of cars, or by rails and cars of such character and size as to practically work all evils of the steam railway, and that there will be inaugurated systems of through cars, in furtherance of rapid transit between distant points, which will crowd and burden the street to the inconvenience and obstruction of its other uses, without any accommodation to the ordinary local use of the street, and thus the degree of incompatibility with the common use may be so raised that the courts will be obliged to distinguish between methods of use, and declare against some as creating an additional servitude of the land occupied by the highway, the crucial test for that distinction being whether the use contemplated is compatible with the purpose for which the common highway was originally designed. But such use is not at present the normal operation of the electric street railway, and it is not claimed that any such abnormal conditions exist in the case under consideration.

"Basing their conclusions upon the contemplation of the customary use of the electric street railway, the courts have regarded that, as operated by the trolley system, it is not an additional burden upon the soil in the common highway. *Halsey* v. *Railway Co.*, *supra*; *Taggart* v. *Railway Co.*, 16 R. I. 668, 19 Atl. 326; *Railway Co.* v. *Mills*, 85 Mich. 634, 48 N. W. 1007; *Lockhart* v. *Railway Co.*, 139 Pa. St. 419, 21 Atl. 26; *Hudson River Tel. Co.* v. *Watervliet Turnpike and Ry. Co.*, 135 N. Y. 393, 407, 32 N. E. 148; *Railway Co.* v. *Winslow*, 3 Ohio Cir. Ct. R. 425. The first cited of these cases is the utterance of this court. But it is a work of supererogation at this time to treat this question as more than an unsettled and doubtful one. It is at least that. The present application is to dissolve a preliminary injunction which will not be suffered to stand in the protection of the complainant from a use of the street by the defendant which may or may not invade its property rights. Unless the invasion be clear, the injunction must be dissolved. *Citizens' Coach Co.* v. *Camden Horse R. Co.*, *supra*: *Hagerty* v. *Lee*, 45 N. J. Eq. 255, 17 Atl. 826.

"But it is urged that the poles, planted within the curb lines of the sidewalk to support the overhead wires, are at least an invasion of private property. The sidewalks are parts of the highway, subject to the public easement. They are set apart principally for use by pedestrians. They are defined by the curb lines beyond which vehicles may not go, and at which, experience has taught, lamp, hitching, and awning posts, shade trees, and the like, may be planted without inconvenience either to pedestrians or vehicles. At that place the lamp-post, which provides a means to light the highway and thus facilitate its use, has not been regarded as an additional burden upon the soil, and, upon similar consideration, it becomes difficult to perceive why the poles which accommodate a convenient use of the highway by a street railway are to be regarded differently. It is to be remembered, however, that the abutting land-owner ordinarily has something more of property than the ownership of the mere fee of the soil in the sidewalk. By the laws and usages of the State the sidewalk has in a degree been regarded as an appendage to and a part of the premises abutting upon it, and as so essential to the beneficial use of such premises that its improvement is prop-

STREET RAILWAY COMPANY *v.* DOYLE.

SUPREME COURT OF TENNESSEE. 1890.

[88 *Tenn.* 747.]

APPEAL in error from Circuit Court of Shelby County, L. H. ESTES, J. *Turley & Wright* and *Myers & Sneed*, for Street Railway Company. *F. P. Edmonson* and *J. P. Houston*, for Doyle.

CALDWELL, J. Action of Doyle, an abutting lot-owner, to recover damages from the East End Street Railway Company for the alleged wrongful and unlawful construction and operation of its railway line along and upon the highway in front of his property. Verdict and judgment for plaintiff, and appeal in error by defendant.

On the trial below the defendant requested the trial judge to instruct the jury as follows: "If the jury find that the defendant constructed its road through a part of the city to a point five miles into the country, in accordance with its contract with the city and county, road [its cars] being propelled by a steam motor, and used only for carrying passengers, stopping at street crossings to take on passengers, then the court charges you that its construction is not an additional servitude upon the streets or public roads from that contemplated in the dedication."

The court refused to give this instruction, and his action in that behalf is assigned as error.

This presents the question reserved in the Smith case (3 Pickle, 633), namely: Whether a railway, whose cars are propelled by "a dummy steam-engine," and used for passengers only, is a burden or servitude on the public street or highway in addition to that contemplated in the original dedication of the land to public use. The reser-

erly imposed upon the owner of the abutting land. *Halsey* v. *Railway Co., supra; State* v. *Mayor, &c.*, 37 N. J. Law, 415; *Weller* v. *McCormick*, 47 N. J. Law, 397, 1 Atl. 516. It follows that if such improvement of the sidewalk, or constructions under it, which the land-owner shall lawfully make in pursuance of his duty to the public, or for his own private convenience, be expensive in character, so that substantial damage will result to him from the planting of the trolley poles, a serious question will arise whether there will not be a taking of his property for which he must be compensated, and a threatened invasion sufficiently serious to induce this court's interference. But that question is not presented in this case. It does not appear that the complainant has improved the sidewalk in front of its property so that the planting of the poles will substantially or seriously damage such improvement, or, indeed, that it has improved them at all. Another consideration borne in mind is that the abutting property owner has the right of ingress to and egress from his property by means of the street in a manner which will accord with the lawful purposes to which he devotes his property, and also to a reasonably available way through the highway to the several stories of his building in cases of emergencies, like fire. He also has the right to light and air from the highway. And he cannot be deprived of either of these rights by the placing of poles or erection of wires without compensation being made to him. *Railway Co.* v. *Grundy*, 51 N. J. Eq. 213, 223, 26 Atl. 788. No question touching these rights is presented at this time." — ED.

vation was made in that case because the plaintiff therein did not own the ultimate fee in the street, and was not, therefore, in an attitude to be affected by a decision of the question. For reasons stated in that case and in the Bingham case, to be hereafter cited, an abutting land-owner, whose line is the side and not the centre of the public highway, is not entitled to compensation for the imposition of an additional burden on the ultimate fee. Not owning the fee, he can justly claim no compensation for its impairment by a new burden imposed upon it. That is a matter for the owner of the estate, out of which the public easement was originally carved, and not for the abutting owner, whose title-papers take him only to the side of the highway, as was true in the Bingham and Smith cases.

In the present case the plaintiff's line is in the centre of the highway, and to that line he owns the ultimate fee; that is, he has such ownership of the soil that he may resume absolute possession and dominion of it to the centre of the highway whenever the original use for which the highway was set apart shall be finally abandoned.

The appropriation vested the public with only such part of his fee-simple estate as was necessary to the full enjoyment of the use then in contemplation. Consequently anything which diverts the highway from that use, or applies it to another or different use, is the imposition of an additional burden on the reserved estate of the owner, and constitutes a taking of his property, for which he may demand and recover just compensation.

So, then, the proposition contained in the request for special instruction is a material one in this case, and should have been given or refused, as it may be sound or unsound in law.

It is well settled that an ordinary steam or commercial railway is, and that an ordinary street railway, operated with horses, is not an additional servitude on the ultimate fee in the public street or highway, the former being a new and different use, while the latter is but an improved and consistent mode of enjoying the original or ordinary use. *Bingham* v. *Railroad*, 3 Pickle, 522; *Smith* v. *Street Railroad*, lb., 633, and authorities cited.

The distinction between the use by the commercial railway and that by the horse railway is so wide and plain that it needs no further comment or illustration.

Confessedly, the railway involved in this case is on the line between the two — the equivalent of neither, but partaking largely of the nature of both. Like those upon the commercial railway, its cars are propelled by a steam-engine, with its unavoidable smoke, noise, and vibration, though in a less degree; and, like the horse-car line, it transports passengers only, stopping at short intervals upon the highway to take them on and let them off, while the commercial railway carries both passengers and other freight, receiving and discharging them at regular depots farther apart.

The size, weight, and speed of appellant's trains (consisting usually

of a small "boxed" engine and two coaches) are much less than those of the commercial railway trains; but, at the same time, its trains are much larger, heavier, and more rapid in transit than the ordinary horse-car. Alike, the commercial railway and that operated by the appellant are obvious hindrances to other modes of travel and traffic rightfully enjoyed upon the public highway; alike, they endanger the lives and property of individuals, for whom, in the aggregate, the original dedication or condemnation was made. There is a difference, it is true; but the difference is in the degree and not in the kind of interruption and peril.

From the very nature of the case it is perfectly manifest to our minds that the presence of appellant's track and trains is entirely inconsistent with, and a perpetual embarrassment to, the ordinary use of the public highway.

It is utterly impossible to operate such a railway with such trains without greatly obstructing and rendering more dangerous other business and travel usually seen and always allowable on a public highway.

To the extent of this obstruction and this increase of danger by its appropriation of the highway for its own purposes, there is necessarily a diversion from and inconsistency with the original use; and to that extent the construction and operation of appellant's road is the imposition of an additional servitude upon the ultimate fee of the owners of the soil in the public highway.

This does not mean that the trains of appellant are to be banished as unauthorized by law, but simply that their presence and operation in the public highway is an additional burden on the ultimate fee, for which the owner is entitled to compensation.

The charter from the State and contract with the city and county authorize the proper construction and use of this railway, but they do not purport to warrant the appropriation of the owner's property without paying him therefor. Even if such were their purport and intent, that could not alter the case, and would afford no sufficient answer to the plaintiff's demand, because the Constitution forbids the taking of private property for public use without just compensation. Constitution, Art. I., Sec. 21.

The instruction requested was properly refused.

Counsel for appellant have called our attention to the case of *Newell* v. *Minn. L. & M. Ry. Co.*, 35 Minn. 112 (s. c. 27 N. W. R. 839), which we find to be an authority for the proposition requested, and in conflict with the conclusion reached in this opinion. Not agreeing to the reasoning of that case, and the decision of a sister State being at most only persuasive authority, we prefer not to follow it.

We have carefully considered the several other assignments of error. None of them are well taken.

Let the judgment be affirmed.[1]

[1] Compare *McQuaid* v. *Portl., &c. Ry. Co.*, 18 Oreg. 237 (1889). — Ed.

IN *Sterling's Appeal*, 111 Pa. 35, 40 (1885), where a Natural Gas Company was proposing to lay its pipes under a country highway in front of the appellant's land, the court (STERRETT, J.) said: "As owner of the land traversed by the public road, he has a right to use it and the land on which it is located for any purpose that will not impede or interfere with the public travel. By appropriating land for the specific purpose of a common highway, the public acquires a mere right of passage with the powers and privileges incident to such right. The fee still remains in the land-owner notwithstanding the public have acquired a right to the free and uninterrupted use of the road for the purpose of passing and re-passing; and he may use the land for his own purposes in any way that is not inconsistent with the public easement. He may, for example, construct underneath the surface passage-ways for water and other purposes, or appropriate the subjacent soil and minerals if any, to any use he pleases, provided he does not interfere with the rights of the public. In other words, the only servitude imposed on the land is the right of the public to construct and maintain thereon a safe and convenient roadway, which shall at all times be free and open for public use as a highway. It is in view of this servitude that damages may be awarded to the land-owner. Laying and maintaining a pipe line, at the ordinary depth under the surface, necessarily imposes an additional burden on the land, not contemplated either by the owner or by the public authorities, when the land was appropriated for the purpose of a public road. It is a burden, moreover, which to some extent, at least, abridges the rights of the land-owner in the soil traversed by the road, and hence it is a taking within the meaning of the constitutional provision requiring just compensation to be made for property taken, injured, or destroyed. (Const. Art. XVI., sect. 8.) In some cases it is possible the injury may be consequential as well as direct. The constitutional provision embraces both.

"In *Bloomfield & Rochester Natural Gas Light Co.* v. *Calkins*, 62 N. Y. 386, it was held that a corporation organized under an Act, similar to ours, authorizing the formation of gas-light companies, has no authority to lay its pipes in a country highway without the consent of or without the appraisal and payment of compensation to the owner of the land. There is no reason why this should not be the rule with respect to public roads in the rural districts. As to streets and alleys in cities and boroughs, there are reasons why a different rule to some extent should prevail; but that question is not now before us."

McDEVITT v. PEOPLE'S NATURAL GAS COMPANY.

SUPREME COURT OF PENNSYLVANIA. 1894.

[28 *Atl. Rep.* 948.]

APPEAL from Court of Common Pleas, Alleghany County. . . .

S. Schoyer, Jr., and *W. S. Miller*, for appellants. *Geo. C. Wilson* and *F. M. Magee*, for the appellee.

WILLIAMS, J. The People's Natural Gas Company was incorporated under the Act of 1885 (P. L. 29), known as the "Natural Gas Act," for the purpose of supplying natural gas to the citizens of Pittsburgh for use as fuel. The city had given its permission to the company to occupy the streets with its mains and service pipes, and had undertaken to impose certain modes and restrictions upon it, in the manner of conducting its business, that have since been held to be unauthorized by law, and therefore without force or effect. *Pittsburgh's Appeal*, 115 Pa. St. 4, 7 Atl. 778. Pending the litigation over this subject the company began laying its mains into the city, and in July, 1886, entered upon Forbes Street, in the city, for that purpose. The appellees, who are the owners of lots on said street, then began proceedings by bill in equity to restrain the company from laying its gas main under the sidewalk in front of their premises on Forbes Street. Relief was asked on two grounds: First, because the ordinances of the city of Pittsburgh had not been complied with by the company; second, because the sidewalks along the sides of the cartways were not within the meaning of the Act of 1885, and were no part of the highways, but were private property, except for the purposes of passage by pedestrians. A preliminary injunction was granted, which was afterwards dissolved on condition that the company should execute a bond to indemnify the plaintiffs in that case for any loss they might sustain by reason of the laying of said main under the sidewalk in front of their premises. The bond was given, and the gas main laid. The plaintiffs then made application for the appointment of viewers to appraise the damages done to their property by the laying of the main under the sidewalk. Viewers were appointed, and an appraisement of the damages was made by them, which was appealed from. On a trial before a jury a verdict has been rendered against the company for a few cents less than $5,500, and the judgment entered thereon is now before us for review. . . .

We are in a position, therefore, to enter unembarrassed upon a consideration of the subject brought to our attention by the first assignment of error. The Act of 1885 confers the right of eminent domain on companies formed for the transportation of natural gas. In the exercise of this right, they may enter upon private property, or upon public streets or highways. If the entry is upon private property, the company must try "to agree with the owner as to the damage properly

payable for an easement in his or her property, if such owner can be found and is *sui juris*." Failing to agree with the owner, the corporation must tender him a bond to secure the payment of damages, and, if this is refused, must apply to the Court of Common Pleas of the proper county to approve the sufficiency of the bond. After this has been done, viewers may be appointed by the court to assess the damages proper to be paid to the property-owner "for the easement appropriated by the company." If the entry is upon a public street in a borough or city, the corporation must first procure the consent of the municipality, expressed "by ordinance duly passed and approved." So long as the gas main follows the street, the entry upon and occupation of the street is under the authority of the municipality. Whenever it leaves the street, and enters the private property of an individual, then the duty to negotiate with the owner arises, since entry upon and occupation of private property must be under authority derived from the owner. Forbes Street was a city highway, and subject, like all other streets in a city, to urban servitudes [1] for the benefit of the public. In land taken for a highway in the country, the easement acquired by the public is only for the purposes of a way over the surface. For all other purposes the land may be occupied by the owner, so long as the public easement is not disturbed. We accordingly held in *Sterling's Appeal*, 111 Pa. St. 35, 2 Atl. 106, that the maintenance of a pipe line under such a highway imposed an additional servitude upon the land. It may be a very slight one, but to some extent it abridges the rights of the land-owner in the soil. Our Brother STERRETT said in that case: "As to streets and alleys in cities and boroughs, there are reasons why a different rule, to some extent, should prevail." These reasons are obvious. The necessity for drainage, for a water supply, for gas for purposes of lighting, for natural or fuel gas for heat, for subways for telegraph and other wires, and for other urban necessities or conveniences, gives to the municipality a control over the subsurface that the township has not. Property in a city is no less sacred than property in the country. The title of the owner is neither better nor worse because of the location of his land. But its situation may subject it to a greater servitude in favor of the public in a large, compactly built city than would be imposed upon it in the open country. The city has the right to use the streets and alleys, to whatever depth below the surface it may be desirable to go, for sewers, gas and water mains, and any other urban uses. In taking the streets for these necessary or desirable purposes, it is acting, not for its own profit, but for the public good. It is the

[1] This phrase suggests, but has no real relation to the like expression in the Roman law. "The leading division of prædial servitudes in the civil law, but which appears to afford no practically useful distinction in the English law, is into urban and rustic servitudes, — the former including all servitudes relating to buildings wherever situated; the latter, all those relating to land uncovered by buildings, whether situated in town or country." — *Gale on Easements* (6th ed.), 22. Hunter, Roman Law (2d ed.), 415, 419, gives the right of *aquæ ductus* as a rural servitude, and the right of passing a sewer through or below another's ground, as an urban servitude. — ED.

representative of the inhabitants of the city, considering their health, their family comfort, and their business needs; and every lot-owner shares in the benefits which such an appropriation of the streets and alleys confers. If the city abridges his control over the soil in and under the streets, it compensates him by making him a sharer in the public advantages that result from proper drainage, from an abundant water supply, from the general distribution of gas, and the like. The disturbance of the owner's control over the subsurface of the streets is, in a legal sense, an invasion of his rights, but it is *damnum absque injuria*. He has no right of action against the municipality therefor. Dill. Mun. Corp. §§ 691, 699; Ang. Highw. §§ 25, 312; Elliott, Roads & S. 299; *Lockhart* v. *Railway Co.*, 139 Pa. St. 123, 21 Atl. 26; *Sterling's Appeal, supra.* The use of the surface is not restricted to the modes of travel in common use when the street is opened, but such improved methods of travel as the public interest requires may be adopted, with the consent of municipality. In *Rafferty* v. *Traction Co.*, 147 Pa. St. 579, 23 Atl. 884, we held that the operation of a street railway on a public street, when authorized by law, does not impose an additional servitude on the land, whether the railway company employs horses as motive power, or a cable, or electricity. It is a legitimate use of the surface in aid of the public right of passage over the streets. The Act of 1885 declares the transportation and supply of natural gas to be a public use, confers upon the corporations organized under its provisions the right of eminent domain, and requires them to furnish natural gas to consumers along their lines, or within the districts supplied by them, respectively. The appellant was organized under the Act of 1885. It came to the city of Pittsburgh proposing to furnish its citizens with natural gas as a fuel. The city was then to judge whether such fuel was desirable, and whether its introduction would be a convenience to its citizens so great as to justify the occupancy of the public streets by its mains and service pipes. This question was decided in favor of the company, and permission was given to use the streets of the city as a means of reaching customers. Under this permission, it might lawfully enter upon the streets, as we have already seen, to lay its pipes, without liability to lot-owners therefor.

But it is contended that the sidewalks are not a part of the street, and that, in laying its pipes under the sidewalk, the gas company has entered private property by virtue of its power of eminent domain, and must treat with the owner for the damages it may have done. This contention cannot be sustained. The Act of 1847 gives to cities the power "to cause to be graded, paved or macadamized any public street, lane or alley or parts thereof which is now or may hereafter be laid out and opened in any of the said cities . . . and to regulate, grade, pave and re-pave, curb and re-curb, the said footways and sidewalks," and to make regulations concerning the deposit of lumber, building material, or other articles "on any of the said footways, sidewalks or other portions of the said streets or alleys." The street includes the whole of

the land laid out for public use as a highway. The city determines how much of it shall be devoted to a cartway, and how much to a footway, and regulates the grading and paving of both. The separation of one from the other by a line of curbing is for the security of that part of the public that passes along the streets on foot, and for no other purpose. The municipality has the same control over the sidewalks that it has over the carriageways. *Livingston* v. *Wolf*, 136 Pa. St. 533, 20 Atl. 551. The learned judge of the court below took the same view of this question, and affirmed the defendant's first point, which asked an instruction that the "defendants have the same right in the sidewalks as they would have in that portion of the street lying between the curbstones." The situation of the defendant under this ruling was precisely the same as it would have been had the gas main been laid under the cartway.

The defendant's second point asked the court to say that the lot-owners on Forbes Street had no rights in the street except such as were subservient to the public use, under the direction or sanction of the city, and that as the defendant's gas-main was laid for a public use, under the authority of the Act of 1885, and with the consent of the municipal government, the lot-owners along Forbes Street were not entitled to recover damages for the use of the street. This point the learned judge refused. The logical result of this ruling is to put the rights of the lot-owner in the street in front of his premises above the rights of the public represented by the municipality. In other words, it puts the urban servitudes in a subservient position, and makes the imposition of each of them upon a city street an additional servitude upon the land of the adjoining lot-owner, for which he has a right of action. This is not the law in this State, as is shown by the authorities already cited. As applicable to a country highway, it would be quite right, for under the general road laws the public easement in such a highway is for passage over the surface only. Land taken for a street in a city is subjected to a very different easement, because of the sanitary and business needs of a city; and the extent of the easement depends upon the municipal judgment as to the extent of occupancy necessary to subserve the health, the comfort, and convenience of the citizens. Elevated structures that interfere with the passage of light and air stand on different ground. *Jones* v. *Railroad Co.*, 151 Pa. St. 30, 25 Atl. 134. In this case no entry was made upon the close of the plaintiffs. The pipe is buried in the street, at a depth of four feet under the surface. Access to the plaintiff's property has not been affected. There is no physical change made in it, or in the street on which it fronts. If the lots are affected in value, it is as a consequence of the proximity of the gas line, and not because of anything done to or upon them. Their remedy, under such circumstances, is by action, or upon the bond given to secure them against loss by reason of the dissolution of the injunction. It is not by the appointment of viewers, and the proceeding provided by the Act of 1885 for the assessment

of damages done by an entry upon private property under the right of eminent domain. The 1st assignment of error is sustained; also, the 4th, 5th, 7th, 8th, and 9th assignments.

The judgment is reversed, and the order appointing viewers is set aside.[1]

MARCHANT *v.* PENNSYLVANIA RAILROAD CO.

SUPREME COURT OF PENNSYLVANIA. 1894.

[14 *Sup. Court Rep.* 894.]

M. Hampton Todd, for plaintiff in error. *A. H. Wintersteen*, and *Wayne MacVeagh*, for defendant in error.

MR. JUSTICE SHIRAS, after stating the facts in the foregoing language,[2] delivered the opinion of the court.

The Pennsylvania Railroad Company, a corporation under the laws of the State of Pennsylvania, and invested with the privilege of taking private property for its corporate use, erected in May, 1881, and has since maintained, a viaduct or elevated roadway and railroad thereon along the south side of Filbert Street in the city of Philadelphia. On the opposite or north side of Filbert Street the plaintiff below was the owner of a lot or parcel of land, whereon was erected a large four-story building, at that time occupied as a dwelling and business house. The elevated railway did not occupy any portion of the plaintiff's land, nor did it trench upon Filbert Street where it extends in front of the plaintiff's property, which is situated on Filbert between Seventeenth and Eighteenth Streets; but where the elevated road, in its course westward, reaches Twentieth Street, it trends to the north, and is supported over the cartway of Filbert Street by iron pillars having their foundations in that street inside the curb line, and thus extends westwardly to the Schuylkill River. Opposite the plaintiff's lot the railroad structure occupies land owned by the company.

The plaintiff, by his action in the Court of Common Pleas, sought to recover for injuries caused to his property by the smoke, dust, noise, and vibration arising from the use of the engines and cars, the necessary consequence and incidents of the operations of a steam railway.

The trial court refused the defendant's prayer that "the jury should

[1] Compare *Kincaid* v. *Indiana Nat. Gas Co. et al.*, 124 Ind. 577, 579 (1890), in which it was held that, subject to the right of the public to pass and repass, "the owner of the fee of a rural road retains all right and interest in it." The court (ELLIOTT, J.) said: "There is an essential distinction between urban and suburban highways, and the rights of abutters are much more limited in the case of urban streets than they are in the case of suburban ways." See Randolph, Em. Dom., ss. 401, 413. — ED.

[2] The statement of facts is omitted; they sufficiently appear in the opinion. — ED.

be instructed that the defendant, under its charter and supplements in evidence, had full lawful authority to create and operate the Filbert Street extension or branch described in the declaration without incurring any liability by reason thereof for consequential damages to the property of the plaintiff, the uncontradicted evidence being that none of the said property was taken by the defendant, but that the entire width of Filbert Street intervenes between the railroad of the defendant and the nearest point thereto of the property of the plaintiff;" and instructed the jury that the only question for them to determine was the amount of depreciation in value of the plaintiff's property caused by the operation of the railroad, and that in estimating the damages they should consider the value of the property before and its value after the injury was inflicted, and allow the difference. The plaintiff recovered a verdict and judgment. The judgment was reversed by the Supreme Court of Pennsylvania (13 Atl. 690), because of the action of the trial court in refusing to grant the defendant's prayer for instruction, and, in effect, because the plaintiff had no cause of action. By the specifications of error contained in this record we are asked to reverse the judgment of the Supreme Court of Pennsylvania because the plaintiff in error was thereby deprived of her property without compensation, because she was thereby deprived of the equal protection of the laws, and because she was thereby deprived of her property without due process of law. . . .

The first proposition asserted by the plaintiff, that her private property has been taken from her without just compensation having been first made or secured, involves certain questions of fact. Was the plaintiff the owner of private property, and was such property taken, injured, or destroyed by a corporation invested with the privilege of taking private property for public use? The title of the plaintiff to the property affected was not disputed, nor that the railroad company was a corporation invested with the privilege of taking private property for public use. But it was adjudged by the Supreme Court of Pennsylvania that the acts of the defendant which were complained of did not, under the laws and Constitution of that State, constitute a taking, an injury, or a destruction of the plaintiff's property.

We are not authorized to inquire into the grounds and reasons upon which the Supreme Court of Pennsylvania proceeded in its construction of the statutes and Constitution of that State, and, if this record presented no other question except errors alleged to have been committed by that court in its construction of its domestic laws, we should be obliged to hold, as has been often held in like cases, that we have no jurisdiction to review the judgment of the State Court, and we should have to dismiss this writ of error for that reason.

But we are urged to sustain and exercise our jurisdiction in this case, because it is said that the plaintiff's property was taken "without due process of law," and because the plaintiff was denied "the equal protection of the laws," and these propositions are said to pre-

sent Federal questions arising under the Fourteenth Amendment of the Constitution of the United States, to which our jurisdiction extends.

It is sufficient for us in the present case to say that, even if the plaintiff could be regarded as having been deprived of her property, the proceedings that so resulted were in "due process of law."

The plaintiff below had the benefit of a full and fair trial in the several courts of her own State, whose jurisdiction was invoked by herself. In those courts her rights were measured, not by laws made to affect her individually, but by general provisions of law applicable to all those in like condition. . . .

The plaintiff in error further contends that by the proceedings in the courts of Pennsylvania she was denied the equal protection of the laws. We understand this proposition to be based on the allegation that those suitors whose property abutted on Filbert Street between the Schuylkill River and Twentieth Street, where the elevated road actually occupies the territory of Filbert Street, were allowed by the Pennsylvania courts to recover damages for the injury thus occasioned to their property, while the plaintiff, and those in like case, whose property abutted on Filbert Street where it was not occupied by the railroad structure, which was erected on the opposite side of the street, on land belonging to the railroad company, were not permitted to recover. The diversity of result in the two classes of cases is supposed to show that equal protection of the laws was not afforded to the unsuccessful litigants. It is not clear that the facts are so presented as to authorize us to consider this question. Neither in the plaintiff's declaration, in the instructions prayed for, nor in the charge of the trial court, do we perceive any finding or admission that there were suitors, holding property abutting on Filbert Street, who were held entitled to recover for damages occasioned by the elevated railroad. However, the third assignment of error is as follows: "The Supreme Court of Pennsylvania erred in deciding that the present cause was different in principle from the case of *Railroad Co.* v. *Duncan*, 111 Pa. St. 352, 5 Atl. 742, and *Railroad Co.* v. *Miller*, 132 U. S. 75, 10 Sup. Ct. 34. The effect of said decision is that, under the same constitutional guaranties, it gives to one person a right to compensation for property damaged by the defendant in the exercise of its power of eminent domain, and denies it to another; and as, in this instance, the decision is against the plaintiff's right to compensation for the injury to her property by the defendant, she is thereby deprived of the equal protection of the laws." The counsel of defendant in error, in their printed brief, make no point that the facts are not shown by this record, but discuss the question on its merits. We are referred in the printed briefs to our own case of *Railroad Co.* v. *Miller*, 132 U. S. 76, 10 Sup. Ct. 34, in the report of which it appears that one Duncan, whose property abutted on Filbert Street, where that street was occupied by the elevated railroad in question, was permitted by the State courts to recover for

damages suffered by having been deprived of access to, and the free use of, Filbert Street.

Conceding, for the sake of the argument, that the facts are as alleged by the plaintiff in error, we are unable to see any merit in the contention that the Supreme Court of Pennsylvania, in distinguishing between the case of those who, like Duncan, were shut off from access to and use of the street by the construction thereon of the elevated railroad, and the case of those who suffered, not from the construction of the railroad on the street on which their property abutted, but from the injuries consequential on the operation of the railroad, as situated on defendant's own property, thereby deprived the plaintiff of the equal protection of the laws. The two classes of complainants differed in the critical particular that one class suffered direct and immediate damage from the construction of the railroad in such a way as to exclude them from the use of their accustomed highway, and the other class suffered damages which were consequential on the use by the defendant company of their franchise on their own property. . . .

It should also be observed that the plaintiff does not complain that, by any legislative enactment, she has been denied rights granted to others, but she attributes error to the judgment of the Supreme Court of Pennsylvania in construing that provision of the Constitution of the State which gives a remedy for property injured by the construction of a railroad, as not extending the remedy to embrace property injured by the lawful operation of the railroad. It is not pretended that by such a construction of the law the plaintiff has been deprived of any right previously enjoyed. The scope of the remedy added by the Constitution of 1874 to those previously possessed by persons whose property is affected by the erection of a public work is declared by the court not to embrace the case of damages purely consequential.

In so holding it does not appear to us that the Supreme Court of Pennsylvania has either deprived the plaintiff of property without due process of law, or denied her the equal protection of the law, and its judgment is accordingly affirmed.

NEWBY *v.* PLATTE COUNTY.

SUPREME COURT OF MISSOURI. 1857.

[25 *Mo.* 258.[1]]

P. R. Hayden, for appellant.

I. Newby was entitled in damages to the full value of his land appropriated and taken for the road, and the court in the assessment thereof had no right to take into consideration the probable or incidental

[1] This case contains nowhere any statement of facts. — ED.

advantages which might or should accrue to Newby from the road in its enhancement of the value of his adjacent lands. (See Constitution of Missouri, article 13, section 7; 5 Dana, 32; 7 Dana, 87; 9 Dana, 114.)

LEONARD, J., delivered the opinion of the court. . . . The 17th section of the 2d article of the general road law of 1845 (R. C. 1846, p. 974) provides that, in assessing the land-owner's damages, the commissioners "shall take into consideration the advantages as well as the disadvantages of the road to such persons." The present road was authorized to be established as a State road by the special Act of the 7th February, 1849, and the proceedings for this purpose are directed to be according to the general road law of 1845, and the amendatory Act of the 25th of January, 1847. On an appeal from the County Court, the plaintiff's damages as a land-owner were assessed in the Circuit Court by the court in lieu of a jury, on an agreed statement of the facts, and the Circuit Court, when applied to for that purpose, refused to declare that the plaintiff "was entitled to the value of the land taken for the road, and that the advantages of the road to him could not be set off against his claim for the value of the land," and decided that the plaintiff was not entitled to any money compensation for the land taken for the public use; and thus the validity of the statute provision to which we have referred is submitted to our judgment by the present proceedings. If the State government possessed no authority over private property except that of taking it for the public use upon rendering the owner a just compensation, it would seem that, under this provision, the owner would be entitled to the full money value of his property without any deduction. The rule of constitutional law being that private property cannot be taken for public use, by the authority of the legislature, without a just compensation, it follows that what is to be considered as compensation within the meaning of the clause is a question of law for the courts, and not a matter for the legislature; and, under such a constitution as we have supposed, with no other power over private property than that of taking it for the public use upon making the owner a just compensation, it would be quite beyond the scope of the legislative authority to declare that the benefit derived by the land-owner from the road is the just compensation secured by the Constitution. If the provision were that the owner should be indemnified against the act complained of, it might be insisted, that, in ascertaining the extent of the damages sustained, the advantages as well as the disadvantages resulting from the act must be taken into consideration; and this seems to be the view taken of the subject by the Supreme Court of Ohio, in Simonds and others against Cincinnati (14 Ohio, 174), under the Constitution of that State, which expressly requires the compensation to be made in "money." But that is not the language nor the scope of the provision. The declaration of the Constitution is, that no private property ought to be taken or applied to public use without a just compensation; and this would seem to imply that the party should receive the value of his property in money. The transac-

tion is a forced sale to the public, and the Constitution in this provision secures to the owner the just price of his property as the only condition upon which he can be lawfully deprived of it.

The government, however, possesses other powers over private property beside the right of eminent domain; and if in the exercise of the taxing power, the government may lawfully require the adjacent land-owners to contribute towards paying for the right of way in proportion to the benefit each will derive from the road, the present enactment, so far as it directs the advantages of the road to be deducted from the price of the land, must perhaps be considered as an exercise of the taxing power. This law is, indeed, nothing more in effect than the exercise of both powers of government in the same breath — that of taking the land by the right of eminent domain, and of requiring, under the taxing power, the adjacent land-owners to contribute to the cost of it in proportion to the benefit each will derive from the road. We have an instance of express legislation of this character in the St. Louis Charter Amendment Act of the 23d of February, 1853, where it is provided that when it shall become necessary, in order to improve any street, &c., to take private property, the jury shall first ascertain the value of all the ground proposed to be taken, and then assess against the city, for the payment of this debt, a sum equal to the value of the improvement to the general public; and the balance of the money necessary to pay for the ground they shall assess against the owners of the lots fronting on the streets according to the value of their lots, and in the proportion that they will be respectively benefited by the improvement. Under this Act, and the ordinance passed to carry it into execution, when the whole lot is taken, the owner receives the whole value of it in money; but when part only is taken, the value of the part taken and the amount of benefit the owner will derive from the improvement of the street in respect to the residue of his lot are assessed separately, and one being set off against the other, the owner receives or pays the balance as it turns out to be for or against him. Under the St. Louis Act, the city pays toward the cost of the ground a sum equal to the value of the improvement to the city generally, and the residue of the cost is apportioned among the adjacent lot-owners in proportion to the benefit derived respectively from the improvement. Under the provisions of the general road law, the adjacent land-owners pay towards the cost of the right of way the value of the improvement to themselves — not exceeding, however, the value of the land taken from them respectively, — leaving the balance of the cost to be paid by the county. Under the St. Louis Act, the sums to be paid by and to the adjacent lot-owners are assessed separately, and when part only of a proprietor's lot is taken, one amount is set off against the other, and the balance only is settled in money. Under the road law, the benefit is in every case deducted from the value of the land taken, and the balance only is formally ascertained and declared; thus what is formally gone through with under the St. Louis Act, step by step, is done substantially at one

blow under the road law. In both cases the legislature exercises the same power over private property, and no other; and although in one case the language employed has a more direct reference to the taxing power than in the other, we are not at liberty, we think, on that account to treat the provision in one act as a prohibited invasion of private property, and to give effect to it in the other as an exercise of a lawful power. If the legislature may, under the taxing power, lawfully require the contribution, and if this provision in the road law be substantially such a requisition, as we think it is, we are not at liberty to treat it as a nullity, but must give effect to it accordingly. In a case now before us at St. Louis (*Garrett* v. *St. Louis*), under the St. Louis Act before referred to, part of the plaintiff's lot was taken for the improvement of Main Street, and he insists upon being paid the whole assessed value of the part taken, without any deduction on account of the assessment against him for benefits in respect to the residue of his ground; and the question there is as to the validity of what is in that case express taxation for a local object, — while in the present case it is as to the validity of what is, in effect, though not in words, a like assessment for a like purpose.

In both cases the only question, as it appears to us, is as to the competency of the legislature to require the adjacent land-owners to contribute towards the cost of the ground for a road or street, in proportion to the benefit; or, to state the proposition in more general terms, it is as to the constitutional validity of taxes imposed by a subordinate authority in the State upon an arbitrary district of country, in proportion, not to the value of the property, but to the benefit to be derived by the owner from the improvement.

Upon this question we begin by remarking that the power of taxation, as the more subordinate power of taking private property for the use of the public, without any reference to the owner's duty to contribute to a common burden, exist and are exercised of necessity in every nation as legitimate powers of civil government, and appertain to our State government as part of the legislative power, without any express grant for that purpose. The right of eminent domain is, in its nature, capable of being limited and regulated in some degree by general rules, and has accordingly, as we have already remarked, been confined in all civilized States by the practice of government, and in our American republics by express constitutional provision, to cases of public necessity and convenience, on the payment to the owner of a just compensation. But the power of taxation is more indefinite in its character, and less capable of limitation by general rules of law, — the amount of money to be raised, and to what purpose it shall be applied, and the persons and things that shall contribute to it and according to what rule of apportionment, are all matters left almost of necessity to the discretion of the legislative department, — the only express limitations in our Constitution upon the taxing power being that "all property subject to taxation shall be taxed in proportion to its value," and the prohi-

bition against taxing the lands of non-residents higher than residents' lands.

The validity of the enactment now under consideration, considered as an exercise of the taxing power, is not questioned upon the ground of its being a local tax. There are everywhere, in all civilized States, two sorts of public expenditure, — those that concern the whole State in general, and those that are confined to its civil subdivisions and lesser localities, and both justice and convenience require, and have accordingly introduced into the practice of all governments, corresponding general and local taxation. (Domat, Pub. Law Book, L., tit. 5, secs. 1 and 5.) Our own practice, corresponding with the general practice of the other States, has been to meet the general burdens by general taxation, and to make it the duty of the local authorities to raise and expend within their respective limits, under such restrictions as the legislature should deem proper, the taxes applicable to the local public service. The manifest equity and convenience of these local assessments, for the accomplishment of local purposes, has brought them more and more into general use, confining them, in very many instances, to very small localities; and no one now questions their validity, although at an early day the constitutional validity of taxation levied by subordinate tribunals was questioned, on the ground that it was levied without the consent of the people or their representatives; or, in other words, that it was an exercise of the legislative power of taxation which it was not competent for the legislature to delegate to others. (County Levy Case, 5 Call, 139.) That objection, however, was overruled in the case in which it was made, and has never been regarded in American legislation.

The objections that have since been relied upon to these local assessments for local improvements are that it is not "legitimate taxation," and that in this State, under our Constitution, they are not valid as taxes, because they are apportioned according to the benefit and not according to the value of the property as required by the Constitution. The position assumed is that "legitimate taxation is limited to the imposing of burdens or charges for a public purpose equally upon the persons or property within a district known and recognized by law as possessing a local sovereignty, for certain purposes, as a State, county, city, town, village, &c.;" and consequently road and street and other similar assessments for local improvements are no other than the taking of private property, under color of the taxing power, without providing the compensation required by the Constitution. This idea, it is believed, was first formally announced in New York, in the case of *The People* v. *Mayor of Brooklyn*, 6 Barb. 216, and is said to have originated in the Court of Appeals of Kentucky, in the case of *Sutton's Heirs* v. *City of Louisville* (5 Dana, 28). The New York case was an assessment on a lot-owner in proportion to the benefit for the purpose of building a sewer, and the Kentucky case was a similar assessment for the extension of a street, and both assessments were decided to be uncon-

stitutional, as not being legitimate exercises of the taxing power. The New York case, however, was reversed on appeal, in the Court of Appeals (4 Comst. 428), and the doctrine itself seems to have been subsequently abandoned in effect in Kentucky, in the case of the *City of Lexington* v. *McMillain's Heirs*, 9 Dana, 513, by the same court, composed of the same judges, in which it originated. In the latter case, Lexington was authorized by its charter to cause the streets to be paved at the expense of the lot-owners in each square, either upon the application of the greater part of them, or without such application by the unanimous consent of the mayor and council; and one question being as to the validity of an assessment that had been made pursuant to an ordinance passed with the required unanimity, the court held it valid, suggesting that each square might be considered an independent municipality for this purpose. Upon principle, there is nothing, we think, in the objection.

In distinguishing taxation from the taking of private property under the right of eminent domain, it has been well observed that taxation exacts property from individuals as their respective shares of contribution to a public burden. Private property taken by the right of eminent domain is not taken as the owner's share of such a contribution, but as so much beyond it. Taxation operates upon a class of persons or things, and by some rule of apportionment. The exercise of the right of eminent domain operates upon individual persons or things, and without any reference to what is exacted from others. The present tax, if we may consider it as one, operates upon a class of persons, — the owners of the several tracts of land over which the road passes, — is assessed against them in proportion to the benefit each derives from the improvement, and is exacted from them as their respective shares of contribution to the establishment of the road. We may remark, too, that taxation of this character has prevailed too long and too extensively to be treated as illegitimate, or denounced as legislative spoliation under the guise of the taxing power. It prevailed in England several centuries ago; and the assessments made there by the commissioners of sewers on the lands affected by their operations was taxation of this character. (28 Hen. VIII., chap. 5, sec. 5.) In Massachusetts, from an early period, meadows, swamps, and lowlands were required to be assessed among the proprietors to pay the expense of draining them (Rev. Stat. of Mass. p. 673), and in Connecticut the same power was given to commissioners for draining marshy lands (Conn. Stat. ed. 1839, p. 544). It is said by the judge, who delivered the opinion of the Court of Appeals in the Brooklyn case before referred to, that the system of local taxation for local improvements, by assessing the burden according to the benefit, had prevailed for more than one hundred and fifty years, and that this power was given to the corporation of New York in 1691, and had since been conferred on nearly every city and on many of the villages of the State. We are informed in the opinion of the Supreme Court of Kentucky, in the Lexington case before referred to,

that the assessment of benefits for the improvement of streets had been sanctioned as constitutional in Louisiana, South Carolina, and Pennsylvania; had been virtually recognized by the courts in New York and Massachusetts, and had never been declared unconstitutional by any court, so far as they had been able to ascertain; and we may ourselves remark that similar taxation is authorized by law in New Jersey, Maryland, Virginia, Ohio, and Indiana, and either acquiesced in by these communities or adjudged valid by their courts. Finally, the validity of local assessments of this character was considered and affirmed in this court at our last St. Louis fall term, in the case of *Lockwood* v. *The City of St. Louis*, 24 Mo. 20, where the assessment was to construct a common sewer, and was levied on all the lots in an arbitrary district, — laid off by the corporation for the purpose of constructing the sewer. . . . But, although we concur with the Circuit Court in thinking this section of the road law constitutional, yet the judgment must be reversed upon another ground. The only facts agreed between the parties, and upon which the decision was pronounced, were, that the road ran "through the plaintiff's land one hundred and twenty-two poles, and occupied one and one-half acres of ground, worth fifteen dollars per acre;" but it was not admitted that the road was any benefit to the party, and the court, we think, could not infer this as a matter of law from the agreed facts, and pronounce against allowing the plaintiff any compensation for the property of which he was deprived.

As to the proper rule by which to compute the benefits in cases of this character, it may not be improper, as the case is to be remanded for further proceedings, to remark that the Supreme Court of Massachusetts, in the case of *Meacham* v. *The Fitchburg Railroad Co.*, 4 Cush. 392, declared that the benefits to be charged against the adjacent land-owners and deducted from the compensation to be paid to them were the direct and peculiar benefits that would result to them in particular, and not the general benefit that they would derive in common with other land-owners from the building of the road; and this seems to be substantially the principle adopted by our own legislature as just and equitable in the St. Louis Street Improvement Act before referred to, and ought perhaps to be followed in the construction of this provision of the road law. In reference to the disadvantages, it is to be observed that the Constitution only secures to the owner the price of his property, but it is competent for the legislature to go beyond this, and not only pay him the value of his property, but also indemnify him against any damage that will result to him from the use to which it is to be applied; and this they have effected by requiring the disadvantages as well as the advantages to be taken into consideration in the assessment of the damages. JUDGE RYLAND concurring, the judgment is reversed, and the cause remanded.

SCOTT, J., dissenting. I dissent from so much of the opinion of the majority of the court as maintains that, in the computation of the damages to be paid to the owner of the property taken for public use, regard

must be had to the advantages and disadvantages resulting to such owner from the use to which the property may be applied. The value in cash of the thing taken, considering its place and situation, is the compensation contemplated by the Constitution to which the owner, as such, is entitled. The legislature may compensate disadvantages with advantages, but the value of the property taken must be paid for in money.[1]

IN *Wagner* v. *Gage County*, 3 Neb. 237 (1874), on appeal from the award of commissioners to assess damages from the laying out of a road, it appeared that the presiding judge below had instructed the jury as follows: —

"In your consideration of the evidence, you will not take into consideration any consequential damages that might possibly occur by reason of the location of such road, nor what might be consequential costs of erecting fences; but the measure of damages is the difference between the market value of the premises immediately before the road was located, and the market value thereof immediately after its location."

The jury found a verdict for the defendant; whereupon the plaintiff filed a motion for a new trial, which being overruled by the court, judgment was rendered on the verdict. To reverse this judgment the cause was brought to this court by petition in error.

N. K. Griggs and *W. H. Ashby*, for plaintiff in error. *S. C. B. Dean* and *W. J. Galbraith*, for defendant in error.

MAXWELL, J. Section thirteen of the bill of rights in our Constitution declares that "the property of no person shall be taken for the public use without just compensation therefor;" and that section is only declaratory of the common law. . . .

Our statutes (General Statutes, 955) provide the mode of locating new roads, and section twenty-four of the chapter provides for compensation to the owner of the land.

The question arises, what is just compensation? All the cases seem to concur in excluding mere general and public benefits, which the owner of the land shares in common with the rest of the inhabitants of the vicinity, from being taken into consideration in estimating compensation. While this is the law in theory, in several of the States it seems to be disregarded.

In Massachusetts the court held, "the jury might and ought to have returned that the party sustained no damages, if such was their conviction; the benefit the owner of the land derived from the laying out of a way over it may often exceed the value of the land covered by the way." *Commonwealth* v. *Sessions of Middlesex*, 9 Mass. 388. And the same doctrine has been held in Vermont. *Livermore* v. *Ja-*

[1] Affirmed in *State* v. *City of Kansas*, 89 Mo. 34 (1886). Compare *Kennedy* v. *Indianapolis*, 103 U. S. 599; *Bloomington* v. *Latham et al.*, 142 Ill. 462, and the cases on special assessments, *infra*, pp. 000 to 000. — ED.

maica, 23 Vt. 361. And in Pennsylvania the court held, "the more common mode of estimating land damages unquestionably is, to give the company the specific benefit caused to land, a portion of which is taken, in the enhancing the value of the same, and only to allow the land-owner such a sum as will leave him as well off in regard to the particular land, as if the works had not been built, or his land taken. This is done by giving the land-owner a sum equal to the difference between what the land would have sold for before the road was built, and what the remainder will sell for after the construction." *Harvey* v. *Lackawanna & Bloomsburgh R. R.*, 47 Pa. St. 428; *Troy & Boston R. R.* v. *Lee*, 13 Barb. 169; *Matter of Furnam Street*, 17 Wend. 649.

The Supreme Court of Ohio, since the adoption of the Constitution of 1851, hold that in all cases compensation must be made for the land actually taken. The court says, in regard to the provisions of the Constitution providing for compensation, "by the one, the compensation is to be assessed without deduction for benefits, and by the other irrespective of benefits, and by each a full compensation is required. Now, when is a man fully compensated for his property? Most clearly and unquestionably when he is paid its full value, and never before. The word 'irrespective' relates to this full compensation, and binds the jury to assess the amount without looking at or regarding any benefits contemplated by the construction of the improvement. When this is done, and this consideration wholly excluded, the jury have nothing to do but ascertain the fair market value of the property taken. . . . Whether the property is appropriated directly by the public, or through the intervention of a corporation, the owner is entitled to receive its fair market value at the time it is taken, as much as he might fairly expect to be able to sell it to others, for if it was not taken, and this amount is not to be increased from the necessity of the public or the corporation to have it, on the one hand, nor diminished from any necessity of the owner to dispose of it, on the other. It is to be valued precisely as it would be appraised for sale upon execution, or by an executor or guardian, and without any regard to the external causes that may have contributed to make up its present value." *Giesy* v. *C. W. & Z. R. R. Co.*, 4 Ohio St. 330–332.

This seems to us to be the only just and equitable rule, requiring in all cases that compensation shall be made for the fair market value of the land actually taken, while special benefits may be set off against any local or incidental injury to the residue of the tract.

Section nineteen of the bill of rights of the Ohio Constitution provides, that compensation for property taken for public use shall be assessed by a jury "without deduction for benefits to any property of the owner." This provision seems to have been incorporated in the Constitution of 1851, in consequence of the decisions of the Supreme Court of that State in *Symonds* v. *The City of Cincinnati*, 14 Ohio, 147; and *Brown* v. *The Same*, 14 Id. 541, where the court held it was

competent for the defence to show the benefit conferred on the owner by the appropriation, such benefit to be considered by the jury in estimating the damages. We think the words "without deduction for benefits" adds nothing to the term "just compensation," and that the same rule is as applicable in our State as in Ohio.

The jury in this case having found for the defendant, it was the duty of the court to set aside the verdict and grant a new trial.

The judgment of the District Court is reversed, and cause remanded for a trial *de novo*. *Reversed and remanded.*[1]

MR. CHIEF JUSTICE LAKE concurs.

IN *Conn. River R. R. Co.* v. *County Com'rs of Franklin*, 127 Mass. 50 (1879), a statute had required the manager of a railroad owned by the State, upon the direction of the Governor and Council, to take certain land for the purposes of the road, and provided that it should be paid for out of the earnings of the road. It was admitted that these earnings would "probably be amply sufficient" to meet these payments. The manager, having been duly directed, entered upon the land, and petitioned the county commissioners to proceed in ascertaining and awarding damages. In granting a writ of prohibition against the commissioners, the court (GRAY, C. J.) said: "Two questions are presented by the case, and have been argued by counsel: First. Whether the St. of 1878, c. 277, is unconstitutional, for want of a sufficient provision for the payment of compensation for the land taken? Second. Whether the writ of prohibition is a suitable remedy?

"The Constitution of the Commonwealth declares that, 'whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensa-

[1] And so *Omaha* v. *Howell Lumber Co.*, 30 Neb. 633, 635 (1890). Compare *Terry* v. *Hartford*, 39 Conn. 286, Randolph, *Em. Dom.* s. 273. In *Omaha South. Ry. Co.* v. *Todd*, 58 N. W. Rep 289 (Neb. 1894), the court (RAGAN, C.), said: "The damages to which a land-owner is entitled by reason of the construction of a railway across his farm are (1) the actual value of the land taken, at the time of the taking, without diminution on account of any benefit, advantage, or other set-off, whatsoever; (2) the depreciation in the value of the remainder of the tract of land caused by the appropriation of a part thereof for railway purposes, and the construction and permanent operation and occupation of the railroad thereon, excluding general benefits. *Railroad Co.* v. *McKinley*, 64 Ill. 339; *Railroad Co.* v. *Wiebe*, 25 Neb. 542, 41 N. W. 297; *Robbins* v. *Railroad Co.*, 6 Wis. 610; *Railroad Co.* v. *Horn*, 41 Ind. 479. In an inquiry whether, and how much, the part of a farm not taken for railroad right of way is depreciated in value by the appropriation of a part, evidence as to the size of the farm; the purpose for which it is used; the improvements thereon, and how located; the direction of the road across the farm; the cuts and fills made or to be made in the construction of the road; the width of the right of way; the height of embankments; the depth of ditches; the inconvenience in crossing the track from one part of the farm to another; the liability of stock being killed; and danger from fire from passing trains, — are all facts competent for the jury's consideration in determining the depreciation in value of the remainder of the farm. *Railway Co.* v. *Beeson*, 36 Neb. 361, 54 N. W. 557." See *Leroy & West. R. R. Co.* v. *Ross et al.*, 40 Kans. 598; *Meacham* v. *Fitchb. R. R. Co.*, 4 Cush. 291. — ED.

tion therefor.' Declaration of Rights, art. 10. It has long been settled by the decisions of this court, that a statute which undertakes to appropriate private property for a public highway of any kind, without adequate provision for the payment of compensation, is unconstitutional and void, and does not justify an entry on the land of the owner without his consent. *Commonwealth* v. *Peters*, 2 Mass. 125; *Perry* v. *Wilson*, 7 Mass. 393; *Thacher* v. *Dartmouth Bridge*, 18 Pick. 501. 'Under our Constitution,' said Chief Justice Shaw, 'the Act conferring the power must be accompanied by just and constitutional provisions for full compensation to be made to the owner. If the government authorizes the taking of property, for any use other than a public one, or fails to make provision for a compensation, the Act is simply void; no right of taking as against the owner is conferred; and he has the same rights and remedies against a party acting under such authority, as if it had not existed.' *Boston & Lowell Railroad* v. *Salem & Lowell Railroad*, 2 Gray, 1, 87. So in a case of laying out as a public highway a bridge owned by a private corporation, Mr. Justice Colt said: 'The duty of paying an adequate compensation, for private property taken, is inseparable from the exercise of the right of eminent domain. The Act granting the power must provide for compensation, and a ready means of ascertaining the amount. Payment need not precede the seizure; but the means for securing indemnity must be such that the owner will be put to no risk or unreasonable delay.' *Haverhill Bridge* v. *County Commissioners*, 103 Mass. 120, 124.

"In *Rogers* v. *Bradshaw*, 20 Johns. 735, 744, cited by the learned counsel for the respondents, the decision was that the statutes applicable to the case, construed together, expressly provided for the estimate and payment of the damages, and that such payment need not be actually made before the entry upon the land; and the *dictum* of Chancellor Kent, that an omission of the legislature to provide for compensation might not have made the entry a trespass, is opposed to the course of decisions in this Commonwealth, and has not been followed in New York. In *Bloodgood* v. *Mohawk & Hudson Railroad*, 18 Wend. 1, 17, Chancellor Walworth, while admitting that the legislature might authorize the land of an individual to be entered upon for the purpose of examination or of making preliminary surveys, without compensation, said: 'But it certainly was not the intention of the framers of the Constitution to authorize the property of a citizen to be taken and actually appropriated to the use of the public, and thus to compel him to trust to the future justice of the legislature to provide him a compensation therefor. The compensation must be either ascertained and paid to him before his property is thus appropriated, or an appropriate remedy must be provided, and upon an adequate fund; whereby he may obtain such compensation through the medium of the courts of justice, if those whose duty it is to make such compensation refuse to do so. In the ordinary case of lands taken for the making of public highways, or for the use of the State canal, such a remedy is pro-

vided; and if the town, county, or State officers refuse to do their duty in ascertaining, raising, or paying such compensation in the mode prescribed by law, the owner of the property has a remedy by *mandamus* to compel them to perform their duty. The public purse, or the property of the town or county upon which the assessment is to be made, may justly be considered an adequate fund. He has no such remedy, however, against the legislature to compel the passage of the necessary laws to ascertain the amount of compensation he is to receive, or the fund out of which he is to be paid.' And in *People* v. *Hayden*, 6 Hill, 359, 361, Chief Justice Nelson said: 'Although it may not be necessary, within the constitutional provision, that the amount of compensation should be actually ascertained and paid before property is thus taken, it is, I apprehend, the settled doctrine, even as it respects the State itself, that, at least, certain and ample provision must be first made by law (except in cases of public emergency), so that the owner can coerce payment through the judicial tribunals or otherwise, without any unreasonable or unnecessary delay.' See also *Rexford* v. *Knight*, 1 Kernan, 308, 314; *Chapman* v. *Gates*, 54 N. Y. 132, 146.

"Statutes taking private property for a public highway, and providing for the ascertaining of the damages, and for payment thereof out of the treasury of the county, town, or city, have often been held to be constitutional. *Haverhill Bridge* v. *County Commissioners*, 103 Mass. 120; *Chapman* v. *Gates*, 54 N. Y. 132; *Loweree* v. *Newark*, 9 Vroom, 151; *Yost's Report*, 17 Penn. St. 524; *Powers* v. *Bears*, 12 Wis. 213, 220; *Commissioners* v. *Bowie*, 34 Ala. 461. But, in the cases in which it has been so held, the liability to pay the damages rested upon the whole property of the inhabitants of the municipality, and might be enforced by writ of execution or warrant of distress, or by *mandamus* to compel the levy of a general tax. *Hill* v. *Boston*, 122 Mass. 344, 350; *Rose* v. *Taunton*, 119 Mass. 99, 101; *Bloodgood* v. *Mohawk & Hudson Railroad*, and *Rexford* v. *Knight*, above cited; *Commonwealth* v. *Commissioners of Allegheny*, 37 Penn. St. 237, 277; *Minhinnah* v. *Haines*, 5 Dutcher, 388; *Brock* v. *Hishen*, 40 Wis. 674. The rule has not been extended to cases in which only a special fund was charged with the payment of the damages, and the municipality had no power to levy a general tax to pay them. *Chapman* v. *Gates*, 54 N. Y. 146; *Keene* v. *Bristol*, 26 Penn. St. 46.

"In *Ash* v. *Cummings*, 50 N. H. 591, 621, it was said: 'In cases where the State, or a county, or a town, is to be made liable for the damages which an individual may suffer by having his property taken for the public use, it is not so important that the compensation should be paid or secured in advance, provided the law provides a certain and expeditious way of ascertaining and recovering it, because there the presumption and the fact are that these municipalities are always responsible.' And the saying was quoted with approval by a majority of the court in *Orr* v. *Quimby*, 54 N. H. 590, 594. But in each case it was *obiter dictum*. *Ash* v. *Cummings* was the case of a mill-dam

erected by one individual to the injury of another. In *Orr* v. *Quimby*, it was admitted that the only question to be determined was whether the defendant had the right to enter and cut trees on the plaintiff's land, and that the question whether the land could be permanently occupied without assessment and payment of damages did not arise; 54 N. H. 596; and the position assumed in the *dictum* above quoted was strongly controverted in an elaborate dissenting opinion of Mr. Justice Doe, as it had previously been in an able judgment of the Supreme Court of Maine, delivered by Chief Justice Shepley. *Cushman* v. *Smith*, 34 Maine, 247.

"When private property is taken directly by the Commonwealth for the public use, it is not necessary or usual that the Commonwealth should be made subject to compulsory process for the collection of the money to be paid by way of compensation. It is sufficient that the statute which authorizes the taking of the property should provide for the assessment of the damages in the ordinary manner, and direct that the damages so assessed be paid out of the treasury of the Commonwealth, and authorize the Governor to draw his warrant therefor; because, as observed by Chief Justice Bigelow, 'This is clearly an appropriation of so much money as may be necessary to pay the damages which may be assessed under the Act.' 'It is a pledge of the faith and credit of the Commonwealth, made in the most solemn and authentic manner, for the payment of the damages as soon as they are ascertained and liquidated by due process of law.' *Talbot* v. *Hudson*, 16 Gray, 417, 431.

"But in the statute before us there is no pledge of the faith and credit of the Commonwealth, no appropriation of the general funds in its treasury, and no authority to the Governor to draw his warrant for the payment of the damages out of such funds. On the contrary, the very terms of the statute preclude the inference of any such pledge, appropriation, or authority, by directing that the land taken for the union passenger station shall be paid for from the earnings of the Troy and Greenfield Railroad and Hoosac Tunnel, and appropriating for the purposes of the Act a sum not exceeding nine thousand dollars, to be paid out of those earnings. St. 1878, c. 277, §§ 6, 8. The fact, admitted by the parties, that those earnings will probably be sufficient to meet and extinguish all claims for damages for lands so taken, falls short of satisfying the requirement of the Constitution that the owner of property taken for the use of the public shall have a prompt and certain compensation, without being subject to any risk or unreasonable delay.

"The provisions of the St. of 1878, c. 277, specifying and appropriating a certain sum out of those earnings for the payment of damages assessed under this Act, are equally conclusive against the suggestion made, though not strongly pressed, at the argument, that the Commonwealth, or the manager acting in its behalf, may be required by the county commissioners, at the request of the land-owner, to give additional security for the payment of the damages under the General Rail-

road Act of 1874, c. 372, § 65. Sections 69 and 72 of that Act, providing that, if the railroad corporation shall not pay the amount of damages awarded by the jury, a warrant of distress or execution may issue to compel the payment thereof, and that, until such warrant or execution is satisfied, all right and authority to enter upon the land, except for making surveys, shall be suspended, and the exercise thereof may be restrained by injunction, are also inapplicable, because in the present case no warrant of distress or execution can issue, either against the manager or against the Commonwealth; not against the manager, because he takes no title himself in the land, but is a mere agent of the Commonwealth, acting under the direction of the Governor and Council, and removable at their pleasure; Sts. 1875, c. 77; 1876, c. 150; 1878, c. 191; not against the Commonwealth, because the Commonwealth is never liable to judicial suit or process, except so far as its own consent thereto has been clearly manifested by statute. *Troy & Greenfield Railroad* v. *Commonwealth*, *ante*, 43.

"The St. of 1878, c. 277, therefore, so far as it purported to authorize the taking of land of the Connecticut River Railroad Company for a union railroad station, was unconstitutional, and the taking under that Act was void, for want of any provision for adequate and certain compensation to the owner.

"That taking, being unauthorized and void, did not alter the rights of the owner of the land, vested no title in the Commonwealth, and could not be the basis of a petition to the county commissioners for the assessment of damages as for land lawfully appropriated to the public use. The invalidity of the taking and the consequent want of jurisdiction in the county commissioners are not cured by the St. of 1879, c. 290, passed since this case was argued, and providing that the sums of money required under the St. of 1878, c. 277, shall be paid from the treasury of the Commonwealth, instead of from the earnings of the Troy and Greenfield Railroad and Hoosac Tunnel. The statement of Mr. Justice Baldwin, in *Bonaparte* v. *Camden & Amboy Railroad*, Bald. 205, 226, that it is not indispensable that a law permanently appropriating private property to the use of the public should contain a provision for compensation, or prescribe the mode of making it, but that such a law would be valid if the legislature should by a subsequent law direct compensation to be made, appears to have been founded on the *dictum* of Chancellor Kent referred to in the early part of this opinion, and is inconsistent with the settled law of this Commonwealth, and with the weight of authority elsewhere." [1]

In *Brickett* v. *Haverhill Aqueduct Company*, 142 Mass. 394 (1886), the defendant, under a statute purporting to authorize the taking and use of the waters of certain ponds, took the waters of Kenoza lake and

[1] Compare *United States* v. *Engerman*, 46 Fed. Rep. 176, holding that under the Constitution of the United States a jury is not necessary. And so in other jurisdictions. See Randolph, Em. Dom. s. 316. — Ed.

built a dam across a river which was the only outlet of the lake; whereby, as the plaintiff alleged, the flow of the stream through his land was prevented. The State provided for paying "all damages sustained by entering upon and taking" these waters. The plaintiff brought a common-law action of tort, and a verdict was ordered for the defendant. In setting aside this verdict on the ground that the defendant might, perhaps, have exceeded the statutory authority, the court (MORTON, C. J.) said: "Without doubt, the defendant was liable to the plaintiff in some form of proceeding for any damage sustained by him by reason of taking the water and building the dam. *Watuppa Reservoir Co.* v. *Fall River*, 134 Mass. 267. But it is settled that, when the legislature authorizes a municipal or other corporation to take private property for public uses, and provides in the statute a mode of ascertaining and recovering the damages, such statutory remedy is the only remedy to which the injured party can resort for acts done within the authority of the statute.

"It follows that the plaintiff cannot maintain an action of tort for injuries caused to him by any acts of the defendant which it was authorized to do under the statute, but his only remedy is the one pointed out by the statute.

"The plaintiff recognizes this principle; but contends that the St. of 1867 is unconstitutional and invalid, because it does not make adequate provision for the recovery of damages caused by the defendant's acts under it.

"The Constitution provides that, 'whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor.' Declaration of Rights, art. 10. Undoubtedly, a statute which attempts to authorize the appropriation of private property for public uses, without making adequate provision for compensation, is unconstitutional and void. *Connecticut River Railroad* v. *County Commissioners*, 127 Mass. 50, and cases cited. But the St. of 1867 does not undertake to do this. It provides, in substance, that the corporation shall be liable to pay all damages for injury to private property, and specifies a sufficient remedy to enable the person injured to recover such damages. We are not aware of any case in which it has been held that such provisions are not a sufficient compliance with the requirement of the Constitution. The instances are numerous in which aqueduct companies have been incorporated by statutes which contain the same provisions for securing compensation. The successive legislatures, in these statutes, recognized the constitutional obligation to make adequate compensation, and deemed that such provisions did, with practical certainty, secure the rights of individuals whose property was taken or injured.

"They undoubtedly took into consideration, not only the special remedy provided by each statute, but the other rights and remedies which an individual would have under the general laws, if his damages

were not paid after they were ascertained. Take the case before us. If the plaintiff, or any person injured, had, upon proper application, had his damages ascertained, he would be entitled to a warrant of distress to compel the payment of them; Pub. Sts. c. 110, § 18; if this was ineffectual, and the defendant still refused to pay, without doubt this court would, by proceedings in equity, restrain the defendant from a further use of the water, and, if necessary, order the removal of the dam.

"The question whether the provision for compensation furnished by the statute is an adequate one is a practical question. It seems to us that the remedy which the statute in question furnishes against the corporation, supplemented by the remedies afforded by the general laws, if it refuses to pay the damages assessed, affords to any person whose property is taken or injured by the acts of the corporation a reasonable certainty that he will recover and receive compensation therefor. We are not, therefore, prepared to hold that the statute is unconstitutional, because it does not make adequate provision for compensation.

"The case of *Connecticut River Railroad* v. *County Commissioners*, *ubi supra*, is quite different from the case at bar. In that case, in the statute which was held to be unconstitutional, no person or corporation, neither the State nor the manager of the railroad, was made liable for the damages, but the plaintiff was left to look solely to a future uncertain fund, and he was provided with no means of enforcing his claim against the fund.

"We do not deem it important that the land of the plaintiff which was injured was outside of the limits of this State. The language of the Act is general, and puts all water rights upon the same footing, and applies to a proprietor outside the State. Such proprietor certainly has no greater rights than the citizen whose lands or water rights within the State are injured by the acts of the defendant under the authority of the legislature. Whether the constitutional objection we have considered would be open to a citizen of another State, whose lands or water rights in that State are injured, we need not discuss nor decide.

"It follows that the plaintiff cannot maintain this action for damages caused by any acts of the defendant which are authorized by the statute." [1]

[1] And so *Cherokee Nation* v. *So. Kans. Ry. Co.*, 135 U. S. 641. See *supra*, pp. 979–990; *Tuttle* v. *Knox County*, 89 Tenn. 157 (1890); *Wallace* v. *R. R. Co.*, 138 Pa. 168 (1890).

"The fundamental doctrine, of course, is that private property cannot be taken for public purposes without just compensation, but this need not be given in all cases concurrently in point of time with the actual exercise of the right of eminent domain. It is enough if an adequate and certain remedy is provided whereby the owner of such property may compel payment of his damages. (*Bloodgood* v. *M. & H. R. R. Co.*, 18 Wend. 9; *Lyon* v. *Jerome*, 26 Id. 585; *People ex rel. Utley* v. *Hayden*, 6 Hill, 359; *Rexford* v. *Knight*, 11 N. Y. 308.) This means reasonable legal certainty. (*Chapman* v. *Gates*, 54 N. Y. 146; *Sage* v. *City of Brooklyn*, 89 Id. 189.)" — DANFORTH, J., for the court, in *In the Matter of the Pet'n of the U. S.*, 96 N. Y. 227.

In *The State* v. *Perth Amboy*, 52 N. J. Law, 132 (1889), the Supreme Court of New Jersey (GARRISON, J.) said: "The ordinance brought up by this writ is nugatory if the charter of the city of Perth Amboy contains no provision by which private lands can be taken for public use by the proceedings in question.

"The sovereign power of compelling an owner to part with the title to his lands is coupled with the correlative duty of providing for the payment of the compulsory purchase. By the Constitution of this State a distinction is made between those cases n which property is taken directly by the State, as by a municipal corporation by State authority, and those cases in which a private corporation, acting as the State's agent, appropriates private property for a public purpose. In the latter case actual compensation to the owner must precede the taking of his lands, whereas in the former it is enough if provision be made by which the owner can obtain compensation, and that an impartial tribunal is provided for assessing it. *Loweree* v. *Newark*, 9 Vroom, 151; *Wheeler* v. *Essex Road Board*, 10 Id. 291.

"A law which lacks these requisites will not authorize the exercise of this sovereign right. Furthermore, the provision which thus enables the owner to obtain compensation for his lands must be in existence at the time the power to compel him to part with them is exerted. *Gaines* v. *Hudson County Commissioners*, 8 Vroom, 12.

"Where no such legislation exists, the owner may resist the initial step toward the divestment of his title. The invasion of his own rights as well as his duties to the representatives of the public requires him to challenge the improvement at its threshold, before outlay and acquiescence shall have worked to his detriment and to theirs. *Gaines* v. *Hudson County Commissioners*, *supra*.

"The remedy, moreover, in cases when compensation is deferred, must be adequate, one to which the party can resort of his own motion; it must not be burdened by unusual steps of procedure or other vexatious features. *Butler* v. *Sewer Commissioners*, 10 Vroom, 667. Such a remedy can exist only where the owner, who is compelled to part with his property without being paid the price, has his damages legally ascertained under the law which authorized the taking.

"The tribunal which is thus to assess the owner's damages may be determined by the Constitution or by the statute under which the condemnation proceedings are had. Where the Constitution is silent as to the manner in which the assessment for property taken shall be made, the power to take is dormant until the legislature supplies the plan. However ordained, the proceeding is judicial in character, and the party in interest is entitled to have an impartial tribunal and the rights and privileges usually deemed essential to a judicial investigation. And, in general, by whatever method the property of an individual is to be divested, under color of law, by proceedings against his will, the existence of the proper machinery must be clear in the law, and a strict compliance with all those provisions which have been therein made for his protection must be shown. *Davis* v *Howell*, 18 Vroom, 280; 2 Dill. Mun. Corp. § 604.

"We have seen that, in the absence of controlling constitutional provision, it is competent for the State to authorize municipal corporations to take private lands for public use without first making payment therefor, although such a course is characterized by Judge Dillon as an unusual one — 'The almost invariable, and certainly the just, course being to require payment to precede or to accompany the act of appropriation.' 2 Dill. Mun. Corp. 615.

"The power delegated, moreover, being a stringent and extraordinary one, no presumptions will be intended against the owner. In any event, if a legislative purpose to postpone appropriation to payment be discovered, it will be given strict effect.

"Applying these general principles to the case in hand, it is clear that the proceedings open to the defendant under its charter neither provide for the compensation of the prosecutrix in respect to her lands, nor do they give her that adequate remedy which the organic law guarantees." — ED.

FORSTER v. SCOTT.

NEW YORK COURT OF APPEALS. 1893.

[136 *N. Y.* 577.]

APPEAL from judgment of the General Term of the Superior Court in the city of New York, entered upon an order made Jan. 15, 1892, which directed a judgment in favor of plaintiff, upon a case submitted, under the Code of Civil Procedure (§ 1279).

The questions involved and the facts, so far as material, are stated in the opinion.

Rollin H. Lynde, for appellant. *Henry A. Foster*, for respondent.

O'BRIEN, J. The question in this case is in respect to the plaintiff's rights under a contract made by him with the defendant June 18, 1891, whereby he agreed to sell and the defendant to purchase a parcel of vacant land in the city of New York, at a price specified, subject to but without assuming a mortgage thereon of $4,000. The plaintiff on his part agreed to convey the premises to the defendant by a full covenant warranty deed, sufficient to vest the title in fee simple free from any lien or encumbrance except the mortgage. At the time stipulated in the contract the plaintiff tendered to the defendant a deed in the required form and containing the proper covenants, which the defendant declined to accept for the reason that upon searching the title he had discovered that there was such an encumbrance upon the land that the plaintiff was unable to convey a good title as required by the contract. The facts were agreed upon and submitted to the General Term under the provisions of § 1279 of the Code, where it was held that no lien or encumbrance, aside from the mortgage, existed or attached to the land by reason of the facts so stated, and directed judgment for the plaintiff that the defendant accept the deed tendered and pay the purchase price. The facts so far as they are material to the point involved are these: On the 18th of October, 1890, the department of parks of the city of New York, under the provisions of chapter 681 of the Laws of 1886, filed a map of a proposed street or avenue which entirely covers the plaintiff's lot. The map so filed complies strictly, with respect to form and substance, with all the provisions of law on the subject. The proposed street has not been opened and no proceedings have been taken to open it or to acquire the title to plaintiff's land by condemnation. Section 677 of the Consolidation Act provides as follows with reference to damages for taking lands for such streets when the same are finally opened: "No compensation shall be allowed for any building, erection, or construction which at any time, subsequent to the filing of the maps, plans, or profiles mentioned in section six hundred and seventy-two of the Act, may be built, erected, or placed in part or in whole upon or through any street, avenue, road, public square, or place exhibited upon such maps, plans, or profiles." The plaintiff's vacant lot derives almost its entire value from the fact that it is possi-

ble to use it for building purposes. The facts, therefore, present two questions.

(1) Whether, assuming the statute to be valid, a lien or encumbrance was created and attached to the land in question by the filing of the map by the park department. (2) Whether the legislature had power under the Constitution to enact, as it virtually did, that whenever land thus exhibited upon the map is taken for street purposes, at any time after the filing thereof, no compensation shall be made to the owner for any improvements put upon the land during the time between the filing of the map and the condemnation proceeding.

An encumbrance is said to import every right to or interest in the land, which may subsist in another, to the diminution of the value of the land, but consistent with the power to pass the fee by a conveyance. (1 Bouvier's Law Dict. p. 696; 2 Greenl. Ev. § 242; 3 Washburn on Real Property, 659, § 14.)

Any right existing in another to use the land or whereby the use by the owner is restricted is an encumbrance within the legal meaning of the term. (*Wetmore* v. *Bruce*, 118 N. Y. 319.)

It was conceded by the General Term that the public authorities might or might not appropriate the land according to their pleasure, notwithstanding the filing of the map, and further that in case the owner, after the map was filed, made improvements upon it, he did so at the peril of losing the enhanced value of the land resulting therefrom. These propositions seem to be correct, but we are constrained to differ with that court in the conclusion that such a situation does not impair the value of the property and amount to an encumbrance within the meaning of the contract. If the law was valid it virtually imposed a restriction upon the use of the property because it enacted that it could not be used for building purposes, except at the risk to the owner of losing the cost of the building at some time in the future. We are also constrained to differ with the General Term in regard to the validity of the statute in so far as it enacts that the owner of land exhibited upon the maps is not entitled to compensation for improvements subsequently made. This statute is of somewhat ancient origin, and it was said in some of the cases that it was at first enacted at the solicitation of the land-owners in order to enhance the value of their property. (*In re Furman Street*, 17 Wend. 658; *In re Wall Street*, 17 Barb. 639; *Seaman* v. *Hicks*, 8 Paige, 660.)

However that may be, in the aspect in which the question is now presented, we think it is in conflict with the provisions of the Constitution for the protection and security of private property. The constitutional guarantees against the appropriation of private property for public use, except upon just compensation, as well as that against depriving the owner of its enjoyment and possession without due process of law, have been the subject of much judicial discussion in the manifold aspects in which the questions have been presented in the numerous cases. These provisions have been so thoroughly expounded,

and their application, meaning, and practical scope so minutely explained, that it would be very difficult to suggest now any views which could be called new, and a restatement of propositions, so often before sanctioned by courts and judicial writers, is quite needless. This case is governed by a few principles so well settled and understood that they are elementary, and nothing can be added to their force or application by illustration or extended discussion. The validity of a law is to be determined by its purpose and its reasonable and practical effect and operation, though enacted under the guise of some general power, which the legislature may lawfully exercise, but which may be and frequently is used in such a manner as to encroach, by design or otherwise, upon the positive restraints of the Constitution. What the legislature cannot do directly, it cannot do indirectly, as the Constitution guards as effectually against insidious approaches as an open and direct attack. Whenever a law deprives the owner of the beneficial use and free enjoyment of his property, or imposes restraints upon such use and enjoyment, that materially affect its value, without legal process or compensation, it deprives him of his property within the meaning of the Constitution. All that is beneficial in property arises from its use and the fruits of that use, and whatever deprives a person of them deprives him of all that is desirable or valuable in the title and possession. It is not necessary, in order to render a statute obnoxious to the restraints of the Constitution, that it must in terms or in effect authorize an actual physical taking of the property or the thing itself, so long as it affects its free use and enjoyment, or the power of disposition at the will of the owner. Though the police and other powers of government may sometimes incidentally affect property rights, according to established usages and recognized principles familiar to courts, yet even these powers are not without limitations, as they can be exercised only to promote the public good, and are always subject to judicial scrutiny. (*Wynehamer* v. *People*, 13 N. Y. 378; *People* v. *Budd*, 117 Id. 1; *Gilman* v. *Tucker*, 128 Id. 190; *People ex rel.* v. *Albertson*, 55 Id. 50; *In re Jacobs*, 98 Id. 98; *People ex rel.* v. *Otis*, 90 Id. 48; *People* v. *Gillson*, 109 Id. 389; *Munn* v. *Illinois*, 94 U. S. 141; *Henderson* v. *Mayor, etc.*, 92 Id. 259; *Id.* p. 275; *Brimmer* v. *Rebman*, 138 Id. 78; *Chicago, etc.* v. *Minnesota*, 134 Id. 418; *Bohan* v. *Port Jervis G. L. Co.*, 122 N. Y. 18; Cooley on Con. Lim. [6th ed.] 207, 670.)

As the plaintiff in the case at bar was virtually deprived of the right to build upon his lot by the statute in question, and as this circumstance obviously impaired its value and interfered with his power of disposition, it was to that extent void as to him, and created no encumbrance upon it. It follows that the judgment of the General Term was correct in its result, though we have not been able to concur in the grounds upon which it was made, and in affirming its action, we have preferred to place our reasons upon other grounds. The judgment should be affirmed. All concur. *Judgment affirmed.*

END OF VOL. I.

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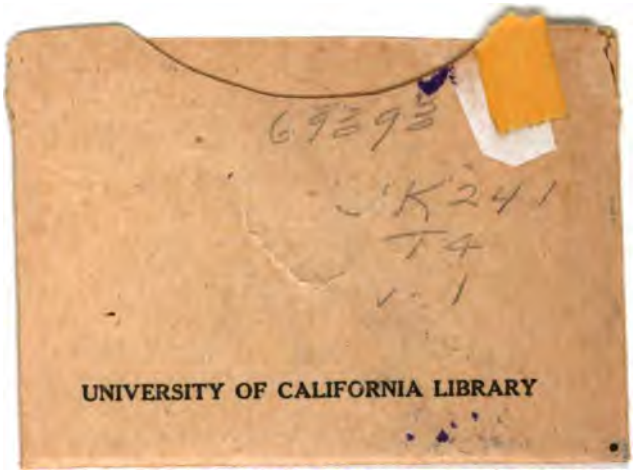
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